

No. 2024-2336

**United States Court of Appeals
for the Federal Circuit**

LEMKO CORP.,
Appellant,

v.

MICROSOFT CORPORATION, AFFIRMED NETWORKS, INC.,
Appellees.

Appeal from the United States Patent and Trademark Office,
Patent Trial and Appeal Board, in No. IPR2023-00531.

REPLY BRIEF FOR APPELLANT LEMKO CORP.

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INTRODUCTION

Microsoft fails to explain away the Board’s plain legal errors that require reversal or, at a minimum, remand. The Board applied an incorrect construction of “communications information” that contradicted the express claim language and the intrinsic record. The Board also failed to construe the key term “distributed mobile architecture,” despite the dispositive dispute between the parties over its meaning. Microsoft’s Response Brief attacks strawman positions that Lemko is not asserting, ignores the intrinsic record, and asserts waiver arguments that are untenable because Lemko raised all of the arguments with the Board that Lemko now asserts on appeal.

Lemko showed that, in light of the specification and the express claim language, “communications information” must identify (1) a mobile device subscribed to a communications network accessible via a second distributed mobile architecture (DMA) gateway and (2) the communications network itself. That is the only interpretation consistent with the express language of the claims and the core purpose of the ’988 Patent, which was to enable mobile devices subscribed to separate DMA networks to connect via DMA gateways. In response, Microsoft first relies on a waiver argument that fails on its face because Lemko argued the same claim construction to the Board that it now presents on appeal. This is confirmed by Microsoft’s second argument, which is that the Board correctly rejected Lemko’s proposed construction in the IPR proceeding, which, of course, requires that Lemko presented to the Board and, therefore, cannot have waived. Microsoft also contends that there was substantial

evidence to support the Board's findings of anticipation. This argument is irrelevant because Lemko is challenging the Board's claim construction, not its factual finding under its incorrect claim construction.

For the "distributed mobile architecture" term, Lemko showed that there was a dispositive dispute between the parties over what it means for a mobile architecture to be "distributed." The Board committed legal error in failing to resolve that dispute by construing the term. Lemko, therefore, asks for a remand so that the Board can construe the term and determine whether Flore anticipates in the first instance. In response, Microsoft contends that there was substantial evidence of anticipation, which is irrelevant because that determination cannot be made until the DMA term is construed, given that the Board made no finding here that the challenged claims were anticipated under Lemko's proposed construction. Microsoft also contends that the Board correctly rejected the construction for DMA that Lemko proposed in the IPR proceeding. Aside from Microsoft's argument being wrong, it misses the point. The Board's error at issue on appeal was in failing to give *any* construction to the term.

Accordingly, the Court should reverse in view of the Board's erroneous construction of "communications information" or vacate and remand so that the Board can provide a construction for DMA and evaluate the validity of the challenged claims in view of that construction.

ARGUMENT

I. THIS APPEAL SEEKS DE NOVO REVIEW OF THE BOARD'S CLAIM CONSTRUCTIONS, NOT SUBSTANTIAL EVIDENCE REVIEW OF ITS FACTUAL FINDINGS

Lemko's appeal is limited to two questions of claim construction that are both subject to de novo review. Br. at 34-35. Lemko first appeals the Board's incorrect construction of "communications information." *Id.* at 35-36. Lemko is not challenging the sufficiency of the evidence under the Board's incorrect construction. Lemko's second issue on appeal is the Board's legal error in failing to provide a construction for "distributed mobile architecture," (*id.* at 46) in particular with respect to the disputed "distributed" portion of the term. Thus, this appeal presents purely legal questions that this Court reviews de novo, and substantial evidence review does not apply.

Microsoft devotes much of its Response Brief to irrelevant arguments about the supposed substantial evidence in the record. Resp. Br. at 24-30 (arguing "There is Substantial Evidence Supporting the Board's Decision that Flore Anticipates"), *id.* at 42-49 (arguing "Substantial Evidence Supports the Board's Finding that Flore Discloses the Claimed 'Communications Information' Even Under Lemko's New Proposed Construction"). These substantial evidence arguments should be disregarded in their entirety because they are non-responsive to Lemko's claim construction arguments actually raised on appeal.

II. THE BOARD MISCONSTRUED “COMMUNICATIONS INFORMATION”

A. Lemko Presented its Claim Construction Argument to the Board

“Communications information” should be construed to require that it identify (1) one or more devices accessible via the second DMA gateway and (2) the communications network it is for. Br. at 35.

Microsoft’s waiver argument is meritless because Lemko fully presented the same claim construction arguments in its Patent Owner Response during the IPR proceedings that it now raises on appeal. Resp. Br. at 30-34.

Lemko’s Claim Construction Argument on Appeal:	Lemko Raised the Same Claim Construction Position in its Patent Owner Response:
“The communications information must <i>indicate one or more devices accessible by one of a DMA server and a legacy communications network.</i>” Br. at 36 (emphasis added).	“The Challenged Claims require communications information . . . [that] <i>indicates one or more devices accessible by one of a DMA server and a legacy communications network.</i>” Appx311 (emphasis added).
“The Board further erred in not construing ‘communications information’ to <i>require identifying the particular ‘communications network’ that it is ‘for.’</i> Flore’s PDP context does not contain any information about the network behind the SGSN.” Br. at 40 (emphasis added) (citations omitted).	“There is nothing in a PDP context [the alleged communications information] <i>that identifies any network accessible by a second gateway.</i> . . . No information about any networks accessible by [the DMA gateway] is contained in this PDP context. Thus, Flore does not disclose ‘receiving a communication . . . <i>indicated by the communications information . . .</i>’” Appx311-312 (emphasis added).

Even though Lemko argued the same position during the IPR proceeding that it now raises on appeal, Microsoft contends that Lemko nevertheless waived this argument because Lemko did not place it in the section of its Patent Owner Response titled “Claim Construction.” Resp. Br. at 31-32. That form-over-substance argument is irrelevant. As this Court dictates, arguments addressing the “scope and boundaries” of the claim are claim construction arguments. *Google LLC v. Ecolfactor, Inc.*, 92 F.4th 1049, 1057 (Fed. Cir. 2024) (parties may make claim construction arguments even when “an explicit claim construction was not proposed by either party”). This is exactly what Lemko did in arguing before the Board that Flore’s disclosure did not identify the network the communication was “for” and, therefore, could not satisfy the “communications information” limitations. Appx311-312 (Patent Owner’s Response).

The record confirms that Microsoft and the Board both understood Lemko’s argument, which Lemko now reasserts on appeal, as sounding in claim construction. In reply to Lemko’s claim construction argument in the Patent Owner Response, Microsoft contended that Lemko was relying on an incorrect ***claim construction*** and that Flore’s PDP context satisfied the “communications information” limitation ***“[u]nder the correct claim construction.”*** Appx363 (alleging that “Lemko again creates limitations where none exist” and that Flore’s PDP context meets the communications-information limitation “under the correct construction”) (emphasis added). Thus, Microsoft plainly understood Lemko’s argument to be one of “claim construction.” *Id.*

In its Final Written Decision, the Board also characterized Lemko’s argument as a claim construction argument, disagreed with Lemko about what the claims “require” and disagreed that Lemko’s arguments were “commensurate with the scope of claim 1”:

In the Reply, Petitioner argues, and we agree, that “[t]he claims do not **require** that the communications information **identify a network** accessible by a second gateway,” as Patent Owner argues. The claim recites “receiving . . . communications information **for** a communications network accessible by a second DMA gateway,” not “identify a network.” Thus, Patent Owner’s arguments are unavailing because **they are not commensurate with the scope of claim 1**.

Appx29 (emphasis added) (citations omitted); *see also id.* (Board rejecting Lemko’s “identify a network” argument as “not commensurate with the scope of claim 1” and “reading in . . . limitations from the specification”); Appx31 (Board rejecting Lemko’s “via the second DMA gateway” argument as “not commensurate with the scope of claim 1”). Accordingly, the Board recognized that Lemko was arguing claim construction.

Thus, Lemko preserved its arguments about the construction of “communications information” by arguing before the Board the requirements and scope of that limitation, such that “the tribunal was ‘fairly put on notice as to the substance of the issue.’” *Medtronic, Inc. v. TeleFlex Innovations S.A.R.L.*, 68 F.4th 1298, 1305 (Fed. Cir. 2023) (“The exact phrasing of the argument need not have been used below” to preserve it for appeal).

B. Communications Information Must Identify a Device Subscribed to a Communications Network Accessible Via the Second DMA Gateway

The Board's construction of the "communications information" term is inconsistent with the claims' plain language and the intrinsic record. "Communications information" must identify a device subscribed to a communications network accessible via the second DMA gateway.

As explained in Lemko's Opening Brief, the '988 Patent describes distributing call-routing functionality among DMA servers, in contrast to routing *all calls* through a centralized node, as was necessary in the conventional centralized and hierarchical mobile architectures taught, for example, in Flore. Br. at 12-13 (citing Appx65, Appx80 at 7:4-7, Appx73, Appx85 at 17:2-12, 17:50-18:8, Appx77 at 1:62-65 ('988 Patent)). Such architectures required every call to traverse expensive backhaul connections to the central node, even when the caller and the recipient of the call were within the same service area and served by the same network operator. The decentralization of the '988 Patent creates a problem, however, in that mobile devices being served by one DMA network need a way to locate and connect to mobile devices that are being served by a different DMA network. Br. at 13-14 (citing Appx77 at 1:62-65; Appx1471-1473, ¶¶ 50-52).

To address these concerns about "compatibility" with "different communication systems" and "provid[e] a medium through which newly deployed systems can communicate with one another," (Appx77 at 1:59-2:2), Lemko's '988 Patent introduced

a DMA gateway element that routes calls between devices that are not part of the same DMA network. Appx1471-1473, ¶¶ 50-52 (Cooklev Decl.). To enable such routing of calls from one DMA network to a different DMA network, each DMA gateway distributes “communications information” about the networks it serves to other DMA gateways. Br. at 15 (citing Appx82 at 11:20-25 (’988 Patent)).

1. The Communications Information Describes Networks and Devices that *Are* Served by the Second DMA Gateway, Not Those that *Will Be* Served by the Second DMA Gateway in the Future

As discussed above, the point of the claims at issue is to enable a mobile device in one network to find and connect to a different mobile device in a different DMA network. Br. at 5-6, 13-17. That requires knowing the particular second DMA gateway that can connect to the second DMA network that is *currently* serving the target mobile device. That sequence is embedded in the claims on appeal. The first DMA gateway receives communications information for the second DMA gateway and stored that information in its home DMA register. Then, the first DMA gateway receives a “communication,” which is a call from one mobile device, intended for a “target device.” Finally, the first DMA gateway routes that communication to the target device by relaying the communication to the second DMA gateway. Appx86, Claim 1 (’988 Patent).

Microsoft’s entire argument on appeal depends on the Court construing the limitation “receiving a communication at the first DMA gateway for ***a target device***

indicated by the communications information to be served by the second DMA gateway” to be “future looking.” Resp. Br. at 36. That interpretation is wrong as a matter of basic grammar, it vitiates the purpose of the invention in favor of an interpretation that describes its allegedly anticipatory art, and it makes no sense when considering the claim as a whole.

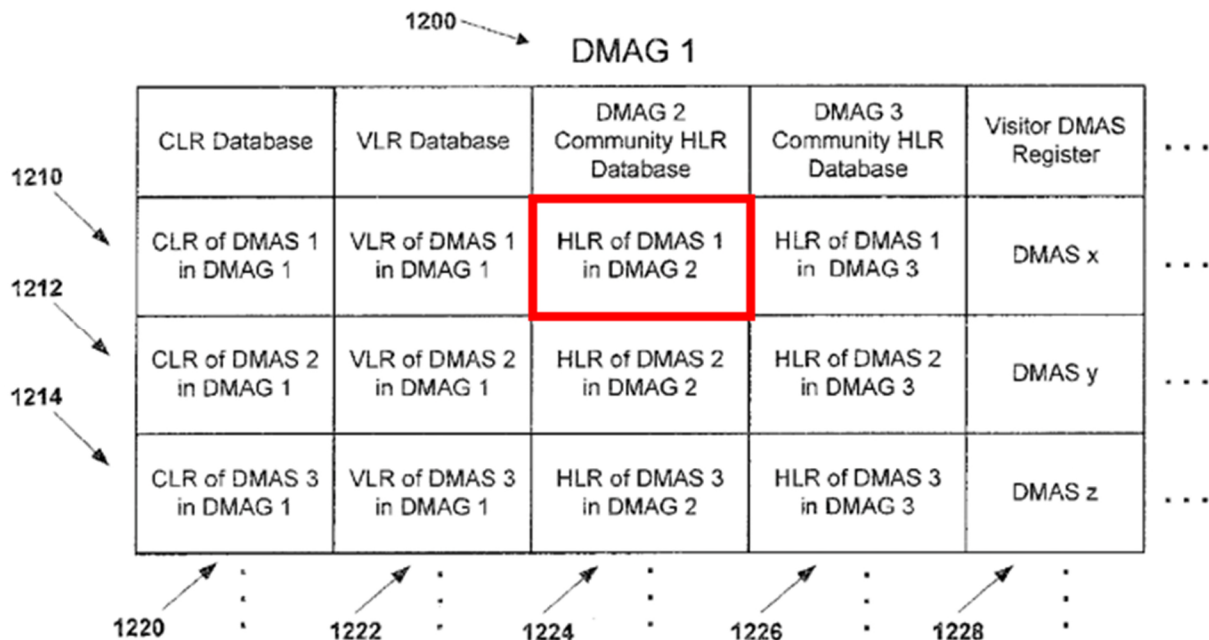
Microsoft’s proposed interpretation fails because it takes the phrase “to be served” out of context and simply states that it is “future looking.” *Id.* Read in full context, the phrase “receiving a communication at the first DMA gateway for *a target device indicated by the communications information to be served by the second DMA gateway*” is in the passive voice—referring to a target device described in the received communications information. Indeed, the key part of the term is in the *past tense* (“a target device *indicated* by the communications information to be served by the second DMA gateway”), and it is not “future looking” in any way. For this phrase to read as Microsoft suggests, it would need to say: receiving a communication at the first DMA gateway for a target device indicated by the communications information *to be seeking to be served by* the second DMA gateway in the future. This means the communications information already indicated that the target device is being served by the second DMA gateway.

Nor does the claim language refer to managing the handover of a single mobile device from one DMA network to another, as Microsoft contends. Appx86, Claim 1 (’988 Patent). On the contrary, Microsoft’s proposed interpretation should be rejected

as vitiating the purpose of distributing communications information between DMA gateways. *See Apple Comput. Inc., v. Articulate Sys., Inc.*, 234 F.3d 14, 25 (Fed. Cir. 2000) (“[T]he claim must be interpreted in light of the teachings of the written description and purpose of the invention described therein.”).

To ensure seamless routing of calls from one distributed network to another network, each DMA gateway distributes information about the networks it serves to other DMA gateways in the form of “communications information.” Br. at 15 (citing Appx82 at 11:20-25 (’988 Patent)). So when the claims recite a first DMA gateway receiving “communications information for a communications network accessible by a second DMA gateway” and “storing the communications information in a home DMA register of the first DMA gateway,” they are referring to that distribution of information, which identifies how the first DMA gateway can relay communication to a target device that is reachable by the second DMA gateway in order to presently connect to each target device. Appx86, Claim 1 (’988 Patent).

As illustrated in Figure 12, for example, each DMA gateway (e.g., DMAG 1) receives communications information for a communications network (e.g., DMAS 1) of a different DMA gateway (DMAG 2) that describes the network and the devices it serves (e.g., HLR). It stores that communications information in its home DMA register 1200:



Appx73, FIG. 12 ('988 Patent) (annotated). Then, as shown with the annotation of Figure 12 above, when DMAG 1 receives a call for a target device listed in the “HLR of DMAS 1 in DMAG 2,” it knows where to route the call. Appx85 at 17:29-18:8 ('988 Patent); Appx86, Claim 1 ('988 Patent) (reciting “routing the communication *from the first DMA gateway to the target device* by relaying the communication from the first DMA gateway *to the second DMA gateway* via the DMA gateway communications network”) (emphasis added). This confirms that the communications information must specify how to presently reach a target device, not predict where a device will be reachable at some point in the future, such as after a handover event is concluded.

Microsoft’s proposed interpretation also makes little sense in the context of the challenged claims. This limitation describes a DMA gateway receiving a communication (e.g., a call) for a target device that is—according to the received communications

information—served by the second DMA gateway (“a target device indicated... to be served by the second DMA gateway”). After all, the received communications information was “for a communications network accessible by a second DMA gateway,” and after receiving the communication, the first DMA gateway routes it to “the target device by relaying the communication from the first DMA gateway to the second DMA gateway via the DMA gateway communications network.” Appx86, Claim 1 (’988 Patent). This series of steps makes no sense if the target device is *not* accessible via a communications network accessible via the second DMA gateway, as would be the case under the Board’s and Microsoft’s construction.

2. The ’988 Patent is About Connecting Mobile Devices in Two Different DMA Networks, Not Managing a Single Mobile Device Moving From One Network to Another

The Board’s construction is incorrect because it is directed to managing the handover of a single device from one DMA network to another, not enabling a mobile device from one DMA network to locate and connect to a mobile device from a different DMA network. This was a dispositive error because the asserted Flore reference is limited to device handover and does not address locating and connecting to a mobile device in a different network. Br. at 18 (“[Flore] describes a technique for handing off calls between a 3G UMTS Network and the soon-to-be standardized 4G [E-UTRAN] Network”); Appx21 (citing Appx784, ¶ [0007]); Appx1473-1476 (Cooklev Declaration). Microsoft mischaracterizes the ’988 Patent’s specification in arguing that it “undermines” Lemko’s argument about the purpose of the ’988 Patent and “discusses

a scenario similar to the handover process discussed in *Flore*.” Resp. Br. at 38-39 (citing Appx82, 11:34-52). The ’988 Patent does not disclose, let alone claim, a single device handover process.

In particular, Microsoft alleges that the ’988 Patent discusses that “***a mobile device*** ‘may move out of communications range of a DMA gateway.’” Resp. Br. at 38-39 (citing Appx82, 11:34-52) (emphasis added). This citation is misleading and irrelevant because the cited portion of the specification discusses what occurs when a mobile ***DMA server***, not a mobile device like a phone, moves location. Appx82, 11:34-52. The ’988 Patent describes embodiments where the DMA server is located in a portable briefcase-like device (Figure 1) or mounted in a vehicle (Figure 2). *Id.* (’988 Patent) at 11:29-31. In such cases, the ’988 Patent specification discusses how “[a] DMA server may associate itself with different DMA gateways,” depending on its deployment. *Id.* at 11:28-29. This embodiment has nothing to do with Microsoft’s reliance on the disclosure in *Flore* of managing the movement of a mobile phone from one network to another. Microsoft never asserted that the mobile phones in *Flore* are equivalent to the DMA servers discussed in the ’988 Patent. There is no disclosure in the ’988 Patent of such a handover scenario and no basis for the Board to have construed communications information as being intended to manage handovers, as is described in *Flore*.

C. The Communications Information Must Identify the Communications Network it is “For”

The Board erred by not requiring “communications information *for* a communications network” to identify the particular “communications network” it is “for.” As discussed in Lemko’s Opening Brief, this is the correct construction of the claim term that is consistent with the specification and the intrinsic record. Br. at 40-42; Appx82 (’988 Patent) at 11:20-25 (describing communications information stored in a home DMA register which maps the identity of a communications network to the devices it serves); *see also* Appx380-381 (Sur-Reply) (citing Appx73 (’988 Patent), Figure 12) (Figure 12 showing a DMA register that provides the identity of the gateway that serves the network and the identity of the particular network (e.g., DMAS1 in DMAG 1)); Appx82 at 11:10-27. It is this communications information that enables the benefits of the claimed invention by allowing a mobile device in one DMA network to locate and connect to a mobile device in a different DMA network or in a legacy communications network via a second DMA gateway.

Microsoft and the Board dismissed Lemko’s proposed construction as an attempt to “read[] in [] limitations from the specification” into the claims. Appx29; Appx362 (Petitioner’s Reply); Resp. Br. at 39-42. But claims “must be read in view of the specification, of which they are a part.” *Phillips v. AWH Corp.*, 415 F. 3d 1303, 1315 (Fed. Cir. 2005) (en banc) (quoting *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995) (en banc)). Further, this Court cautions that “the line between

construing terms and importing limitations can be discerned with reasonable certainty and predictability if the court's focus remains on understanding how a person of ordinary skill in the art would understand the claim terms.” *Id.* at 1323. Here, the Board erred by characterizing Lemko's reliance on intrinsic evidence as an attempt to “read[] in these limitations from the specification,” rather than properly using the specification to interpret the meaning of “communications information.” Appx29. Indeed, the claimed invention requires that the communications information identifies the communications network it is used to connect to, and the claim terms should be construed in light of that requirement.

As discussed above and in Lemko's Opening Brief, communications information “for” a particular communications network must identify the network it is for. Br. at 40-42. Microsoft wrongly characterizes this as an “*ipse dixit*” argument. Resp. Br. at 40. But, it is not *ipse dixit* to simply read the plain language of the claims, which require that the communications information must “indicat[e] one or more devices accessible by one of a DMA server and a legacy communications network.” Appx78 ('988 Patent) at 3:1-4; Appx86, Claim 1. Neither the Board nor Microsoft has yet explained how communications information can indicate that a device is accessible by a DMA server without identifying the DMA server.

Indeed, Microsoft's inapt analogy proves this point. Resp. Br. at 40. Microsoft argues that its “response brief is clearly drafted for the Federal Circuit reviewing panel even though it doesn't identify the specific panel” to suggest that communications

information can be for a specific network without identifying that network. *Id.* First, in this analogy (and with full apologies to the panel), the panel members would represent the target devices, not the communications network. Instead, the Federal Circuit Court of Appeals would represent the communications network, the name of which is emblazoned on the front of Microsoft’s brief. Second, even granting the misapplied analogy, Microsoft’s brief does identify the panel it is “for” on its cover and every other page, with the identifier “24-2336.” Stripped of that identifier or similar information, it would not be clear which panel the brief was for. Finally, the analogy does not fit the facts. The Court already has procedures in place for receiving briefing and routing them to the correct panel, for example when parties upload their briefs to the Court they select the case the brief should be filed in. In contrast, the point of the ’988 Patent was to provide a solution to the problem of how to enable callers in one DMA network to locate and connect to callers in a different DMA network when the callers do not themselves know how to connect to the target phone.

Microsoft also incorrectly attempts to identify “many other examples from the ’988 Patent” that would deter the claim requirement that communications information must identify the communications network it is for. Resp. Br. at 41-42. For example, Microsoft contends that Lemko’s cited portions of the specification “only describes storing information *about devices*.” *Id.* at 41 (citing Appx82 at 11:20-25). Microsoft misses that the immediately-preceding sentence explains that the “register data describ[es] *the networks they service*.” Appx82 at 11:20-22 (emphasis added). Thus,

the passage that Microsoft cites confirms that the communications information identifies the networks that each DMA gateway services.

Further, Microsoft mistakenly argues that the '988 Patent discloses that information identifying communications networks "is only sent" to update the previously sent communications information. Resp. Br. at 41 (citing Appx84, 15:7-13). But this portion of the specification supports Lemko's construction. The express statement that the updates contain information identifying communications networks confirms that the "previously-communicated communications information" that is now being updated had identified the communications networks the information was for, because, as a matter of logic, that is what is being "update[d]." Appx84 ('988 Patent) at 15:7-13.

Contrary to Microsoft's assertion, the '988 Patent does indeed disclose "communications information identifying a communications network." Resp. Br. at 42; Br. at 40-42. As discussed above, Figure 12 shows a DMA register that provides the identity of the gateway that serves the network and the identity of the particular network (e.g., DMAS1 in DMAG 1)). Appx73 ('988 Patent), Figure 12. This is communications information identifying the communications network. Thus, the intrinsic record compels a construction that "communications information for a communications network" must identify the particular "communications network" it is "for" and does not support the Board's erroneous construction proposed by Microsoft.

D. Reversal or Remand is Necessary to Correct the Board’s Legal Error in Construing the “Communications Information” Limitation

Finding that the Board’s construction of communications information is erroneous would require reversal or, at a minimum, remand. Reversal is warranted because Flore does not teach communications information that identifies (1) devices accessible via a communications network of the second DMA gateway and (2) the communications network it is for. *Homeland Housewares, LLC v. Whirlpool Corp.*, 865 F.3d 1372, 1376-77 (Fed. Cir. 2017) (reversing the Board’s decision, after determining the correct construction of “settling speed” and then determining that the prior art reference did not meet the limitations of the claim as correctly construed).

Microsoft appears to argue that there is substantial evidence even under Lemko’s proposed construction, but that is not a valid basis to affirm the Board’s anticipation decision. Resp. Br. at 43-49. The Board did not make an alternative finding of anticipation under Lemko’s proposed construction of “communications information,” and this Court should not do so as a matter of first impression. Specifically, the Board did not reach or weigh Microsoft’s arguments in the alternative that Flore anticipated the challenged claims even under Lemko’s claim construction. See Appx29-30 (the Board ending its analysis of limitation 1b after declining Lemko’s proposed construction).

Microsoft mischaracterizes the Board’s statement that, “regardless of timing, Flore meets the claim,” as an alternative factual finding that supports affirmance under

the claim construction Lemko seeks on appeal. Resp. Br. at 43-44 (citing Appx32-33). The Board did not, however, apply Lemko's construction in its analysis. Appx32. Lemko had argued that it was undisputed that the PDP context **message** sent from the AGW to the Inter A/S anchor (the alleged communications information) does not identify a target device accessible via the second DMA gateway. The Board looked to something else—the Inter A/S Anchor's stored PDP context (not the PDP context **message**)—to conclude that after the handoff, the Inter A/S Anchor knows where to forward future traffic. The point, which the Board's analysis did not address, is that the message itself—the alleged communications information—simply does not identify a target device accessible via the second DMA gateway. That PDP context message undisputedly refers to a target device that is **only** accessible, at that time, via the first (alleged) DMA gateway. Br. at 20 (citing Appx363).

Therefore, the Court should reverse or, at a minimum, remand for further proceedings based on the correct construction of “communications information.” *Kaken Pharm. Co. v. Iancu*, 952 F.3d 1346, 1355 (Fed. Cir. 2020) (“[T]he appropriate course in this case, as in so many other involving a reversal of a Board claim construction, is to vacate the Board's decision and remand the matter.”).

III. THE BOARD FAILED TO CONSTRUE “DISTRIBUTED MOBILE ARCHITECTURE”

The Board committed legal error by failing to construe the word “distributed” in the term “distributed mobile architecture,” despite the word’s centrality to the parties’ dispute. Br. at 46-56. In its Final Written Decision, the Board rejected Lemko’s arguments regarding the scope of the full term “distributed mobile architecture,” and decided to use the “plain and ordinary meaning of each of its individual terms” (Appx14), but then failed to explain its interpretation of the disputed individual word “distributed.” Appx13 (“We need not assign further meaning to the term ‘DMA’ because determining that Patent Owner’s construction is incorrect sufficiently decides the issues before us.”). But declining to adopt Lemko’s construction left “distributed” and, therefore, “distributed mobile architecture,” unconstrued.

Thus, the Board did not resolve the dispute over the scope of the challenged claims and cannot have properly found substantial evidence to support its finding that Flore anticipated the claims. As a result, the Final Written Decision should be vacated and remanded for the Board to affirmatively construe the term and then assess whether Flore anticipates any claims under that construction. *CSR, PLC v. Skullcandy, Inc.*, 594 F. App’x 672, 677-78 (Fed. Cir. 2014) (vacating and remanding Board’s decision because it failed to construe the term “threshold value” in a clear enough manner “to satisfy the requirement that a Board opinion must contain sufficient reasoning to permit appellate scrutiny”).

A. Lemko Argued the Construction of Distributed Mobile Architecture Before the Board

Lemko preserved its arguments about the construction of “distributed mobile architecture” by repeatedly raising them in the IPR proceedings. *Medtronic*, 68 F.4th at 1305 (a party preserves an issue for appeal when “the tribunal was ‘fairly put on notice as to the substance of the issue.’”).

While Microsoft claims that Lemko’s arguments concerning the plain meaning of “distributed” is a “new” issue, this was one of Lemko’s primary arguments during the entirety of the IPR proceeding. Br. at 22-31 (summarizing the “distributed mobile architecture” issue in the IPR proceeding); Appx168 (Patent Owner’s Preliminary Response, “POPR”) (“There is nothing ‘**distributed**’ about the conventional, hierarchical networks disclosed in Flore”) (emphasis added); *see also, generally*, Appx166-172 (POPR) (discussing construction of “distributed”); Appx293 (Patent Owner Response) (“The term ‘distributed mobile architecture (DMA)’ should be construed consistent with the plain meaning of its words and the inventor’s description, which require a mobile architecture with **distributed functionality** and organization, **instead of centralized functionality** and hierarchal organization.”) (emphasis added); *see generally* Appx293-303 (arguing construction of DMA); Appx389 (Sur-Reply) (“[T]he record is replete with undisputed, un rebutted evidence about what the term ‘**distributed**’ means in the field of communications networks, including un rebutted explanations about how distributed networks differ categorically from hierarchical

ones.”) (emphasis added); *see generally* Appx384-396 (claim construction argument); Appx2617 (Lemko’s oral hearing demonstrative) (arguing that a distributed mobile architecture must have distributed call-routing functionality).

The Board and Microsoft well understood that Lemko was placing the construction of “distributed” at issue. The parties and the Board discussed at length during oral argument what it means for a mobile architecture to be “distributed.” Br. at 28-29 (citing Appx420-421 (the Board’s pre-hearing Order requesting the parties address several dictionary definitions related to distributed computing that the Board *sua sponte* proposed); Appx497-499 (Hearing Tr). at 60:17-26, 61:18-62:2 (Lemko’s counsel discussing the Board-submitted dictionary exhibits); *see also* Appx488-491 at 51:23-54:10 (Lemko’s counsel addressing the Board’s questions’ about claim construction).

And, in its Final Written Decision, the Board fully considered (and erroneously) rejected Lemko’s proposed construction for “distributed mobile architecture,” including specifically Lemko’s proposal for the meaning of distributed. Appx8-21, Appx13 (14-page discussion of Lemko’s proposed construction: “we disagree with Patent Owner that Petitioner’s expert, Mr. Procter, conceded that ‘***distributed***’ requires call routing functionality be distributed among the DMA systems.”) (emphasis added). Thus, Lemko preserved its argument by repeatedly raising it to the Board and there is no merit to Microsoft’s waiver argument.

B. Lemko Seeks Remand Due to the Board’s Failure to Construe a Dispositive Term

In focusing on how “distributed” should be construed, Microsoft ignores Lemko’s argument on appeal. Resp. Br. at 49-51. Lemko is not asking this Court to **reverse** the Board’s construction for distributed. There is no “construction” to reverse because the Board **failed** to construe the term. Appx13-14 (Final Written Decision). Lemko requests that the Court vacate the Final Written Decision and remand for the Board to construe the term “distributed mobile architecture.”

The Board’s failure to construe “distributed” is legal error. Simply noting that “DMA ‘should be accorded . . . its plain and ordinary meaning of each of its individual terms’” and rejecting Lemko’s proposed construction does not end the matter. Appx13-14 (quoting Appx348 (Reply)). A determination that a claim term has a plain and ordinary meaning is inadequate, as was the case here, “when reliance on a term’s ‘ordinary’ meaning does not resolve the parties’ dispute.” *O2 Micro Int’l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1361 (Fed. Cir. 2008) (finding legal error where the district court declined to construe the term “only if” because the “parties presented a dispute . . . regarding the scope of the asserted claims”).

O2 Micro applies fully to IPRs: “Just as district courts must, when the parties raise an actual dispute regarding the proper scope of claims, resolve that dispute, the Board also must resolve such disputes in the context of IPRs.” *Homeland Housewares*, 865 F.3d at 1375 (cleaned up) (finding the Board should have provided a construction for the

term “settling speed,” after the Board had rejected patent owner’s proposal and explicitly held it was not adopting any explicit construction of the term).

Microsoft does not dispute that *O2 Micro* requires the Board to construe terms when the parties have a material dispute over their construction, which alone requires remand of the Final Written Decision. Instead, Microsoft incorrectly contends that the Board did construe “distributed.” Resp. Br. at 58. But Microsoft fails to identify the Board’s construction of “distributed” because there was no such construction. *See id.*

Instead of identifying the Board’s purported construction of the term “distributed,” Microsoft first quotes its own proposed construction for “distributed,” where Microsoft contended that the “plain meaning of ‘distributed’ means ‘something that is part of a broader network or intended to be part of a broader network.’” Resp. Br. at 58 (quoting Appx9). Microsoft notes that the Board agreed that “DMA ‘should be accorded . . . its plain and ordinary meaning of each of its individual terms,’” but the Board **did not** adopt Microsoft’s interpretation of the plain and ordinary meaning of distributed. Resp. Br. at 58 (quoting Appx-13-14) (emphasis omitted). Microsoft also observes that the Board “explicitly considered and rejected Lemko’s attempt to construe the DMA term to require ‘call routing functionality’ to be distributed.” Resp. Br. at 58 (emphasis omitted). None of this, however, is an affirmative construction of what “distributed” actually means. The Board never provided such a construction and left that dispositive question unanswered.

The Board’s rejection of Lemko’s construction and decision that “distributed” should be given its plain and ordinary meaning is not the same as construing the term. Distributed mobile architecture is not an empty word—the parties agreed that it must mean something in the context of the ’988 Patent for a mobile architecture to be “distributed.” *See, e.g.*, Appx348 (Microsoft stating “the parties’ dispute appears to focus on the term ‘distributed.’”); Appx349 (Microsoft articulating its plain meaning of “distributed” as “something that is part of a broader network or intended to be part of a broader network.”); Appx385 (Lemko arguing that “[r]eading ‘DMA’ out of the Challenged Claims would be especially egregious here given the emphasis on the distributed nature of the claimed mobile architecture throughout the ’988 Patent”).

Without construing the term “distributed” and resolving the legal question of the scope of the challenged claims, the Board cannot have properly found substantial evidence to support anticipation. *CSR, PLC*, 594 F. App’x at 678 (“The Board erred by failing to construe ‘threshold value’ as it is used in claims 1-6 before finding that [a prior art reference] failed to disclose a ‘threshold value’” in anticipation). In *CSR*, this Court agreed with the appellant that the “absence of a clear construction fails to satisfy the requirement that a Board opinion must contain sufficient reasoning to permit appellate scrutiny.” *Id.* at 677; *see also id.* at 677-78 (quoting *Gechter v. Davidson*, 116 F.3d 1454, 1457 (Fed. Cir. 1997) (holding that the Board’s “findings must be expressed with sufficient particularity to enable [the] court, without resort to speculation, to understand the reasoning of the Board, and to determine whether it applied the law correctly and

whether the evidence supported the underlying fact findings)); *see also* *Gechter*, 116 F.3d at 1460 (the Board’s claim construction “must . . . be explicit, at least as to any construction disputed by parties”).

Microsoft argues that the Board correctly relied on Figure 6 of the ’988 Patent to support its rejection of Lemko’s proposed claim construction. Resp. Br. at 56-57. There are multiple flaws with this argument. First, Lemko’s issue on appeal is that remand is necessary because the Board erred in failing to provide an affirmative construction for “distributed.” Br. at 50-56. Thus, evidence that purportedly supports the Board’s rejection of Lemko’s construction does not excuse its failure to provide an actual construction. Second, Microsoft did not rely on Figure 6 below in opposing Lemko’s proposed construction. Instead, the Board improperly raised the notion *sua sponte* that Figure 6 would be inconsistent with a requirement that a distributed mobile architecture is different from conventional architectures that are hierarchical. Appx18-19.

The Board erred in basing its decision on an interpretation of Figure 6 that neither party advanced. Br. at 53-54 (citing *In re Magnum Oil Tools, Int’l, Ltd.*, 829 F.3d 1364, 1381 (Fed. Cir. 2016); Appx18-19)). Microsoft’s responsive reliance on *Rovalma, S.A. v. Bohler-Edelstahl GmbH & Co. KG*, 856 F.3d 1019 (Fed. Cir. 2017), is misplaced because it requires the Board to “timely inform a patent owner of ‘the matters of fact and law asserted’” so that it has “adequate notice and an adequate opportunity to be heard.” *Id.* at 1029. The Board’s reliance here on arguments not made by either party

failed to provide such notice because Lemko never had a chance to address it or notice that it needed to do so.

Finally, to the extent the Court reaches the merits of the argument, the Board completely misread Figure 6, which is not surprising given the lack of briefing about Figure 6 as it relates to this issue. Figure 6 shows two separate DMA networks (620 and 640), each of which interconnects the DMA servers of those networks (622, 624, 626) and (642, 644, and 646) to form a non-hierarchical network with routing functionality distributed among the individual DMA servers. Appx81-82 at 9:55-10:3, 10:24-11:9 ('988 Patent); Appx1482-1484, ¶¶ 70-72 (Cooklev Decl.) (analyzing Figure 6). The Board observed that there is a hierarchical connection **between** the two DMA networks over the DMA gateway network (606) between DMA gateways (602 and 604), but that is irrelevant to the non-hierarchical structure **of the DMA networks themselves** (620, 640), each of which is a decentralized group of DMA servers connected as peers. Appx18-19.

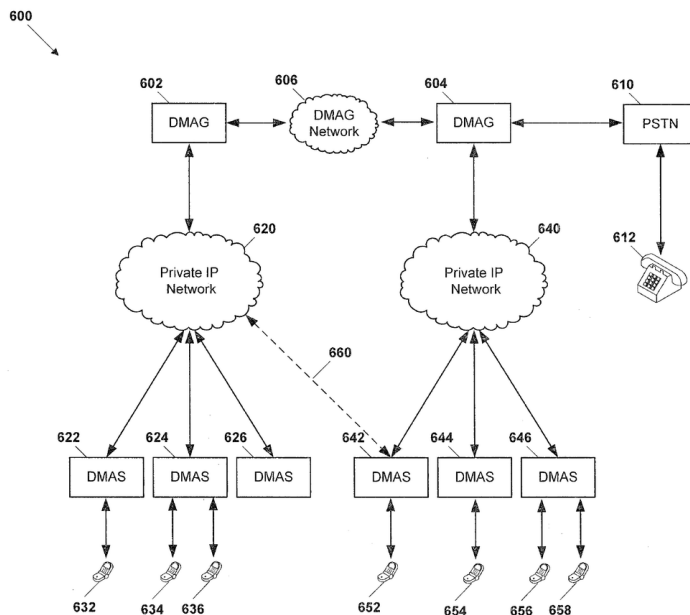


FIG. 6

Appx67 at Fig. 6.

The key difference between this distributed mobile architecture and a conventional hierarchical architecture is that the DMA gateway is not a centralized node that routes ***all calls***, like the SGSN and Inter A/S Anchor of Flore. For example, calls between UE 632 and 634 in Figure 6 above would never traverse DMAG 602.

In sum, the Court should decline Microsoft’s invitation to construe “distributed” in the first instance. In *CSR*, the court vacated and remanded for the Board to construe the term that it had erred by leaving unconstrued. *CSR*, 595 F. App’x at 678. The Court similarly held, in *Homeland Housewares*, 865 F.3d at 1374-75, that the Board must construe the claims before determining whether they are infringed, obvious, or anticipated. The Court should take the same path here and remand so that the Board can, in the first instance, evaluate the record evidence concerning the plain and ordinary

meaning of the term “distributed,” construe the disputed term, and evaluate whether the prior art anticipates the challenged claims under the correct construction of the term.

CONCLUSION

Lemko respectfully requests that the Court reverse the Board’s Final Written Decision and find patentable Claims 1, 3-9, and 20 of the ’988 Patent in view of the Board’s erroneous construction of “communications information.” In the alternative, the Final Written Decision should be vacated and the case remanded for the Board to construe “distributed mobile architecture.”

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. Cir. R. 32(b)(1) because this brief contains 6,610 words, exclusive of the items exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b)(2).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Garamond 14 point font.

Dated: April 30, 2025

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