

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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SAMSUNG ELECTRONICS CO., LTD.,  
Petitioner,

v.

G+ COMMUNICATIONS, LLC,  
Patent Owner.

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Case IPR2023-00441  
Patent 10,448,430

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**PATENT OWNER'S SUR REPLY**

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**TABLE OF AUTHORITIES****Cases**

*New Hampshire v. Maine*, 532 U.S. 742 (2001).....4

**Statutes**

35 U.S.C. § 112(f).....2, 5

**Exhibit List**

| <b>Exhibit No.</b> | <b>Description</b>                                                                                         |
|--------------------|------------------------------------------------------------------------------------------------------------|
| 2001               | Samsung Invalidity Contentions App'x B, 2:22-cv-00078-JRG                                                  |
| 2002               | Samsung Invalidity Contentions Ex. B2, 2:22-cv-00078-JRG                                                   |
| 2003               | Memorandum Opinion Denying G+ Motion to Dismiss Counterclaims, 2:22-cv-00078-JRG, Dkt. 41 (Sept. 29, 2022) |
| 2004               | Memorandum Opinion Denying Samsung Motions to Dismiss, 2:22-cv-00078-JRG, Dkt. 103 (Apr. 28, 2023)         |
| 2005               | G+ Opening Claim Construction Brief, 2:22-cv-00078-JRG, Dkt. 98 (Apr. 12, 2023)                            |
| 2006               | Samsung Responsive Claim Construction Brief, 2:22-cv-00078-JRG, Dkt. 101 (Apr. 26, 2023)                   |
| 2007               | G+ Reply Claim Construction Brief, 2:22-cv-00078-JRG, Dkt. 106 (May 3, 2023)                               |
| 2008               | Claim Construction Memorandum Opinion and Order, 2:22-cv-00078-JRG, Dkt. 169 (E.D. Tex. Jul. 13, 2023)     |
| 2009               | Exhibits to Samsung Responsive Claim Construction Brief, 2:22-cv-00078-JRG, Dkt. 101 (Apr. 26, 2023)       |

**I. Introduction**

G+ Communications, LLC, the owner of U.S. Patent No. 10,448,430 (“the ’430 Patent”), submits this Sur Reply in Response to Samsung’s Reply.

First, Samsung’s Reply makes clear that it takes no position on the proper interpretation of “pre-set UE number.” As the party with the burden of proof in this IPR, Samsung’s position is untenable. On this basis alone, the Board should determine that Samsung has failed to meet its burden of proof of unpatentability of any claim.

If the Board does not determine that Samsung has failed to meet its burden by failing to argue for any interpretation of “pre-set UE number” (as argued above), the Board should construe the term consistent with the district court as “a pre-set number of UEs.” This is the proper course based on Samsung’s failure to take a position on claim construction, estoppel, and for the reasons given in Patent Owner’s Response, which were not disputed in Petitioner’s Reply. Samsung has admitted that it cannot prevail under the district court’s construction. Reply 5 (“Li and Kim don’t disclose that the message 3 includes a ‘pre-set number of UEs,’ . . . .”). This disposes of all issues in the IPR.

If the Board determines that Samsung has not met its burden to prove unpatentability for any of the reasons argued herein, such reasons apply also to claim 18 and the Board need not reach Samsung’s Reply arguments regarding claim 18. If

the Board is not inclined to determine that Samsung has failed to meet its burden of proving unpatentability of claim 18, it should decline to reach the merits of claim 18 based on Petitioner's invitation to do so, but not for any alleged reasons of indefiniteness. Samsung avoided taking a position as to § 112(f) in its Petition, but now seeks to have the Board provide an advisory opinion on indefiniteness. Samsung's gamesmanship should not be rewarded with such an opinion.

For these and additional reasons discussed below, Patent Owner respectfully submits that Petitioner has failed to meet its burden to prove by a preponderance of the evidence that any claim of the '430 Patent is unpatentable.

## **II. Samsung's failure to take any position on the proper interpretation of "pre-set UE number" dooms its Petition.**

Samsung's Reply makes clear that it takes no position on the proper interpretation of "pre-set UE number." As the party with the burden of proof in this IPR, Samsung's position is untenable. On this basis alone, the Board should determine that Samsung has failed to meet its burden of proof of unpatentability of any claim.

The Petition at most implied that Petitioner was interpreting "pre-set UE number" as an identifier, but failed to argue why such an interpretation was correct. *See* Patent Owner's Response (Paper 12) 27. Patent Owner's Response argued that "[i]n the interests of fairness and consistency, and for the reasons given by the district court, the Board should construe 'pre-set UE number' to be a quantity, i.e., a 'pre-

set number of UEs.” *Id.* at 19. In its Reply, Petitioner retreated from its Petition by not providing any support for interpreting “pre-set UE number” as an identifier and took no position on the correctness of the district court’s construction. Reply 2 (“Samsung takes no position in this IPR as to the correctness of the district court’s construction.”). As the party with the burden of proof, Samsung cannot merely throw its hands in the air and invite the Board to construe the claim however it wishes without taking any position. For this reason, the Board should determine that Samsung has failed to meet its burden to prove unpatentability of any claim.

**III. Samsung admits that its Petition fails under the district court’s interpretation of “pre-set UE number.”**

If the Board does not determine that Samsung has failed to meet its burden by failing to argue for any interpretation of “pre-set UE number” (as argued above), the Board should construe the term consistent with the district court as “a pre-set number of UEs.” This is the proper course based on Samsung’s failure to take a position on claim construction, estoppel (as argued below), and for the reasons given in Patent Owner’s Response, which were not disputed in Petitioner’s Reply (*see* PO Response 19-22). Samsung has admitted that it cannot prevail under the district court’s construction. Reply 5 (“Li and Kim don’t disclose that the message 3 includes a ‘pre-set number of UEs,’ . . . .”). This disposes of all issues in the IPR.

Samsung has retreated from its Petition and offers no support for interpreting “pre-set UE number” as an identifier. Its reason for doing so may be that it

recognizes it is estopped from taking such a position. In light of such estoppel, the Board should not construe “pre-set UE number” as an identifier.

As noted in Patent Owner’s Response, the district court determined that “pre-set UE number” is a quantity, not an identifier, crediting Samsung’s argument that “[i]f anything, the patent suggests that the ‘pre-set UE number’ is not an identifier.” *See* PO Response 19-22 (quoting Ex. 2006 at 18). Were Samsung to contend that “pre-set UE number” means an identifier, as implied in its Petition, that is clearly inconsistent with its position that “[i]f anything, the patent suggests that the ‘pre-set UE number’ is not an identifier.” Ex. 2006 at 18. Having succeeded in persuading the district court that a “pre-set UE number” is not an identifier, the Board’s acceptance of an inconsistent position would create the perception that the district court or the Board was misled. And Samsung would have the unfair advantage of having the district court adopt a construction favorable to Samsung for purposes of infringement in that proceeding only to have the Board adopt a different construction favorable to Samsung for purposes of invalidity here. Whether based on the doctrine of judicial estoppel, *see New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001), or principles of fairness and consistency, the Board should not adopt the construction implied in Samsung’s Petition that Samsung has retreated from in failing to offer any support for despite the Board’s invitation for Samsung to do so.

**IV. Samsung's new arguments on Claim 18 are late and incorrect.**

If the Board determines that Samsung has not met its burden to prove unpatentability for any of the reasons argued above, such reasons apply also to claim 18 and the Board need not reach Samsung's Reply arguments regarding claim 18.

Samsung's Reply argues that § 112(f) applies to the "monitoring unit" and "sending unit" of claim 18, but that the claim is indefinite. Reply 5-10. Had Samsung clearly taken such a position in its Petition, it could not have also argued for institution. Instead, Samsung avoided taking a position in its Petition, but now seeks to have the Board provide an advisory opinion on indefiniteness. Samsung's gamesmanship should not be rewarded with such an opinion. If the Board is not inclined to determine that Samsung has failed to meet its burden of proving unpatentability of claim 18, it should decline to reach the merits of claim 18 based on Petitioner's invitation to do so, but not for any alleged reasons of indefiniteness.

Incredibly, Samsung's theory is based on its argument that Patent Owner has not identified structure corresponding to the claimed functions. Patent Owner bears no burden of doing so. Indeed, Petitioner failed to meet its burden by not taking a position on § 112(f) in the Petition and not attempting to show that corresponding structure was present in the asserted prior art. *See, e.g.*, PO Response 28-30. In addition, Samsung's argument that there is no corresponding structure in the '430

Patent is a new theory presented for the first time in its Reply and should be rejected for that reason.<sup>1</sup>

Finally, Patent Owner notes that Samsung's Reply failed to respond to the Board and Patent Owner noting Samsung's improper "anticipation" ground. *See* PO Response 33-34. The ground of anticipation of claim 18 by Kim should be rejected for this additional reason.

## **V. Conclusion**

For at least the foregoing reasons, Patent Owner respectfully requests that the Board determine that Petitioner has not met its burden to prove unpatentability of the challenged claims.

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<sup>1</sup> Samsung's footnote 5 of the Petition (p. 21) cannot be interpreted to present such a theory. Instead, it shows Samsung was aware of such arguments, which it presented in the district court, but avoided making them here so that the Board would not deny institution on that basis. Again, Samsung's gamesmanship should not be rewarded.

Dated: March 28, 2024

Respectfully submitted,  
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**CERTIFICATE OF WORD COUNT**

I, the undersigned, do hereby certify that the foregoing Patent Owner Response, including footnotes, contains less than 5,600 words, as measured by the Word Count function of Microsoft Word, pursuant to 37 C.F.R. § 42.24(c)(4).

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 28<sup>th</sup> day of March, 2024, a true and correct copy of the foregoing PATENT OWNER'S SUR REPLY, along with any accompanying exhibits, was served by electronic mail upon the following counsel of record for Petitioners:

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