

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

PERCEPT TECHNOLOGIES INC.,

Plaintiff,

v.

MAGIC LEAP, INC.,

Defendant.

C.A. No. 22-25-RGA

DEFENDANT’S SUR-REPLY CLAIM CONSTRUCTION BRIEF

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(“Magic Leap” or “Defendant”) hereby provides its sur-reply claim construction brief. Defendant reaffirms its positions and arguments outlined in Defendant’s Answering Claim Construction Brief. In particular, and as set forth below, Defendant reiterates its right to reserve the argument that any or all claims of U.S. Patent No. 8,696,113 are invalid under § 112.

I. ARGUMENT

A. “dynamic eye tracking mechanism” (’113 Patent)

Plaintiff incorrectly contends that in making this reservation, Defendant is “[reneging] on the parties’ agreed construction for the term ‘dynamic eye tracking mechanism.’” *See* Plaintiff’s Reply Claim Construction Brief at 3. Not so. On the contrary, Defendant reaffirms this agreed-upon construction, and simply invokes its right to reserve further invalidity argumentation relating to these claims. Defendant’s decision to put Plaintiff on notice of this argument is proper. As this Court has noted, “[t]here is no requirement that indefiniteness be raised at claim construction.” *See TQ Delta, LLC v. 2Wire, Inc.*, 373 F. Supp. 3d 509, 523 (D. Del. 2019).

Plaintiff also contends that “a party has no right to narrow a previously agreed upon construction,” citing *Slot Speaker Techs., Inc. v. Apple, Inc.*, No. 13-CV-01161-HSG, 2018 WL 1581985 (N.D. Cal. Mar. 27, 2018), *aff’d*, 776 F. App’x 709 (Fed. Cir. 2019); *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 805 F.3d 1368 (Fed. Cir. 2015); *MASS Engineered Design, Inc. v. Ergotron, Inc.*, 250 F.R.D. 284 (E.D. Tex. 2008). *See* Plaintiff’s Reply Claim Construction Brief at 11. In addition to the fact that Defendant is not seeking to narrow the agreed-upon construction, the case law that Plaintiff cites in support of its position is inapplicable to the current procedural context. In each of the cited cases, parties attempted to modify claim constructions after the Court had already issued a claim construction opinion. *Slot Speaker Techs., Inc. v. Apple, Inc.* (defendant’s motion for summary judgement of non-infringement); *Akamai Techs., Inc. v. Limelight Networks, Inc.* (jury instruction stage); *MASS Engineered*

Design, Inc. v. Ergotron, Inc. (plaintiff's motion to amend answer to counterclaim and to serve invalidity contentions). These post-claim construction procedural postures are very different to the present context in which parties are still engaged in claim construction briefing.

If it makes this argument, Defendant will supplement its invalidity contentions at an appropriate time, and in any event before final invalidity contentions are required on June 9, 2023 as per Paragraph 3(g)(ii)(2) of the Scheduling Order (D.I. 14).

B. “media focals” (’929 Patent)

Defendant notes Plaintiff's inappropriate citation of the ‘113 Patent in support of its proposed construction of the claim term “media focals,” found in claim 7 of U.S. Patent No. 9,010,929. Specifically, Plaintiff cites a paragraph that purports to be from the specification of the ‘929 Patent, (*See* Plaintiff's Reply Claim Construction Brief at 4-5; purportedly citing the ‘929 Patent at 2:40-51.). In fact, though, the paragraph Plaintiff cites is from the ‘113 patent at 3:30-42. The paragraphs are the same except that the ‘929 patent refers to “eyewear” and the ‘113 patent refers to “wearable optics.” Defendant suspects this is an innocent error. However, the ‘113 Patent is irrelevant to the construction of the ‘929 Patent. The term “media focals” does not appear in any claim in the ‘113 Patent and the ‘113 Patent should not inform the construction of the term.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 18, 2023, a copy of the foregoing document was served on the counsel listed below in the manner indicated:

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