

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN ACTIVE MATRIX  
ORGANIC LIGHT-EMITTING DIODE  
DISPLAY PANELS AND MODULES  
FOR MOBILE DEVICES, AND  
COMPONENTS THEREOF**

Inv. No. 337-TA-1351

**ORDER NO. 35: GRANTING-IN-PART COMPLAINANT'S MOTION TO STRIKE  
PORTIONS OF RESPONDENTS' INVALIDITY EXPERT  
REPORTS**

(November 16, 2023)

On October 20, 2023, Complainant Samsung Display Co., Ltd. (“Complainant”) moved to strike (Mot. 1351-013) portions of the invalidity expert reports of Dr. Daniel Foty and Dr. P. Morgan Pattison.<sup>1</sup> Respondents Mianyang BOE Optoelectronics Co., Ltd (“Mianyang BOE”), Apt-Ability, LLC d/b/a MobileSentry, and Mobile Defenders LLC (collectively, “Respondents”)<sup>2</sup> opposed the motion. *See* EDIS Doc. ID 807333 (“Opp.”). The Commission Investigative Staff (“Staff”) filed a response supporting-in-part the requested relief. EDIS Doc. ID 807626 (“Staff Resp.”).

Complainant seeks to strike four categories of opinions contained within the invalidity expert reports of Dr. Foty (“Foty Report”) and Dr. Pattinson (“Pattinson Report”)<sup>3</sup>: (1) opinions with

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<sup>1</sup> On November 1, 2023, Complainant filed a Supplement to Complainant’s Motion to Strike Portions of Respondents’ Invalidity Expert Reports (hereinafter, “Supp.”). Complainant explains that the supplement clarified “a typographical error contained in a chart included in Complainant’s Motion.” Supp. at 1.

<sup>2</sup> Several Respondents did not submit expert reports. The use of the term “Respondents” here refers only to those Respondents specifically identified.

<sup>3</sup> The Foty Report was served on behalf of the Respondents identified here. The Pattinson Report was served on behalf of Mianyang BOE only.

respect to previously rejected indefiniteness arguments; (2) opinions that certain previously construed terms and additional terms are indefinite; (3) opinions with respect to objective indicia of non-obviousness of U.S. Patent No. 7,414,599 (“the ’599 patent”); and (4) opinions relating to prior art combinations that allegedly were not disclosed in Respondents’ Final Invalidity Contentions with respect to U.S. Patent No. 9,330,593 (“the ’593 patent”), U.S. Patent No. 10,854,683 (“the ’683 patent”) and U.S. Patent No. 11,594,578 (“the ’578 patent”).

### **I. Rejected Indefiniteness Contentions**

Complainant seeks to strike paragraphs 169-177 and 202-210 of the Pattison Report. Supp. at 2. These paragraphs assert that the terms “virtual quadrangle” and the “shortest distance between any two of the group of four neighboring ones...” are indefinite. Mot. Ex. 20 at ¶¶ 169-177, 202-210. I have already found that these terms are not indefinite. Order No. 28 at 54, 58-59 (Sept. 11, 2023).

Complainant argues that these opinions should be struck because “the ALJ has already decided that [these terms] are not indefinite.” Mot. at 14. Complainant further notes that “Respondents are transparently trying to add expert opinion that they could have presented in claim construction,” but that “their expert did not opine that any term of the ’578 Patent was indefinite.” *Id.* Complainant thus asserts that “Respondents should not be permitted to circumvent the Ground Rules to do so now.” *Id.*

Mianyang BOE asserts that it “does not intend to relitigate its indefiniteness arguments for these two terms” but instead is “preserving its position pending the final outcome of the claim construction for those terms.” Opp. at 12.

Staff supports Complainant’s motion. Staff Resp. at 4. Staff notes that “[t]hese indefiniteness arguments were considered and rejected in the claim construction order.” *Id.*

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I do not permit experts to opine on rejected claim construction positions. Such opinions are not necessary to preserve a party's position and are routinely rejected by ALJs. *See, e.g., Certain Elec. Devices & Semiconductor Devices Having Wireless Comm'n Capabilities & Components Thereof*, Inv. No. 337-1367, Order No. 2 at 15 (July 27, 2023) (ALJ Elliot's ground rules providing that, after a Markman order issues, "discovery and briefing in the Investigation should be limited to" the judge's claim construction). Additionally, permitting expert opinions (and presumably expert testimony) on issues that have already been decided would be a waste of both time and resources, particularly in an investigation such as this one, in which the parties already need to narrow their case. For these reasons, paragraphs 169-177 and 202-210 of Dr. Pattinson's expert report are struck.

### II. New Indefiniteness Opinions

Complainant seeks to strike paragraphs in both the Foty and Pattison Reports that raise new indefiniteness arguments. These opinions fall into two sub-categories: (1) opinions that previously construed claim terms are indefinite; and (2) opinions that additional terms in the patents are indefinite.

#### A. Previously Construed Terms

Complainant seeks to strike paragraphs 1258-1262, 1264-1267, and 1268-1272<sup>4</sup> of the Foty Report. Supp. at 2. These paragraphs argue the following terms are indefinite: "first node", "second node," "outputting unit," "first driver," and "second driver." *Id.* According to Complainant, these opinions are attempts to relitigate issues already decided and should therefore be struck. Mot. at 15.

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<sup>4</sup> In the supplement, Complainant identifies the paragraphs at issue as: "1258-1262, 1264-3-1267, 1268-1272." Supp. at 2. It appears that the "3" is a typographical error.

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Mianyang BOE asserts that it should be permitted to make indefiniteness arguments with respect to these terms. According to Mianyang BOE, it “point[ed] out these issues during *Markman*” and “consistently made clear that its indefiniteness argument is not one based on the claims in the abstract,” but is due to an “overbroad stretching of the claims.” Opp. at 13. It further asserts that “ITC precedent has found that there is no waiver in this situation.” *Id.* Mianyang BOE contends that it is “clear that there is no prejudice here.” *Id.* at 14.

Staff agrees with Complainant that “[t]he time to raise indefiniteness arguments was during claim construction proceedings, not after the terms have been construed.” Staff Resp. at 4. Staff therefore supports striking these paragraphs. *Id.*

In my Ground Rules, I specifically require parties to identify indefinite claim terms early in the investigation. *See* Ground Rule 7.1 (“By the date ordered in the procedural schedule, each party shall exchange a list of claim terms which that party contends should be construed by the Administrative Law Judge. The list shall identify any claim term which the party contends is indefinite...”). As noted above, I also require that, once a claim term has been construed, parties limit their arguments to these constructions. There are, however, exceptions to these rules. If a party asserts that a term is indefinite when applied, it may not be feasible for that party to raise the argument earlier in the proceeding. *See Certain Flocked Swabs*, Inv. No. 337-TA-1279, Order No. 63 at 4 (June 24, 2002) (permitting an indefiniteness argument first raised in a pre-hearing brief because it was based on Complainant’s application of the term).

I find that such an exception applies to certain opinions in the Foty Report. Dr. Foty does not assert that the terms are indefinite in the abstract. Instead, he asserts that the terms are indefinite based on Complainant’s “apparent interpretation.” *See* Mot. Ex. 20 at ¶¶ 1258 (“first node” and “second node”), 1264 (“outputting unit”), 1269 (“first driver” and “second driver”). With respect

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to node, Dr. Foty explains that Complainant argues “that the Asserted Claims of the ’593 [patent] cover the term ‘nodes’ that encompass intervening circuit elements” and cites to Complainant’s infringement contentions. *Id.* at ¶ 1259. Dr. Foty then explains why he believes “[t]his interpretation is contrary to the disclosure of the specification” and inconsistent with testimony from the inventor of the ’593 patent. *Id.* at ¶¶ 1260-1261. Dr. Foty notes that portions of his analysis for the remaining terms are premised on this purportedly incorrect interpretation of “node.” *See, e.g., id.* at ¶¶ 1266, 1271 (explaining that, due to Complainant’s broad interpretation of the word “node,” “the specification fails to provide guidance to a POSITA regarding the full scope of” outputting unit, first driver, and second driver).

Additionally, Complainant was on notice of Respondents’ position. In the claim construction order, I construed the term “node” as having its plain and ordinary meaning, which is “a point or area of interconnection between two or more components.” Order No. 28 at 18. In doing so, however, I noted that Respondents’ proposed construction was based “on a belief that [Complainant’s] construction may be overbroad when applied.” *Id.* at 17. Because the dispute related to the application of the term’s construction, I found that Respondents’ argument would be better addressed in the context in which it arises. *Id.* Dr. Foty’s opinion raises these arguments in the proper context.<sup>5</sup> As such, I find that these opinions are not in violation of my Ground Rules.

I do, however, find that the opinions offered in paragraphs 1265 and 1270 do not fall into this exception. These paragraphs assert that the terms “outputting unit,” “first driver,” and “second driver” are not terms in the art that have a known meaning. Mot. Ex. 20 at ¶¶ 1265, 1270. Both

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<sup>5</sup> It should be noted that Dr. Foty’s opinions do not appear to be true indefiniteness arguments. He does not argue that these terms are indefinite in the abstract. Instead, his arguments illustrate why he believes that Complainant’s application of these terms cannot be correct. His opinions would therefore be better addressed in the application of the claim limitations to the Accused Products rather than as standalone indefiniteness arguments.

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