UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GOOGLE LLC,
Petitioner,

v.

FLYPSI, INC. (D/B/A FLYP),
Patent Owner.

Case No. IPR2023-00358
U.S. Patent No. 10,334,094

PATENT OWNER FLYPSI, INC.'S SUR-REPLY

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Ex. No.	Brief Description
2001	Order Denying Petition for Writ of Mandamus, No. 6:22-cv-00031-ADA, *Flypsi, Inc. v. Google LLC*, Case: 23-112, Federal Circuit, Document 19, March 6, 2023
2002	Order Denying Motion to Stay, Case Number: 6:22-cv-00031-ADA, *Flypsi, Inc. v. Google, LLC*, Western District of Texas, March 30, 2023
2003	Amended Scheduling Order, Case Number 6:22-cv-00031-ADA, *Flypsi, Inc. v. Google, LLC*, Western District of Texas, Document 112, April 21, 2023
2004	Lex Machina statistics Judge Alan D Albright of the U.S. District Court for the Western District of Texas. https://law.lexmachina.com/federal-court/district/judge/5198506/cases?pending-
2005	Declaration of Michael A. Bittner in Support of Motion for *Pro Hac Vice* Admission
2006	Declaration of William M. Logan in Support of Motion for *Pro Hac Vice* Admission
2007	Declaration of Matthew R. McCullough in Support of Motion for *Pro Hac Vice* Admission
2008	Demonstrative Exhibit Used at Deposition of Bill Lin, Ph.D.
2009	Deposition Transcript of Bill Lin, Ph.D.
2010	Declaration of Robert Akl, D.Sc.
2011	Curriculum Vitae of Robert Akl, D.Sc.

I. Introduction

The Reply fails to remedy the deficiencies identified in the POR, and thus the Petition has failed to prove that any claim of the ’094 patent is invalid under any ground.

First, the Reply never denies that a multi-switch configuration is a technically possible way for a POSITA to implement Backhaus. This is sufficient to defeat Ground 1’s inherent anticipation theory (regardless of the outcome of any claim construction dispute) because the law requires that, to show inherency, Petitioner prove that a single switch configuration is the only possible way to implement Backhaus.

Second, the Reply confirms that the Petition’s argument depends on an improper construction of “channel” that is inconsistent with the specification’s teachings. Both of the Petition’s “first way” and “second way” theories fail to show transmission of an access telephone number via a data channel. Further, the Petition takes internally inconsistent positions as to what constitutes a data channel, failing to prove invalidity and undermining the credibility of Petitioner’s expert (whose declaration is conclusory and should be disregarded by the Board).

Finally, the Reply confirms that the Petition’s Taylor grounds depend on mis-identifying the switch and contradicting what Taylor itself identifies as the

switch. Further, the Reply fails to identify any reason it would be obvious to use the same switch for both call legs.

For all the reasons described in this Sur-Reply and in the POR, Petitioner has failed to show invalidity of any claim.

II. Grounds 1-2: The Reply fails to show that using the same "switch" is inherent.

In the POR, Patent Owner identified at least one possible arrangement that used multiple switches for handling the different call legs, which would then be bridged over Backhaus' SLS platform. Paper 21 at 29-31. The Reply ***never*** disputes that this configuration is technically possible. *See* Reply at 14-16. This is fatal to Ground 1, because inherency requires that the prior art "***necessarily*** functions in accordance with, or includes, the claimed limitations." *MEHL/Biophile Int'l Corp. v. Milgraum*, 192 F.3d 1362, 1365 (Fed. Cir. 1999) (emphasis added).

The Reply's only response is to argue that the expert declaration detailing this alternative configuration is "unsupported by any evidence." Reply at 15. But Dr. Akl's testimony is itself sufficient evidence, and there is no requirement to present any additional evidence. *See, e.g.*, *Acromed Corp. v. Sofamor Danek Grp., Inc.*, 253 F.3d 1371, 1383 (Fed. Cir. 2001) (relying on expert testimony to affirm finding of no inherent anticipation). Petitioner's argument appears to be an improper attempt to flip the burden, but it is Petitioner's burden to prove that the

limitation is inherent and Patent Owner bears no burden at all. *See Kingston Tech. Co., Inc. v. SPEX Techs., Inc.*, 798 F. App'x 629, 633 (Fed. Cir. 2020). Further, Petitioner's argument does not make sense because Backhaus is a printed publication and there is no evidence it was ever implemented by anyone (in any configuration), thus it is unclear what further evidence there could possibly be about how this printed publication could be implemented beyond expert testimony.

The Reply then contends that its position is supported by state of the art references and Backhaus, but none of its evidence specifically describes using a ***single*** switch for multiple call legs that will be connected to one another, and the Reply does not contend otherwise. *See* Reply at 15.

The Reply then argues that the multi-switch configuration is somehow inconsistent with the "bi-directional" nature of a switch. Reply at 16. It is not. In the multi-switch configuration, both switches are bi-directional: one switch handles communications (in both directions) between caller A and the Backhaus SLS platform and the other switch handles communications (in both directions) between the Backhaus SLS platform and recipient B. Both switches are thus handling traffic in both directions, and there is no inconsistency.

The Reply next attempts to manufacture a contradiction with Dr. Akl's declaration in Case IPR2023-00361. Reply at 16. But all Dr. Akl stated there was that Backhaus teaches that "***routing***" is done through the conventional PSTN. Ex.

1103, ¶ 109. *Routing* describes how the call gets from Backhaus' SLS platform to the endpoints, which, as Dr. Akl explained, is through the conventional network. Dr. Akl's statement about *routing* does not describe how many switches Backhaus itself is connected to, and thus there is no contradiction.

Next, the Reply refers to Taylor, but nothing in Taylor describes the use of a single switch for multiple distinct call legs, and the Reply does not contend otherwise. Reply at 16. Instead, the Reply merely states that Taylor describes a conventional PSTN network, which is undisputed and insufficient to prove inherency.

Finally, the Reply seeks to bolster its argument about a "local" switch by arguing—without citing any evidence—that because there is a single call, there is no possibility for the switch to change. Reply at 17. Common sense is enough to defeat this argument: a person can make a call via mobile phone while driving, and may cross between different cell towers, meaning that even in a single call the "local" switch may change. Thus, the Reply does not rebut Dr. Akl's explanation that a "local" switch is not fixed and therefore cannot show inherency.

Because Patent Owner has identified an alternative configuration that uses multiple switches, and the Reply fails to show that this alternative configuration is impossible (or that the single switch configuration is necessarily used/inherent), Ground 1 fails to show anticipation of any claim.

III. Grounds 1-2: The Reply fails to show transmitting an access telephone number "via a data channel" (limitation [1.c]).

A. The Reply confirms the Petition is based on an improper construction of "channel" that conflicts the specification.

The Reply doubles down on the Petition's erroneous "channel" construction, again arguing that "***where there is no voice path connected yet***, and only non-voice data is being transmitted (i.e., a combination of the relationship number and the third party number), a data channel such as an IP channel would be used to transmit the non-voice data." Reply at 2-3 (emphasis added). But this directly contradicts the specification, which expressly teaches that a call leg is made "over a voice channel" before it is bridged with a second call leg (and thus, before, in the words of Petitioner, the "voice path" is connected). Ex. 1001, 7:4-15; Ex. 2010, ¶¶ 44-45. Despite the POR identifying this contradiction (Paper 21 at 9-10), Petitioner offers no response, which confirms that Petitioner's argument cannot be reconciled with the specification's teachings, and thus must be rejected.[1]

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[1] Contrary to the Reply's suggestion, the construction of "channel" is relevant to both the Petition's "first way" and "second way" theories because it goes to whether the Petition states a coherent theory and is at the heart of the Petition's inconsistent positions (*infra* Section IV) and the Petitioner's expert's conclusory testimony (*infra* Section VI), which impact the credibility of the Petition's argument

The Reply repeats the temporal argument of the Petition, focusing on the "when" language in the specification. Reply at 1-2. But the Reply offers no rebuttal to Dr. Akl's opinion that this statement, in the context of the entire specification, does not impose a temporal limit but instead would be understood by a POSITA to refer to using multiple protocols on top of one another and that a POSITA would look to the protocol set to be used to transmit information, not any underlying protocols used for bare transmission. Ex. 2010, ¶ 46. Dr. Akl's testimony about the understanding of a POSITA is thus unrebutted and confirms that Patent Owner's construction should be adopted.

Next, the Reply attempts to criticize Dr. Akl for not offering opinions on various irrelevant hypotheticals. Reply at 2. But neither Dr. Akl nor Patent Owner bear any affirmative burden in an IPR, only the Petitioner does. Further, Dr. Akl's testimony is consistent with the law that claims only need to be construed "to the extent necessary to resolve the controversy." *See Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co.*, 868 F.3d 1013, 1017 (Fed. Cir. 2017) (quoting *Vivid Techs., Inc. v. Am. Sci. & Eng'g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999)).

The Board should therefore adopt Patent Owner's construction.

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and are certainly relevant to weighing the evidence to determine if the Petitioner has met its burden of proving invalidity.

B. The Petition's "first way" fails because Backhaus's relationship number is transmitted as part of the call, not via a data channel.

The Reply confirms that the sole basis for the Petition's "first way" is the erroneous argument that "because a voice path is not connected," the relationship number must be transmitted via a data protocol. Reply at 5-6. As explained above, this erroneous construction should be rejected by the Board.

The Reply focuses much attention on Backhaus's disclosure that the relationship number is a "specially encoded message" and that the encoded message may contain multiple numbers. *E.g.*, Reply at 5-9. But it is not the ***content*** of the encoded message that is in dispute, but ***how*** that message is ***transmitted***. To show anticipation, it must be transmitted via a data channel. The Reply offers no credible response to Backhaus' express teaching that this specially encoded message is included in the "calling party field of the call." Ex. 1005, [0055]. As Dr. Akl explained, the disclosure in Backhaus paragraphs 52-55 would be understood by a POSITA as confirming that the calling party field (which includes the "specially encoded message" the Reply focuses on) would be part "of the call" itself, as Backhaus expressly states. Ex. 2010, ¶ 59. The Reply's only response to this is unsupported attorney argument that Backhaus uses the term "call" more broadly than referring to a voice call. Reply at 8. But the Reply offers no explanation of how this separate embodiment is relevant to the Petition's theory, which expressly relies on a voice call only. *See, e.g.*, Petition at 25-26

(arguing about when a "voice path" is established with no mention of a video or any other type of alleged call). The Reply's newfound reliance on this separate video call embodiment is improper because the Petition could have, but chose not to, rely on the video call embodiment. *See* Rules of Practice for Trials Before the PTAB, 77 Fed. Reg. 48,612, 48,620 (Aug. 14, 2012) ("Reply evidence, however, must be … not merely new evidence that could have been presented earlier"); *Ariosa Diagnostics v. Verinata Health, Inc.*, 805 F.3d 1359, 1367 (Fed. Cir. 2015) (affirming Board's rejection of new argument where the Reply identified new "specific embodiments" for the first time).

The Reply further argues that Dr. Lin explained that the details of how caller ID is transmitted "depends on the implementation." Reply at 7. But to show anticipation, the Petition must show that Backhaus actually discloses transmitting caller ID via a data channel, not just that it is merely possible to do so. Thus, the Reply's criticism that Dr. Akl did not have an opinion on the purely hypothetical question of whether it is possible to transmit caller ID via a data channel (Reply at 7) is misplaced for the same reason.

The Reply next argues that Backhaus' encoded message is "functionally different" than caller ID, because it can include a combination of numbers. Reply at 7-8. But again, the Reply's focus on the ***content*** of the message does not prove the claim limitation, which relates to ***how*** the message is ***transmitted***.

Furthermore, Backhaus makes clear that the purpose of the message is to enable the user's phone to display a phone number to the user, just like conventional caller ID. Ex. 1005, [0056].

The Reply next responds to Dr. Akl's opinion that voice calls use a voice channel while ringing with the confusing suggestion that there may be two channels at that time: a voice channel and a "separate data channel." Reply at 8. But this contradicts the Reply's claim construction position that the data channel exists because "there is no voice path connected yet." Reply at 3. These inconsistencies show that the Petition does not articulate a coherent theory of invalidity but instead relies on contradictory positions. *See also infra* Section IV.

The Reply next argues that Backhaus teaches using an IP communication in paragraph 73. Reply at 8-9. But this is an improper new argument that is inconsistent with the law. The Petition asserted that paragraph 73 showed that IP communications "may be used," which at most establishes a mere possibility but does not specifically show that the relationship number is transmitted via a data channel, and thus failed to show anticipation. Petition at 25. Now, the Reply appears to be making a genus-species argument, alleging that Backhaus discloses using IP for two genera of "setting up the relationship databases, sharing information between the SLS module 105 and the SLS platform 115" and that the specially encoded message is an example species of a transmission in those genera,

so Backhaus allegedly anticipates. Reply at 9 (quoting Ex. 1005, [0073]). This is an entirely new invalidity theory that could have been presented earlier, and should be disregarded. *Ariosa*, 805 F.3d at 1367. Moreover, this argument is inconsistent with the law. "A prior art reference that discloses a genus still does not inherently disclose all species within that broad category." *Metabolite Labs., Inc. v. Lab. Corp. of Am. Holdings*, 370 F.3d 1354, 1367 (Fed. Cir. 2004). Here, even if Backhaus discloses that the genera of "sharing information" or transmission related to "setting up the relationship database" is transmitted via IP, Backhaus never discloses that the species of the relationship number is transmitted via IP, and thus the Reply's new argument fails to show anticipation as a matter of law.

Further, the Reply fails to explain why paragraph 73 of Backhaus is relevant at all given that it is only possible to get to paragraph 73 in the flow of Backhaus Figures 4A-4D if the call is ***not*** an incoming call. The Reply seems to argue that claim limitation [1.c] is not limited to an incoming call (Reply at 9-10), but the problem is that the Petition's "first way" is limited to an incoming call. Petition at 23-25. And the Reply does not deny that paragraph 73 is not part of an incoming call flow. Thus, paragraph 73 is irrelevant to the Petition's "first way," and the Petition has failed to show anticipation via its "first way."

C. The Petition's "second way" fails because Backhaus fails to teach that the relationship number specifically is transmitted via a data channel.

The Reply confirms that the Petition's "second way" depends entirely on paragraph 73 of Backhaus, discussed above. Reply at 4-5. And the Reply relies on the same genus-species argument, which is both improper new argument and inconsistent with the law, as explained above. *See* Petition at 28-29 (only alleging that Backhaus discloses the TD and platform "may communicate" with various protocols); *Metabolite Labs.*, 370 F.3d at 1367. The Reply also mischaracterizes Backhaus when it argues "the piece of information shared between SLS platform 115 and TD 110 is a relationship number." Petition at 5 (citing Ex. 1005, [0072]-[0074]). Backhaus paragraphs 72 and 73 mention alleged data protocols, but never once mention the relationship number. Ex. 1005, [0072]-[0073]. Backhaus paragraph 74 describes a new, separate step of transmitting a relationship number (block 448) and never identifies what protocol is used or how this specific transmission occurs. *Id.*, [0074]. Thus, Backhaus does not anticipate because it never provides the link between the relationship number in paragraph 74 and the alleged data protocols in paragraphs 72 and 73.

IV. Grounds 1-2: The Reply fails to reconcile the Petition's inconsistent positions on the "channel" limitations.

The Reply first defends its inconsistent positions by arguing that only its "first way" argument is inconsistent. Reply at 10-11. But even if this were true,

the fact that the Petition stated an internally inconsistent theory undermines all of its arguments and specifically undermines the expert's credibility, which is something that the Board may consider in evaluating all grounds of the Petition.

Next, the Reply argues there is no inconsistency because "when subscriber TD 110 establishes a call leg to SLS platform 115 (as discussed for limitation [1.d]), Backhaus does not disclose transmitting such a 'calling party field')." Petition at 11. This is directly contradicted by both Backhaus and the Petition itself. The Petition expressly admits that "the SLS platform 115 recognizes a combination of the ***calling*** and called ***numbers***." Petition at 30 (quoting Ex. 1005, [0060], which states "the SLS platform … may recognize that the ***calling number*** is the subscriber's primary number"); *see also* Ex. 1005, [0063] (Backhaus teaching that the SLS platform queries "the calling line ID ('CLID'), i.e. the phone number of the calling party" for call leg from the terminal to the SLS platform). Thus, it is clear that the outgoing call relied on in limitation [1.d] has a "calling number" and the Reply's argument is simply wrong.[2] The Petition thus states an

[2] If the Reply is arguing that a "calling number" is somehow distinct from a "calling party field," it fails to identify any material difference. If the Reply is relying on the field's ***content*** (e.g., being specially encoded) or the field's ***purpose*** (relating to databases), that is not relevant to ***how*** the field is ***transmitted***. Further,

inconsistent theory because it contends the same thing (a call leg with a calling party number) is a data channel for limitation [1.c] but a voice channel for limitation [1.e].

Finally, the Reply attempts to rehabilitate Dr. Lin's testimony by citing to the portion of his answer where he described his theory for limitation [1.c]. Reply at 12 (quoting Ex. 2009, 183:5-20). But Dr. Lin was expressly asked to compare and explain why he reached different conclusions for the channels used in limitations [1.c] and [1.e], and he could not identify a single relevant difference. Ex. 2009 at 182:6-183:20 (not identifying any differences and not providing any explanation for his conclusion for limitation [1.e]). Just like Dr. Lin, the Reply fails to identify any material difference between the inconsistent arguments of the Petition for limitations [1.c] and [1.e], and this inconsistency dooms Ground 1 for failing to show the two different channels as required by the claims.

V. Grounds 3-4: The addition of Taylor does not render the claims obvious.

First, Grounds 3-4 fail because Backhaus does not disclose transmitting the access telephone number "via a data channel" as required by limitation [1.c], and

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the outgoing call for limitation [1.d] is likewise used in setting up the SLS platform's database. Ex. 1005, [0074] (new relationship number is added to central SLS database).

neither the Reply nor the Petition contend that any aspect of Logan is relevant to limitation [1.c].

Second, Grounds 3-4 fail because Taylor's "PSTN interface" is not a switch. The Reply contends that Taylor's PSTN interface 52 is a switch because it "is certainly an element in the communications network that facilitates connections between transmitters and receivers (or takes an input and provides an output)." Reply at 18. But this new claim construction is untimely and could have been presented in the Petition, so the Board should disregard it. *Ariosa*, 805 F.3d at 1367. Moreover, this construction is plainly overbroad. By this logic, the physical wire between telephone poles is a "switch" because it "facilitates connections" in a network and "takes an input and provides an output."

The Reply never addresses the critical problem with this obviousness argument: both Taylor and the Petition expressly identify a different element in Taylor as the switch. Ex. 1007, Fig. 1A, [0004] (identifying "switches 12"); Petition at 39 (identifying element 12 as the "switch" in Taylor). Thus, the PSTN interface is not a switch, and the Petition's obviousness argument (which depends on the PSTN interface) is contrary to its own evidence and thus fails to show obviousness.

The Reply also fails to show that it would be obvious to use the same switch for all limitations. The Reply argues that Grounds 3 and 4 are relevant only if the

switch must be "separate from the PSTN." Reply at 18-19. As Patent Owner has not argued this, it appears the Reply concedes that Grounds 3 and 4 are simply irrelevant. And the Reply's contention that the Petition shows a POSITA would have been motivated to include "a single PSTN interface" is belied by the very evidence the Reply cites: the Petition at 53-58 never once uses the word "single" and never argues that the Taylor renders obvious using the same switch for each recited claim limitation.

Finally, the Reply does not deny that a POSITA would understand that Backhaus has its own PSTN interface. Reply at 19. Instead, it argues that it is not proposing replacing Backhaus' PSTN interface, but simply adding Taylor's. *Id.* But this argument suffers the same problem: why add a second, redundant PSTN interface if Backhaus already has one? The Petition offers no explanation, much less any evidence, in support of this obviousness argument.

VI. The Board should disregard the Petition's conclusory expert testimony.

The Reply fails to rehabilitate Dr. Lin, whose testimony is conclusory and which he could not defend or explain at deposition, as outlined in the POR. The Reply argues that the similarity between the Petition and declaration is no problem, because the "analysis turns on whether the expert declaration 'cite[s] to any additional supporting evidence or provide[s] any technical reasoning to support [the] statement." Reply at 21 (citing *Netflix, Inc. v. GoTV Streaming, LLC*,

IPR2023-00758, paper 7 at 66-67 (PTAB Nov. 7, 2023)). But the Reply does not identify any additional supporting evidence or reasoning provided by Dr. Lin. A comparison of the Petition and declaration confirms that they are virtually identical without sufficient supporting evidence or analysis by Dr. Lin.

The Reply defends the absence of legal standards in Dr. Lin's declaration by arguing that he does not offer ultimate legal opinions. But that is not the problem. The problem is that there is nothing to indicate what instructions on the law Dr. Lin was applying, and the Petitioner used improper privilege cautions to obstruct discovery into that subject. This is particularly troubling on the complicated issues of inherency and the new genus-species argument that appears in the Reply. Without any indication of what law Dr. Lin was given, it is impossible to understand whether Dr. Lin's opinions are consistent with the law or based on some misunderstanding that cannot be identified because Dr. Lin never identified the standards he was applying.

As to the remaining issues, the Reply largely repeats the incorrect arguments about its "first way," caller ID, and voice channels that are addressed above in the substantive grounds. But the Reply cannot deny that Dr. Lin opined that in Figure 4 of the '094 patent, "the handset begins actually using a voice channel" at step 424. Ex. 2009 at 104:12-107:1. But the patent expressly and unambiguously states that earlier step 422 is a call "over a voice channel." Ex. 1001, 7:4-7. Thus,

Dr. Lin's opinions are not only highly conclusory, they contradict the specification of the patent and are thus entirely unreliable. The Board should disregard and strike his testimony.

VII. Conclusion

For at least the foregoing reasons, the Petition has failed to show that any claim is invalid, and the Board should issue a Final Written Decision finding that no claim has been shown invalid.

Dated: March 7, 2024

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CERTIFICATE OF COMPLIANCE

This sur-reply complies with the word count limits set forth in 37 C.F.R. § 42.24(c)(4), because this sur-reply contains 3,900 words, excluding the parts of the sur-reply exempted by 37 C.F.R. § 42.24(a)(1) and determined using the word count provided by Microsoft Word, which was used to prepare this patent owner response.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing PATENT OWNER FLYPSI, INC.'S SUR-REPLY was served electronically via email on March 7, 2024, in its entirety on the following counsel of record:

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