UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SAMSUNG ELECTRONICS CO., LTD.,
Petitioner

v.

DODOTS LICENSING SOLUTIONS LLC,
Patent Owner

Case IPR2023-00756
U.S. Patent No. 9,369,545 B1

PATENT OWNER'S SUR-REPLY TO PETITIONER'S REPLY TO PATENT OWNER'S PRELIMINARY RESPONSE

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37 C.F.R. §42.104(c).....2

37. C.F.R §100 3

37. C.F.R § 104 3

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PATENT OWNER'S EXHIBIT LIST

Exhibit No.	Description
2001	*Lenovo Holding Co, Inc. et al. v. DoDots Licensing Sols.*, IPR2019-01278 (P.T.A.B. Jan. 19, 2021)
2002	*Lenovo Holding Co. v. DoDots Licensing Sols. LLC,* 2021 U.S. App. LEXIS 36126, at *2 (Fed. Cir. Dec. 8, 2021)
2003	Jones and Brown considered by Patent Examiner (IDS)
2004	Fintiv Memo, dated June 21, 2022
2005	Agreed Scheduling Order, dated December 29, 2022
2006	Excerpts from Dr. Schmidt's three declarations in support of Samsung's petitions in IPR2023-00621, IPR2023-00756, and IPR2023-00701
2007	Samsung's counsel's first email to DoDots' counsel regarding meet and confer on the alleged typographical error
2008	July 27, 2023 Order from the United States District Court, Western District of Texas in *DoDots Licensing Solutions LLC v. Samsung Electronics Co., Ltd. et al.,* 6:22-cv-00535-ADA, (W.D. Tex.)

I. Dr. Schmidt's use of an incorrect claim construction standard is not a "typographical error."

A. Petitioner failed to meet its burden of proof in showing that Dr. Schmidt's recitation and use of BRI was a "typographical error."

Samsung admits that Dr. Schmidt's declaration recites the wrong claim construction standard and asks to correct it as a purported "typographical error." *See Reply* at 1-2. It is undisputed, however, that Samsung has the burden of proof under 37 CFR §§42.20(c) and 42.23(a) to show that its expert made a "typographical error." Samsung has wholly failed to meet its burden. Tellingly, Samsung does not even mention the burden it bears to show that Dr. Schmidt made a typographical error.

Samsung's reply relies *solely* on attorney arguments to claim that Dr. Schmidt made a typographical error. Samsung fails to provide any testimonial evidence as to the nature of the error, an explanation of how the purported error occurred, and how it was discovered. *See Ivantis Inc et al. v. Glaukos Corp et al.*, IPR 2018-01180, Paper 14 at 9 (P.T.A.B. Dec. 6, 2018) (holding that the nature and circumstances of the error is a factor in determining whether the error can be deemed typographical or not). Indeed, Samsung fails to provide *any* evidence from anyone with firsthand knowledge that Dr. Schmidt did not intend to rely on BRI. Samsung's bare say-so and arguing that Dr. Schmidt is not an attorney are not enough to meet the burden. With no evidence whatsoever and only attorney

arguments, Petitioner cannot meet its burden of proof on this issue.

The identified error, however, is not actually 'typographical" in nature, and instead is an error of law that would introduce new arguments because Petitioner's efforts to replace the defunct BRI with the correct *Phillips* standard results in wholesale changes to Dr. Schmidt's declaration and the petition. Moreover, submission of any papers to correct errors outside the context of a 37 C.F.R. §42.104(c) motion is improper because it is now more than one year since service of the complaint. The nature of Dr. Schmidt's error is not rectifiable as a clerical or typographical error. *Ivantis Inc et al.*, IPR 2018-01180, Paper 14 at 9-10. (finding that replacing a prior art document referencing specific quotes with an earlier version of the same prior art document without those quotes is not a clerical error but rather an "error of law"); *see also* POPR at 15 (citing cases where expert's testimony found to be inadmissible for using the wrong legal standard). When each of Dr. Schmidt's three declarations (each having different dates) acknowledge the use of BRI, the errors appear less to be "typographical" and more as evidencing the expert's actual intention and approach to construing claims. *See* Ex. 2006.

B. The length of time elapsed between learning of the error and bringing the error to DoDots's and the Board's attention.

Petitioner learned of the error on or about July 14, 2023 when the POPR was filed. POPR at 13-14. But then Samsung waited twenty-six days (until August 9,

2023) to raise this issue with Patent Owner. *See* Ex. 2007. This nearly month-long delay to raise a substantive issue (on the eve of the Patent Owners POPR due date in the related IPR2023-00701) weighs against Samsung. *Ivantis,* Paper 14 at 11 (denying petitioner's request to correct alleged clerical errors as untimely when leave was sought within four days of the error being discovered).

C. DoDots would be prejudiced if the proposed corrections were allowed.

Petitioner's assertion that Patent Owner would not be prejudiced by the proposed corrections is incorrect. In formulating its POPR, DoDots "should be able to rely on the Petition and accompanying exhibits as being correct." *Ivantis Inc et al.*, IPR 2018-01180, Paper 14 at 13. Requiring DoDots to "respond to analysis and arguments not before it" is inherently prejudicial. *Amkor Tech, Inc. v. Tessera, Inc*, IPR2013-00242, Paper No. 32 at 4 (P.T.A.B. August 29, 2013).

Likewise, any argument by Petitioner that the constructions would remain the same regardless of whether *Phillips* or BRI were used is both incorrect and prejudicial. Under 37. C.F.R §§100 and 104, Petitioner has the burden of proof to set forth the construction of the challenged claims accurately and clearly, and this burden does not shift to the patent owner. *Ivantis,* Paper 14 at 13. Arguing that Patent Owner should have known that the constructions do not change regardless of the standard used impermissibly shifts the burden of claim construction to the

patent owner. It is *not* Patent Owner's burden to show "how Dr. Schmidt incorrectly applied the BRI standard in his assessment of the prior art and its applicability to the Challenged Claims," as Samsung argues. *Reply* at 4. Presumably, Dr. Schmidt reviewed his declaration on several occasions and the use of an incorrect standard was in his mind as he formed his opinions on the prior art. After all, it is Dr. Schmidt's, not counsel's, sworn declaration. To say that DoDots is required to show where in his sworn declaration Dr. Schmidt may have used BRI and may have used *Phillips* (a standard he never recites in his declaration) would be speculative at best. Requiring DoDots to parse through Dr. Schmidt's analysis to figure out where he got it wrong/where he may have gotten it right when his declaration only says that he used BRI is unduly prejudicial to DoDots.

But the issue here is whether Dr. Schmidt's recitation and use of BRI is a supposed typographical error. Aside from mere attorney argument and shifting the burden to DoDots to argue that it should have known that the *Phillips* standard was in Dr. Schmidt's head when he considered the challenged claims and prior art when Schmidt specifically said otherwise, Samsung has done nothing to demonstrate that it should be entitled to the relief it seeks.

Petitioner also contends that the parties' use of the Board's and the Federal Circuit's prior claim constructions is evidence of Dr. Schmidt using the *Phillips* standard. But that is a red herring and again, just attorney argument. *Reply* at 2.

Beyond "networked information monitor" and "networked information monitor template," which the Board construed and the Federal Circuit affirmed, there are many other terms and limitations in the challenged claims. And in considering the claims at issue here and the prior art, Schmidt admits using BRI. Accordingly, that "networked information monitor" and "networked information monitor template" have established constructions says nothing about Schmidt using *Phillips* when he expressly states that he used BRI in assessing the validity of the challenged claims.

D. Petitioner's proposed corrections would materially impact the proceeding.

Dr. Schmidt's failure to construe the claims under *Phillips* results in the petition lacking the requisite evidentiary support to institute the IPR. In this regard, Samsung's statement that the "Petition itself is based on the correct *Phillips* standard" and that Schmidt's claim construction analysis is consistent with the invalidity arguments in the Petition is backwards and wrong. *Reply* at 4. The Petition actually uses the BRI standard to construe claims because, while it discusses the *Phillips* standard in general on pages 2-3, the Petition relies entirely on Dr. Schmidt's declaration for evidentiary support for each and every claim element, and Dr. Schmidt admits using BRI. For this reason, both the Petition and Dr. Schmidt's declaration actually rely on the defunct BRI standard and should, therefore, be denied. Permitting the requested corrections would prejudice Patent

Owner because that would then require additional time to respond to new arguments and evidence, thereby disrupting the statutory timeline for an IPR. The proposed corrections also materially impact the Board's institution decision because they change Dr. Schmidt's proposed constructions and introduce new arguments to the Petition. This factor weighs heavily in Patent Owner's favor.

II. Samsung has in fact argued that the '545 patent includes a means-plus-function limitation.

Petitioner's arguments in its reply with respect to this issue are not relevant because, to date, Samsung has not argued that any term in the '545 patent should be construed as a means-plus-function limitation.

III. *Fintiv* factors also favor denying the petition.

Samsung's motion to transfer venue to the Northern District of California has been denied, a Markman Order has been issued, and fact discovery has commenced in earnest. Upon completion of claim construction in July 2023, both parties pushed forward with discovery and Samsung has not sought to stay the case. Moreover, in a July 27, 2023 Order, the Court reiterated that, while some discovery dates will be moved, the June 24, 2024 trial date will not change. *See* Ex. 2008. Based on the current posture of the litigation, DoDots has started expending significant resources, including reviewing Samsung's source code over the last three weeks. Both parties have also collected and intend to produce extensive

documents as part of fact discovery. Samsung's petition should be denied for this reason. Additionally, Samsung's admission that it has not provided a *Sotera* stipulation should be fatal to its petition. *Reply* at 7.

Dated: September 1, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing PATENT OWNER'S SUR-REPLY TO PETITIONER'S REPLY TO PATENT OWNER'S PRELIMINARY RESPONSE was served electronically via email on September 1, 2023, on the following counsel of record for Petitioner:

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