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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

BLUE WATER INNOVATIONS, LLC; Plaintiff, vs. VEVAZZ, LLC Defendant.	Case No. 0:20-CV-208

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

Defendant Vevazz, LLC ("Vevazz"), through counsel undersigned, replies in support of its Motion for Judgment on the Pleadings as follows: (Doc. 47.)

. . . . .

. . . . .

ARGUMENT IN REPLY

The most recent U.S. Supreme Court decision on indefiniteness, *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898 (2014), holds, at 901, "[A] patent is invalid for indefiniteness if its claims, read in light of the specification delineating the patent, and the prosecution history, fail to inform with reasonably certainty, those skilled in the art about the scope of the invention." In 2018, in *Interval Licensing LLC v. AOL, Inc.*, 894 F.3d 1335 (Fed. Cir. 2018), the U.S. Court of Appeals for the Federal Circuit established that terms of degree "must provide objective boundaries" for claimed inventions. Also in interpreting *Nautilus* in 2018, the Federal Circuit held, "While a claim term employing a term of degree may be definite where it provides enough certainty to one of skill in the art when read in the context of the invention, a term of degree that is purely subjective and depends on the unpredictable vagaries of any one person's opinion is indefinite." *Intellectual Ventures I LLC v. T-Mobile USA, Inc.*, 902 F.3d 1372, 1381 (Fed. Cir. 2018) (internal quotation marks, alterations, and citations omitted).

These opinions show that Defendants' analysis of the indefiniteness issue is not, as Plaintiff claims, stale. The Federal Circuit has noted the definiteness problems that arise when "words of degree" such as "about," "approximately," and "substantially" are used in a claim.[1] When a word of degree is used, the district court must determine whether the patent's specification provides some standard for measuring that degree. *Id.* The purpose of this definiteness requirement is "to ensure that the claims delineate the scope of the invention using language that adequately notifies the public of the patentee's right to exclude." *Datamize, L.L.C. v. Plumtree Software, Inc.*, 417 F.3d 1342, 1347 (Fed. Cir. 2005).[2]

[1] *Seattle Box Co. v. Indus. Crafting & Packing, Inc.*, 731 F.2d 818, 826 (Fed. Cir. 1984).

[2] In order to be valid, a patent claim must "particularly point [] out and distinctly claim[] the subject matter which the applicant regards as his invention." 35 U.S.C. § 112

In its opposition memorandum, Plaintiff does not attempt to show where the terms of degree in the Patents-in-Suit are defined or supported. There is no support or "objective boundary" proffered by Plaintiff because there is none. Nothing in the specification of the patents imparts any definiteness to the terms of the degree in the Patents-in-Suit. The terms of degree in the claims of the Patents-in-Suit are purely subjective and fail to meet the definiteness requirements of 35 U.S.C. § 112. Accordingly, the Patents-in-Suit are invalid.

In cases in which suspect terms of degree in patents have been found to be valid, there has been some objective baseline implicated in the terms of degree or the patent specification. For instance, in the recent case of *In Sonix Technology v. Publications International*, 844 F.3d 1370 (Fed. Cir. 2017), the Federal Circuit found that the claim term "visually negligible" was not "purely subjective," and thus was not indefinite, 844 F.3d 1370 (Fed. Cir. 2017). The patent in *Sonix* claimed a system and method for using a "graphical indicator" to encode information on the surface of an object. Although the trial court found the claims indefinite, the Federal Circuit reversed. The Federal Circuit agreed that the term "visually negligible" was a term of degree, but held that the term is not "purely subjective" because "what can be seen by the normal human eye"—implicated by the word "visually"—"provides an objective baseline through which to interpret the claims." In so holding, the court found that "there is some standard in the written description for measuring visual negligibility." There is no such standard to be found in the Patents-in-Suit in presently before this Court.

Plaintiff relies on numerous opinions of the Tenth Circuit in its opposition memorandum, but it is not the Tenth Circuit's opinions to which the Court must turn in patent infringement matters. Rather, it is the opinions of the Federal Circuit, which are not relied on significantly by

Plaintiff. Even the Federal Circuit opinions mentioned in passing by Plaintiff do not stand for the proposition that a trial court must not rule on indefiniteness in a 12(b) motion.

The Patents-in-Suit are facially indefinite under § 112. Defendant respectfully requests the Court find the Patents-in-Suit are indefinite and invalid and, for that reason, grant Defendant's Motion for Judgment on the Pleadings.

DATED AND SIGNED this 12th day of March, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2021, a true and correct copy of the foregoing REPLY MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS was served on the following person(s) indicated below:

All parties of record, including: Louis R. Gigliotti 1605 Dewey Street Hollywood, FL 33020 Phone: (954) 471-4392 *Attorney for Plaintiff* Drake Hill 2616 Carey Avenue Cheyenne, WY 82001 Phone: (307) 638-9334 *Attorney for Plaintiff*	_____ US Mail, Postage Prepaid _____ Facsimile _____ Hand-Delivery _____ Federal Express __X__ Electronically (ECF/PACER)

/s/. Bradley L. Booke
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