ROPES & GRAY LLP
1211 AVENUE OF THE AMERICAS
NEW YORK, NY 10036-8704
WWW.ROPESGRAY.COM

January 24, 2024

Alexander E. Middleton
T +1 212 596 9680
alexander.middleton@ropesgray.com

BY E-MAIL

Christian Conkle
Russ, August & Kabat
12424 Wilshire Boulevard, 12th Floor
Los Angeles, CA 90025

Re: Broadphone LLC v. Samsung Electronics Co., Ltd. et al (E.D. Tex. No. 2:23-cv-00001-JRG-RSP)

Dear Christian:

We write on behalf of Defendant Samsung as a follow up to Broadphone's January 12, 2024, proposed Supplemental Disclosure of Asserted Claims and Infringement Contentions ("Supplemental Infringement Contentions"). The proposed Supplemental Infringement Contentions remain deficient despite generous extensions of time and Samsung's written correspondence that clearly identifies those deficiencies.

As a reminder, Broadphone's infringement contentions were initially due September 14, 2023. Samsung agreed to a last-minute request for a three-week extension to October 5. Because Broadphone's initial infringement contentions were deficient, Samsung initially identified the deficiencies in this letter (as well as others) on November 10, 2023. Broadphone never responded, and Samsung had to follow up on multiple dates (December 6, December 12, December 14, January 4) and prepare to file a motion to strike before Broadphone finally agreed to a meet and confer. It was not until January 12 -- more than two months after Samsung first raised these issues, that Broadphone provided any sort of proposed supplementation. But, as explained below, the Supplemental Infringement Contentions continue to fail to address a number of clear deficiencies.

Broadphone's Infringement Contentions Fail to Chart the SmartTag Products

As noted in our November 10, 2023 letter, the local rules require infringement contentions to include "[a] chart identifying specifically where each element of each asserted claim is found within each Accused Instrumentality." Local Patent Rules 3-1(c). Broadphone's Supplemental Infringement Contentions asserts in the introduction to each claim chart that "each Galaxy Tab and Galaxy mobile phone device uses the Android operating system, Samsung's One UI, and the Play Store and Google

SAMSUNG EXHIBIT 1077
Samsung Electronics Co., Ltd. v. Broadphone LLC
IPR2024-00154

Location Services," and that "Accused Products use Samsung's proprietary SLocation system." But this does not address the accused SmartTag products.

As Broadphone should be aware, the SmartTag is nothing like the accused tablet and mobile devices because the SmartTags do not have user interfaces, and do not support software features like the accused Reminder app and SmartThings find functionality. Moreover, while documents describing certain SmartTag functionality are including in your Supplemental Infringement Contentions, these documents appear to be included because they describe phone/tablet functionality.

As we've previously noted, in order for Broadphone to rely on its exemplary claim chart, it "must provide an explanation of the technical and functional identity of the products represented." *UltimatePointer, LLC v. Nintendo Co.*, No. 6:11-cv-496, 2013 WL 12140173, at *3 (E.D. Tex. May 28, 2013) (granting Defendants motion to enforce Rule 3-1 and ordering Plaintiff to supplement its infringement contentions); *see also Alacritech Inc. v. Century Link, Inc.*, No. 2:16-cv-00693-JRG-RSP, 2017 WL 3007464, at *4 (E.D. Tex. Jul. 14, 2017) (ordering Plaintiff to explain "with specificity and supporting documentary or declaratory evidence, its assertions there are no material differences between the accused instrumentalities that affect its infringement theories for the uncharted products."). Broadphone, has not attempted to do so for the SmartTag devices.

Please confirm that Broadphone will further revise its proposed supplementation to delete SmartTag as an accused instrumentality.

<u>Broadphone Cannot Plead Infringement Under the Doctrine of Equivalents</u>

As we also noted in our November 10, 2023 letter, the local rules require that infringement contentions contain a disclosure of "[w]hether each element of each asserted claim is claimed to be literally present or present under the doctrine of equivalents in the Accused Instrumentality." Local Patent Rule 3-1(d). Broadphone's Supplemental Infringement Contentions still do not meet this requirement. Instead, Broadphone has left unchanged the language from its original Infringement Contentions. In particular, the Supplemental Infringement Contentions cover document simply states:

> Broadphone contends that each element of each Asserted Claim is literally present in each Accused Product. In the alternative, Broadphone contends that certain elements are present under the doctrine of equivalents, as set forth in its P.R. 3-1(c) claim charts. To the extent that Defendants identify specific elements of the Asserted Claims that they contend are not literally present in any Accused Product, Broadphone contends that such elements are present under the doctrine of equivalents.

Supplemental Infringement Contentions at 4.

Then, in each claim chart, Broadphone makes the following assertion:

> However, to the extent any claim limitation is not met literally, it is nonetheless met under the doctrine of equivalents because the differences between the claim limitation and each Accused Product would be insubstantial, and each Accused Product performs substantially the same function, in substantially the same way, to achieve the same result as the claimed invention.

Ex. 1 at 1; Ex. 2 at 1; Ex. 3 at 1.

These bare bones assertions are insufficient and fail to meet the requirements of L.P.R. 3-1(d). *See Davis-Lynch, Inc. v. Weatherford Int'l, Inc.*, No. 6:07-cv-559, 2009 WL 81874, at *6 (E.D. Tex. Jan. 12, 2009) (holding plaintiff "failed to comply with Rule 3–1(d)" by merely asserting "that there is both literal infringement and infringement through the doctrine of equivalents"), denying reconsideration, 2009 WL 10677797 (E.D. Tex. Feb. 20, 2009); *Sycamore IP Holdings LLC v. AT&T Corp.* 2018 WL 1695231, at *3 (E.D. Tex., 2018) ("[T]he doctrine of equivalents theories must be set forth in detail; boilerplate allegations, such as those contained in [plaintiff's] initial disclosures, are insufficient."). Moreover, Broadphone's failure to provide anything more than boilerplate allegations of infringement under the doctrine of equivalents, Broadphone has forfeited the opportunity to assert the doctrine of equivalents. *Sycamore*, at *10 ("[B]y failing to comply with the Local Patent Rules, [plaintiff] has forfeited its opportunity to assert the doctrine of equivalents.").

Please confirm that Broadphone's will withdraw its doctrine of equivalents contentions.

<u>Broadphone's Infringement Contentions Fail to Chart with the Required Specificity</u>

Additionally, Broadphone's continues to fail to provide charts with the required specificity in the following ways:

1. **'698 Patent**

- Claim 12 recites "the signal characteristic is the signal's phase." For this element, Broadphone identifies no Samsung documents, and instead identifies a third party science webpage that describes the relationship between phase shift and time difference. Merely identifying the physical relationship between phase shift and time difference does not inform Samsung in any way how the accused products use a phase shift value as required by the claims, or where that phase shift value is located in the accused products.

2. **'811 Patent**

- Claim 24 recites "the device-specific target location is a shop and the location-based action relates to a coupon redeemable at the shop." For this claim, Broadphone identifies no

Samsung documents, and instead identifies two third party webpages (a blog and Wikipedia) that describes general functionality that is known, but does not specify any particular functionality, including any functionality in Samsung products.

- Claim 25 recites "wherein the location-based action causes incoming calls on the portable RF communications device to be directed to a landline telephone within proximity of the device-specific target location." For this claim, Broadphone points to a third party call forwarding app that Broadphone makes no attempt to tie to the accused products.

Please confirm that Broadphone will withdraw its assertion of these dependent claims.

Broadphone Cannot Amend its Infringement Contentions Without Seeking Leave

Broadphone is not permitted to amend its Infringement Contentions without first seeking leave of the Court. *See Traxcell Technologies, LLC v. AT&T, Inc.*, E.D. Texas Case No. 2:17-cv-00718-RWS-RSP, Dkt. No. 18 (August 13, 2018) ("In short, plaintiffs that rely on 'amended' or 'supplemental' infringement contentions without moving for leave to amend do so at their own peril. Because of the clarity of the rule, any ambiguity as to whether contentions have been accepted by agreement of the parties will likely be resolved in the defendant's favor. The better practice is for the plaintiff to always move for leave to amend"). Samsung's products, and information about them, are publicly available, Samsung has produced technical documents describing how the accused functionality operates (to the extent Samsung can discern the accused functionality), and Broadphone has had more than ample time to prepare its infringement contentions after initiating this lawsuit more than a year ago.

Please confirm by January 29, 2024, that Broadphone will withdraw their doctrine of equivalent contentions, their assertion of infringement against the SmartTag products and their assertion of claim 12 of the '698 and claims 24 and 25 of the '811 patent. If Broadphone does not agree, Samsung requests a meet and confer next week in connection with any Broadphone motion for leave to serve its Supplemental Infringement Contentions and/or a motion to strike at least the deficient infringement allegations raised in this letter.

Sincerely,

Alexander Middleton