

**UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C. 20436**

**Before the Honorable MaryJoan McNamara
Administrative Law Judge**

In the Matter of

**CERTAIN SOFT PROJECTILE
LAUNCHING DEVICES, COMPONENTS
THEREOF, AMMUNITION, AND
PRODUCTS CONTAINING SAME**

Inv. No. 337-TA-1325

**COMPLAINANTS HASBRO INC. AND SPIN MASTER INC.'S
CLAIM CONSTRUCTION BRIEF**

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337-TA-1325

HASBRO 2003
GEL BLASTER v. HASBRO
IPR2023-00302

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EXHIBITS

Ex. Number	Description
Ex. 1	Declaration of Gerald G. Fuller
Ex. 2	Email from Mr. Cutri to Mr. Zhang, dated October 20, 2022
JXM-0001	U.S. 8,371,282 (HASBRO-ITC-00001088-1097)
JXM-0002	'282 Patent File History (HASBRO-ITC-00000119-335)
JXM-0003	U.S. 8,640,683 (HASBRO-ITC-00001098-1108)
CXM-0004	Horie et al., Definitions of Terms Relating to Reactions of Polymers and to Functional Polymeric Materials (IUPAC Recommendations 2003) (HASBRO-ITC-00006455- 6472)
CXM-0005	Japanese Industrial Standard JIS K 7223:1996 Testing Method for Water Absorption Capacity of Super Absorbent Polymers (December 1997) (HASBRO-ITC-00006473- 6481)
CXM-0006	Mohammad J. Zohuriaan-Mehr and Kourosh Kabiri, Superabsorbent Polymer Materials: A Review, Iranian Polymer Journal 17 (6), 451- 477 (2008) (HASBRO-ITC-00006482-6508)
CXM-0007	Fredric L. Buchholz, Encyclopedia of Polymer Science and Technology, "Superabsorbent Polymers" (2006) (HASBRO-ITC-00006374-6390)
CXM-0008	Omidian et al., Advances in Superporous Hydrogels, Journal of Controlled Release 102, 3-12 (2005) (HASBRO-ITC-00006509-6518)
CXM-0010	Fredric L. Buchholz & Andrew T. Graham, Modern Superabsorbent Polymer Technology, Chapter 1 (1998) (HASBRO-ITC-00006391-6410)
CXM-0015	U.S. Patent Application Publication No. 2006/0069367 A1 to Waksmundzki et al. (HASBRO-ITC-00006519-6540)
CXM-0016	International Publication WO 2003/043671 A1 (HASBRO-ITC-00006541-6605)
CXM-0017	Printout of https://gelblaster.com/products/gel-blaster-starfire (HASBRO-ITC-00006301)
CXM-0018	Printout of https://gelblaster.com/products/gel-blaster-surge-x (HASBRO-ITC-00006302)
CXM-0021	Airsoft vs Gel Blaster: Which is Better? by Inbound Pursuit (February 5, 2022) (HASBRO-ITC-00006305-6307)
CXM-0022	Are Gel Blaster Balls Biodegradable? by Inbound Pursuit (October 11, 2021) (HASBRO-ITC-00006308- 6311)
CXM-0023	Are Gel Blaster Balls Toxic? by Inbound Pursuit (November 9, 2021) (HASBRO-ITC-00006312-6313)
CXM-0024	Are Gel Blasters Legal? by Inbound Pursuit (April 12, 2022) (HASBRO-ITC-00006314-6316)
CXM-0025	Do Gel Balls Dissolve On Impact? by Inbound Pursuit (June 15, 2022) (HASBRO-ITC-00006317-6319)

Ex. Number	Description
CXM-0026	Do Gel Blasters Hurt? by Inbound Pursuit (March 15, 2022) (HASBRO-ITC-00006320-6322)
CXM-0027	Gel Blaster vs Paintball: Everything You Need to Know by Inbound Pursuit (December 8, 2021) (HASBRO-ITC-00006323-6326)
CXM-0032	How to Store Gel Balls Correctly: The Complete Guide by Inbound Pursuit (April 12, 2022) (HASBRO-ITC-00006339-6341)
CXM-0034	The Best Water Gun Alternatives of 2022: Options The Whole Family Will Love by Inbound Pursuit (July 14, 2022) (HASBRO-ITC-00006346-6349)
RMX-0006	History of Super Absorbent Polymer Chemistry, SCCO Ma's Group Super Absorbent Polymer
RMX-0009	N. Gawande, A.A. Mungray, Superabsorbent polymer (SAP) hydrogels for Protein Enrichment, Separation and Purification Technology (2015)
RMX-0010	Nidhisha; and Ingle, Pradnya; Super-Absorbent Polymer: A Review on the Characteristics and Application, International Journal of Advanced Research in Chemical Science Volume 7, Issue 5, pp. 8-21 (2020)

I. INTRODUCTION

Complainants Hasbro, Inc. and Spin Master, Inc. (collectively “Complainants”) respectfully submit this brief in support of their proposed constructions for disputed claim terms within the two asserted patents: U.S. Patent Nos. 8,371,282 and 8,640,683 (together, the “Asserted Patents”). As detailed below, Complainants’ proposed constructions reflect how a person of ordinary skill in the art as of the relevant timeframe would have understood the disputed terms in light of the intrinsic and extrinsic evidence. Accordingly, Complainants respectfully request that the ALJ adopt Complainants’ proposal for each disputed term.

A. Overview Of The Patents and Technology

The patented technology generally relates to projectile launching devices (e.g., “blasters” used for recreation and entertainment purposes) that are designed to launch soft, spherical ammunition made from a hydrated super absorbent polymer (“SAP”) material. As the patents explain, SAPs are polymers that can absorb an extremely large amount of water relative to their own mass. *See, e.g.*, JXM-0001 (’282 patent) at 3:41-44.¹ SAPs have been known since the 1960s and have been widely used in household items for their absorbent properties. *Id.* at 3:37-41. Prior applications of SAPs include diapers and personal hygiene products. *Id.* As the inventors discovered, SAPs are suitable for ammunition in projectile launching devices and have many advantages compared to projectiles that were previously known, such as paint balls,

¹ The Asserted Patents share the same specification. Citations to the common specification will be to the ’282 patent.

plastics, and foams. *Id.* at 3:49-3:61. In particular, SAP projectiles strike a balance between being hard enough to project and being soft enough to be safe. *Id.*

B. Products at Issue

The products at issue in this Investigation are Respondents’ projectile launchers designed to launch ammunition made of a SAP material, components of such projectile launchers, SAP ammunition for use in connection with such projectile launchers, and products containing the same. For brevity, this brief refers to the three Respondent groups as the “Splat-R-Ball,” “PTT,” and “Gel Blaster” (collectively, the “Respondents”).²

II. LEGAL STANDARDS

A. Claim Construction

“[T]he claims of a patent define the invention to which the patentee is entitled the right to exclude,” and as such, claim construction begins with the claim language itself. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (internal quotation marks omitted).

Claim terms “are generally given their ordinary and customary meaning” as understood by the skilled artisan at the time of the invention. *Id.* at 1313 (quotation omitted). “Importantly, the person of ordinary skill in the art is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification.” *Id.* “There are only two exceptions to this general rule: 1) when a

² Splat-R-Ball, LLC, Daisy Manufacturing Company, and S-Beam Precision Products Ltd. (collectively, “Splat-R-Ball”), Prime Time Toys LLC, Prime Time Toys Ltd., and Easebon Services Ltd. (collectively, “PTT”), and Gel Blaster, Inc., Shenzhen Yi Jin Electronics Science, Guangdong Yu Lee Technology Corporation, and Yu Lee Company Ltd. (collectively, “Gel Blaster”).

patentee sets out a definition and acts as his own lexicographer; and 2) when the patentee disavows the full scope of a claim term either in the specification or during prosecution.” *Thorner v. Sony Computer Entm’t Am. LLC*, 669 F.3d 1362, 1365 (Fed. Cir. 2012). “The standards for finding lexicography and disavowal are exacting.” *GE Lighting Solutions, LLC v. AgiLight, Inc.*, 750 F.3d 1304, 1309 (Fed. Cir. 2014). “A patentee can act as his own lexicographer, but, to do so, ‘a patentee must clearly set forth a definition of the disputed claim term other than its plain and ordinary meaning’ and must ‘clearly express an intent to redefine the term.’” *Cadence Pharm. Inc. v. Exela PharmSci Inc.*, 780 F.3d 1364, 1369 (Fed. Cir. 2015). Likewise, a disavowal of claim scope in the prosecution history must be “clear and unmistakable.” *See id.* at 1373.

B. Indefiniteness

A claim is sufficiently definite under 35 U.S.C. § 112 if it “inform[s] those skilled in the art about the scope of the invention with reasonable certainty.” *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 910 (2014). The indefiniteness “inquiry trains on the understanding of a skilled artisan at the time of the patent application” and must be conducted in light of the intrinsic evidence. *Id.* at 911, 901. Indefiniteness is an invalidity defense and, as such, must be proven by clear and convincing evidence. *Cox Commc’ns, Inc. v. Sprint Commc’n Co. LP*, 838 F.3d 1224, 1228 (Fed. Cir. 2016).

C. Whether the Preamble is Limiting

“In general, a preamble limits the invention if it recites essential structure or steps, or if it is ‘necessary to give life, meaning, and vitality’ to the claim.” *Catalina Mktg. Int’l, Inc. v. Coolsavings.com, Inc.*, 289 F.3d 801, 808 (Fed. Cir. 2002). “[D]ependence on a particular

disputed preamble phrase for antecedent basis may limit claim scope because it indicates a reliance on both the preamble and claim body to define the claimed invention.” *Id.*

III. LEVEL OF SKILL OF A PERSON OF ORDINARY SKILL IN THE ART

Complainants propose that a person of ordinary skill in the art at the time of the ’282 and ’683 patents would have a bachelor’s degree in mechanical engineering, industrial design, or equivalent, with at least one year of relevant experience designing projectile launching systems but would also be a member of a team, which would include an person with a bachelor’s in materials science, chemistry, or equivalent (e.g., chemical engineering), or has at least one year experience working with materials for use in consumer products. For both, equivalent work experience may substitute for educational experience, and vice versa.

IV. DISPUTED TERMS

A. “super absorbent polymer” (’282 patent, claim 1; ’683 patent, claim 1)

Complainants’ Proposal	Respondents’ Proposal	Staff’s Proposal
Plain and ordinary meaning, i.e., “polymer that can absorb an extremely large amount of liquid relative to its own mass”	<u>PTT and Splat-R-Ball</u> : No construction necessary; term of art known to those skilled in the art at the time of the alleged invention <u>Gel Blaster</u> : Indefinite	No construction necessary; term of art known to those skilled in the art at the time of the alleged invention

Complainants’ proposed construction of “super absorbent polymer”—“polymer that can absorb an extremely large amount of liquid relative to its own mass”—reflects the term’s plain and ordinary meaning as demonstrated in the intrinsic evidence and as understood in the field of art. While Splat-R-Ball, PTT, and Staff acknowledge that the term is known to those skilled in the art at the time of the invention, their proposals do not provide guidance concerning what is

and is not a SAP. Respondent Gel Blaster contends it is indefinite, but ample intrinsic and extrinsic evidence (including Gel Blaster's own marketing materials) shows it is a common term with a commonly-understood meaning.

1. The Intrinsic and Extrinsic Evidence Supports Complainants' Proposed Construction

Ample intrinsic and extrinsic evidence supports Complainants' proposed construction. Complainants' construction flows directly from the patents' specification, which states that SAPs are "polymers that can absorb an extremely large amount of liquid relative to their own mass." JXM-0001 ('282 patent) at 3:41-42. Complainants' construction is also consistent with contemporaneous extrinsic evidence, which describes SAPs in similar terms. *See, e.g.*, CXM-0004 (Definitions of Terms Relating to Reactions of Polymers and to Functional Polymeric Materials) at 15 (International Union of Pure and Applied Chemistry defining "superabsorbent polymer" as "[p]olymer that can absorb and retain extremely large amounts of a liquid relative to its own mass"); CXM-0006 (Superabsorbent Polymer Materials: A Review) at 2 (explaining that SAPs "relative to their own mass can absorb and retain extraordinary large amounts of water or aqueous solution"). Finally, Complainants' construction is also consistent with what a POSITA would understand the term SAP to mean. Ex. 1 (Fuller Decl.) at ¶¶ 20-24.

Thus, Complainants' proposed construction gives the term "super absorbent polymer" the "meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention," who is "deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005).

2. A POSITA Would Have Understood the Meaning of SAP with Reasonable Certainty

Gel Blaster's argument that the term is indefinite ignores the breadth of literature in the field at the time of the invention and is inconsistent with its own extrinsic evidence.

At the time of the invention, super absorbent polymers were already widely-known and used for their super absorbent properties. SAPs "were first invented by the United States Department of Agriculture in the 1960's and are commonly used in personal disposable hygiene products such as diapers, protective underwear, and sanitary napkins[.]" JXM-0001 ('282 patent) at 3:37-41; *see also, e.g.*, CXM-0016 (WO 2003/043671) at 3 ("The development of highly absorbent, SAP-containing articles for use as disposable diapers, adult incontinence pads and briefs, and catamenial products, such as sanitary napkins, is the subject of substantial commercial interest."); CXM-0008 (Advances in Superporous Hydrogels) at 2 ("About three decades ago, superabsorbent polymers (SAPs) were introduced into the agriculture and diaper industries, and then their applications were extended to other industries where an excellent water-holding property was of prime importance."); Ex. 1 (Fuller Decl.) at ¶¶ 19, 21. Thus, by the time of the '282 and '683 patents, i.e., 2010, a POSITA would have been familiar with SAP materials.

A POSITA would also have understood the bounds of what it means to be super absorbent with reasonable certainty, and thus, the scope of the claims reciting this term is not indefinite. Ex. 1 (Fuller Decl.) at ¶¶ 23-24. Extrinsic evidence overwhelmingly shows that a SAP can absorb liquid anywhere between ten times to a thousand times of the polymer's own weight. CXM-0008 (Advances in Superporous Hydrogels) at 2 ("SAPs . . . have the ability to

absorb considerable amounts of water or aqueous fluids (*10-1000 times*³ of their original weight or volume) in relatively short periods of time[.]”); CXM-0015 (U.S. Patent App. Pub. No. 2006/0069367) at 7 (defining a SAP as “a water-insoluble but water-swellaible polymeric substance capable of absorbing water in an amount which is *at least ten times* of the weight of the substance in its dry form”); CXM-0006 (Superabsorbent Polymer Materials: A Review) at 2 (explaining that SAP materials are “ultrahigh absorbing materials [that] can imbibe deionized water as high as 1,000-100,000% (*10-1000 g/g*)”); CXM-0005 (Japanese Industry Standard) at 4 (specifying that SAP “has *10g/g* or more water absorption capacity”); CXM-0007 (Superabsorbent Polymers) at 1 (“Superabsorbent polymers . . . can absorb or imbibe more than *ten times* their mass of water or aqueous solutions.”).⁴

Even Gel Blaster’s own extrinsic evidence confirms these same commonly-understood properties of SAPs. For instance, Gel Blaster provided a scientific article which states that “SAPs as hydrogel, relative to their own mass can absorb and retain extraordinary large amounts of water or aqueous solution these ultra-high absorbing materials can imbibe deionized water as high as 1,000-100,000% (*10-1000 g/g*)” RMX-0010 (Super-Absorbent Polymer: A Review on the Characteristics and Application) at 2. Thus, Gel Blaster’s own extrinsic evidence is consistent with Complainants’ extrinsic evidence, cited above, showing that a POSITA would have understood with reasonable certainty that a SAP can absorb liquid ten to a thousand times

³ Unless otherwise indicated, emphasis added to original.

⁴ These references provide similar bounds: A SAP that can absorb ten times its mass of water (i.e., 10 grams of water per gram of material, or 10g/g) expressed in percentage is 1000%. Ex. 1 (Fuller Decl.) at ¶¶ 23-24.

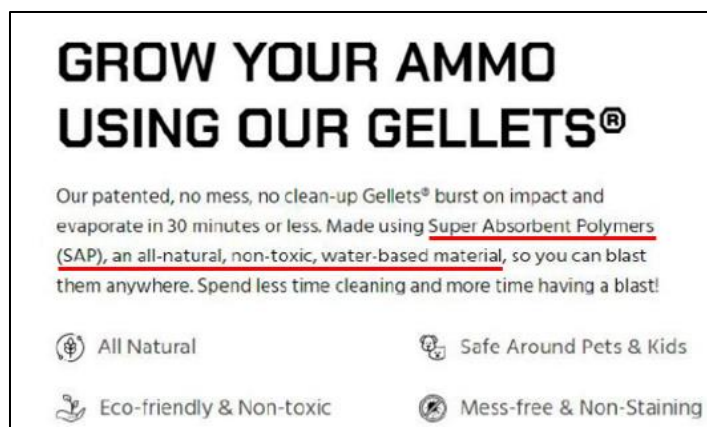
of its own mass. *See Nautilus, Inc.*, 572 U.S. at 910 (“recognizing that absolute precision is unattainable” and that “the law requires in patents is not greater than is reasonable, having regard to their subject-matter”); *see also BASF Corp. v. Johnson Matthew Inc.*, 875 F.3d 1360, 1365 (Fed. Cir. 2017) (“Reasonable certainty does not require absolute or mathematical precision.”) (internal quotations omitted).

Gel Blaster may argue that “super absorbent polymer” is indefinite because some articles it has cited as extrinsic evidence describe different ranges of the amount of liquid a SAP can absorb. *See, e.g.*, RMX-0006 (History of Super Absorbent Polymer Chemistry) at 1 (“As an absorbency material, [SAP] can absorb hundreds to thousands of times its weight and become water-swelling Hydrogel.”); RMX-0009 (Superabsorbent polymer (SAP) hydrogels for protein enrichment) at 2 (stating that SAP hydrogels “are capable of absorbing water around 100 times of their own weight”). Gel Blaster may also point to a preferred embodiment in the specification, which describes that SAP projectiles “may absorb 500 times their weight, and from 30-60 times their dehydrated volume.” JXM-0001 (’282 patent) at 4:57-59.

But these specific examples of SAPs do not render the term indefinite. First, these ranges are entirely consistent with Complainants’ proposed construction and extrinsic evidence—a SAP can absorb “an extremely large amount of liquid relative to its own mass,” anywhere between ten times to a thousand times of the polymer’s own mass. Gel Blaster’s other references do not purport to define a range of absorbency in which a material is considered to be a SAP. They merely provide examples of SAPs—examples that are entirely consistent with Complainants’ proposed construction and extrinsic evidence.

Second, the test for indefiniteness “is not merely whether a claim is susceptible to differing interpretations,” as “[s]uch a test would render nearly every claim term indefinite so long as a party could manufacture a plausible construction.” *Certain Mobile Phones*, Inv. No. 337-TA-1300, Order No. 20, at 17 (citing *Nevro Corp. v. Bos. Sci. Corp.*, 955 F.3d 35, 41 (Fed. Cir. 2020)) (Sept. 26, 2022) (McNamara, ALJ). Moreover, “[the Commission] and the Federal Circuit have rejected the reasoning that a claim term must be limited either to the narrowest example described in the specification or held to be indefinite.” *Id.* (discussing *Guangdong Alison Hi-Tech Co. v. Int’l Trade Comm’n*, 936 F.3d 1353, 1363 (Fed. Cir. 2019)). Rather, “examples in the specification may be used to inform those skilled in the art of the scope of the invention which reasonable certainty—thus demonstrating that the term is not indefinite—without being directly construed into the claim.” *Id.* at 18. Thus, the mere fact that other documentation may point to a different, but not inconsistent, ranges of the amount of liquid a SAP can absorb cannot constitute “clear and convincing” evidence of indefiniteness. *Cox Commc’ns*, 838 F.3d at 1228.

Moreover, contrary to Gel Blaster’s proposed construction, Gel Blaster has repeatedly marketed its own SAP-based projectiles (branded as “Gellets”) as being made of SAPs. This is further evidence that SAP is well-understood in the field, including by the consumers, skilled artisans, and even Gel Blaster itself. For example, Gel Blaster’s website states that its Gellets are made “using Super Absorbent Polymers (SAP)”:



CXM-0017 (Gel Blaster Website) (annotated); CXM-0018 (same); *see also, e.g.,* CXM-0021 (Airsoft vs Gel Blaster: Which is Better?) at 1 (“Gel blasters shoot gel balls that are made from a super absorbent polymer called sodium polyacrylate. *Super absorbent polymers* come in many different types, but sodium polyacrylate is the most common one used for gel bead because they can expand up to *1000 times* their original size.”); CXM-0022 (Are Gel Blaster Balls Biodegradable?) at 2 (“[G]el blasters shoot out gel balls that are *made from super absorbent polymer* beads. These *super absorbent polymer* beads are non-toxic, 90% water, and 100% biodegradable.”); CXM-0023 (Are Gel Blaster Balls Toxic?) at 1 (“Gel balls . . . are made from *super-absorbent polymer (SAP)*. . . .”); CXM-0024 (Are Gel Blasters Legal?) at 1 (stating that gel blasters use projectiles that “are *super-absorbent* water beads that have little to no risk of causing an injury”); CXM-0025 (Do Gel Balls Dissolve On Impact?) at 1 (stating that gel blasters “are made from 100% biodegradable, *super-absorbent polymer* material”); CXM-0026 (Do Gel Blasters Hurt?) at 1 (“Gel blaster balls or Gelllets are *super absorbent polymer* water beads.”); CXM-0027 (Gel Blaster vs Paintball: Everything You Need to Know by Inbound Pursuit) at 1 (“Gell balls are made from *super-absorbent polymers* known as sodium

polyacrylate.”); CXM-0032 (How to Store Gel Balls Correctly) at 1 (“ . . . what gel blaster balls are made of are *super-absorbent polymers* that primarily contain water, and therefore only leave water residue that will evaporate completely.”); CXM-0034 (The Best Water Gun Alternatives of 2022) at 3 (“ . . . Gel Blasters spout only gel rounds called Gellets that are 100% biodegradable, non-toxic, *super absorbent polymer* water beads.”). Given that Gel Blaster routinely uses “super absorbent polymer” to describe its own products, it is odd that Gel Blaster would now argue a POSITA would not even understand what the term even means.

Turning to Splat-R-Ball’s, PTT’s, and Staff’s construction, the dispute with Complainants centers on whether the term “super absorbent polymer” requires any clarification. While Complainants agree the term “super absorbent polymer” has a well-understood meaning in industry, Complainants disagree that no clarification is warranted. As an initial matter, the preceding dispute involving Gel Blaster demonstrates that the parties disagree about the scope of the term. More importantly, Splat-R-Ball, PTT, and Staff’s failure to explain what they believe the plain and ordinary meaning of “super absorbent polymer” is and unwillingness to adopt Complainants’ proposed construction—which flows directly from the specification and is supported by the overwhelming evidence—indicates there is an underlying claim construction dispute. And where the scope of a claim term is disputed, the trial court should provide a construction. *See O2 Micro Int’l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1361 (Fed. Cir. 2008) (“A determination that a claim term ‘needs no construction’ or has the ‘plain and ordinary meaning’ may be inadequate . . . when reliance on a term’s ‘ordinary’ meaning does not resolve the parties’ dispute”).

Here, the ALJ should adopt Complainants’ proposed construction because the intrinsic and extrinsic evidence, including scientific articles and industry standards, confirm that “super absorbent polymer” means a “polymer that can absorb an extremely large amount of liquid relative to its own mass.” The term is not indefinite, as Gel Blaster contends, and Splat-R-Ball, PTT, and Staff have not elaborated on what they believe the plain and ordinary meaning of SAP is (and, in any event, have waived any such elaboration without the ALJ’s advance approval). *See* G.R. 1.14 (“At the time that the parties first exchange their initial proposed constructions, any party who fails to set forth a specific proposed construction or who relies on the plain and ordinary meaning of the patent language at issue (without elaboration) may not subsequently elaborate or rely on a different proposed construction absent advance approval from the Administrative Law Judge.”).

B. “ammunition configured for use with a projectile launcher” (’282 patent, claim 1 preamble)

Complainants’ Proposal	Respondents’ Proposal	Staff’s Proposal
Limiting	Preamble of claim 1 is not limiting as to claims 6, 8, 13, 14, 15, 17, 19, 20, and 21 Preamble of claim 1 is limiting for dependent claim 3	Limiting

Complainants and Staff agree that the preamble of claim 1 of the ’282 patent is limiting for all claims that depend from claim 1. Respondents agree that the preamble of claim 1 is limiting for dependent claim 3, but they disagree that it is limiting with respect to the rest of the

dependent claims. Respondents’ proposal should be rejected because it is contrary to the intrinsic evidence and controlling law.

A preamble is limiting “if it recites essential structure that is important to the invention or necessary to give meaning to the claim.” *Bicon, Inc. v. Straumann Co.*, 441 F.3d 945, 952 (Fed. Cir. 2006). “Thus, if the preamble helps to determine the scope of the patent claim, then it is construed as part of the claimed invention.” *NTP, Inc. v. Rsch. In Motion, Ltd.*, 418 F.3d 1282, 1305 (Fed. Cir. 2005). Specifically, “[a] preamble may limit the scope of a patent claim if it acts as a necessary component of the claimed invention by providing an antecedent basis from which limitations in the body of the claim are derived.” *Bondyopadhyay v. United States*, 748 F. App’x 301, 306 (Fed. Cir. 2018).

That is exactly the case here. The preamble of claim 1 recites “[a]mmunition configured for use with a projectile launcher” JXM-0001 (’282 patent), cl. 1. The term “ammunition” in the preamble of claim 1 provides antecedent basis for the term “ammunition” recited in the body of dependent claim 2 (“[t]he ammunition of claim 1, ...”), claim 3 (“[t]he ammunition of claim 2, ...”), claim 4 (“[t]he ammunition of claim 1”), claim 5 (“[t]he ammunition of claim 4”), claim 6 (“[t]he ammunition of claim 4, ...”), claim 7 (“[t]he ammunition of claim 2, ...”) and claim 8 (“the ammunition of claim 1”). It further provides antecedent basis for claims 13, 14, 15, 17, 19, 20, and 21, as these claims all depend from claim 8. Similarly, the term “projectile launcher” provides antecedent basis for the term “projectile launcher” recited in the body of dependent claim 2 (“ . . . disposed within a feed chamber of the projectile launcher”), claim 3 (“ . . . selective communication with a barrel of the projectile launcher”), claim 7 (“ . . . when launched from the projectile launcher”), claim 8 (“A projectile launcher including the

ammunitions of claim 1 disposed within a feed chamber of the projectile launcher, . . .”), and claims 13-15, 17, 19-21 (“[t]he projectile launcher . . .”).⁵ As such, the preamble of claim 1 is limiting, since it provides antecedent basis for and is necessary to understand the limitations recited in the body of the rest claims of the ’282 patent. *See Deere & Co. v. Bush Hog, LLC*, 703 F.3d 1349, 1358 (Fed. Cir. 2012) (“[A] preamble phrase that provides antecedent basis for a claim limitation generally limits the scope of the claim.”).

The file history of the ’282 patent also supports Complainants’ proposed construction. *See Univ. of S. Fla., Bd. of Trustees v. United States*, 137 Fed. Cl. 658, 662 (2018) (“The prosecution history of the patent, as well, may help the court to determine whether the language in the preamble limits the claim.”). During the prosecution of the ’282 patent, the patent examiner allowed the claims only after amending the preamble of claim 1—“Ammunition configured for use with a projectile launcher. . . .” JXM-0002 (’282 File History) at 173 (Notice of Allowability). This amendment indicates a reliance on the preamble in allowing the claimed invention, and that the claim drafter and patent examiner considered the preamble as a necessary limitation that gives meaning to the claim. *See Novatek, Inc. v. Sollami Co.*, 559 F. App’x 1011, 1015 (Fed. Cir. 2014) (noting that clear reliance on the preamble during prosecution to render the claimed invention patentable “transforms the preamble into a claim limitation because such reliance indicates use of the preamble to define, in part, the claimed invention”) (internal quotations omitted). Thus, the preamble of claim 1 was

⁵ To the extent Respondents argue that the “projectile launcher” recited in claims 8, 13-15, 17, and 19-21 refer to a projectile launcher different from the one recited in claim 1, nothing in the specification or the claims supports that read. Claim 8 merely recites additional characteristics of the projectile launcher claimed in the preamble of claim 1, rather than a different projectile launcher. Indeed, claim 8 recites a projectile launcher that includes “the ammunition of claim 1,” which is “configured for use with a projectile launcher[.]” JXM-0001 (’282 patent), cls. 1, 8.

understood as “a necessary component of the claimed invention” that helps to determine the scope of the patent claim. *Pacing Techs., LLC v. Garmin Int’l, Inc.*, 778 F.3d 1021, 1024 (Fed. Cir. 2015); *see also Bicon*, 441 F.3d at 952.

In addition, “[w]hether the preamble is limiting depends on the facts of each case in light of the claim as a whole and the invention described in the patent.” *Bondyopadhyay*, 748 F. App’x at 306. The specification of the ’282 patent further supports the conclusion that the preamble of claim 1 is limiting. The claimed invention specifically concerns a projectile launching device, i.e., a projectile launcher. *See, e.g.*, JXM-0001 (’282 patent) at Abstract (“A device for projecting a soft-projectile”); *id.* at 1:5-6 (“The present patent document relates to soft-projectile launching devices, such as projectile toys.”); *id.* at 1:64-66 (“One object of the present patent document is to provide an alternative soft-projectile launching system”). In particular, the invention relates to the use of SAP-based projectiles (i.e., SAP-based ammunition) in projectile launchers. *See, e.g., id.* at 4:45-48 (“The present patent document discloses and teaches projectile launching devices, . . . that use projectiles formed from a super absorbent polymer (SAP).”). Thus, the limitations “ammunition” and “projectile launcher” are “fundamental characteristic[s]” of the claimed invention, and the preamble should be limiting. *See, e.g., Bondyopadhyay*, 748 F. App’x at 306 (finding the preamble “geodesic sphere phased array antenna system” to be limiting because “the detailed description [of the patent] refers to the ‘present invention’ as being a ‘geodesic sphere phased array antenna.’”); *Deere & Co.*, 703 F.3d at 1358 (finding the term “rotary cutter deck” in the preamble to be limiting where the specification refers to the “present invention” as “an improved deck for a rotary cutter” or a “rotary cutter deck”).

Moreover, if the preamble of claim 1 is not limiting, any SAP-based projectiles could fall within the scope of the '282 patent. For instance, without the limitation of “[a]mmunition configured for use with a projectile launcher,” something that is designed to be thrown, e.g., basketballs formed from hydrated SAPs, could be soft-projectiles that fall within the scope of claim 1. Indeed, out of twenty-one total claims, the term “projectile launcher” is found in the body of seventeen claims (i.e., 2, 3, and 7-21) and the term “ammunition” is found in the body of twenty claims (i.e., 2-21).

Respondents may argue that the preamble of claim 1 is only limiting for dependent claim 3 because the term “projectile launcher” as claimed in the preamble of claim 1 is not recited in the body of any other claims at issue, including independent claim 1. That argument is not only inconsistent with the intrinsic evidence discussed above, but also contradicts the law. *Pacing Technologies, LLC v. Garmin International, Inc.* is instructive. 778 F.3d 1021, 1024 (Fed. Cir. 2015). There, the Federal Circuit held that the preamble of an independent claim, which reads “[a] repetitive motion pacing system for pacing a user,” is limiting, because the term “user” provides antecedent basis for the term “user” in the body of that claim, and the term “repetitive motion pacing system” provides antecedent basis for the term “repetitive motion pacing system” recited in the body of a dependent claim. *Pacing Techs.*, 778 F.3d at 1024. As such, the Federal Circuit found that providing antecedent basis for a dependent renders the preamble of the independent claim from which the dependent claim depends limiting, as well. That is exactly the case here—the terms “ammunition” and “projectile launcher” in the preamble of independent claim 1 are both recited in the body of dependent claims 2, 3 and 7.

During the parties' meet and confer, Respondents pointed to *TQ Delta, LLC v. 2WIRE, Inc.* as the supporting authority for its proposed construction. No. 1:13-CV-01835-RGA, 2018 WL 4062617 (D. Del. Aug. 24, 2018) (discussing *Pacing Techs.*, 778 F.3d at 1024). But, *TQ Delta* does not support Respondents' proposed construction. There, Judge Andrews read *Pacing Technologies* as not creating "a bright-line rule that a preamble is limiting whenever it provides antecedent basis for a term in a dependent claim." *TQ Delta*, 2018 WL 4062617, *5. But, Judge Andrews' reading of *Pacing Technologies* does not overturn *Pacing Technologies*. Nor does it preclude Complainants' proposed construction, which is, in light of the antecedent basis derived from the preamble and the intrinsic evidence (as discussed above), that the preamble of claim 1 is limiting. See *Bondyopadhyay*, 748 F. App'x at 306 ("Whether the preamble is limiting depends on the facts of each case in light of the claim as a whole and the invention described in the patent."). And *TQ Delta* does not stand for the proposition that preamble which provides antecedent basis for a dependent claim is by default not limiting. Unlike here, the parties in *TQ Delta* did not "object[] to the idea that a preamble could be construed as limiting a dependent claim, but not limiting the independent claim in which it appears." *TQ Delta*, 2018 WL 4062617, at *5. Thus, *TQ Delta*'s finding is neither binding nor instructive.

In light of the intrinsic support and the controlling case law, the preamble of claim 1 should be found limiting.

- C. **“the super absorbent polymer has a cross linking density sufficient to prevent the soft-projectiles from breaking apart when launched from the projectile launcher” (’282 patent, claim 13; ’683 patent, claim 10)**

Complainants’ Proposal	Respondents’ Proposal	Staff’s Proposal
No construction needed	No construction needed	Indefinite

This term (“the cross linking density term”) is not indefinite because it provides a POSITA with reasonable certainty of what is within its scope and what is not. The invention it covers is the adjustment of cross linking density to the point the soft-projectiles do not break apart when launched. Staff may argue this term is indefinite because there is no exact numerical guidance as to the amount of cross linking density, and that the covered level of cross linking density could vary depending on other variables (e.g., the amount of force that a projectile launcher applies to the soft projectile). But the law does not require such precision. Rather, it requires that the claims provide objective boundaries, which is what is provided by the claims here.

1. The Cross Linking Density Term Provides Objective Boundaries for the Claimed Invention

The cross linking density claim is not indefinite because it provides objective boundaries for what is claimed. Patent claims with descriptive words or terms of degree are not indefinite if they “provide objective boundaries for those of skill in the art in the context of the invention.” *Niazi Licensing Corp. v. St. Jude Medical S.C., Inc.*, 30 F.4th 1339, 1349 (Fed. Cir. 2022) (citing *Interval Licensing LLC v. AOL, Inc.*, 766 F.3d 1364, 1371 (Fed. Cir. 2014)) (quotation omitted). In contrast to claim terms that provide objective boundaries, those that are “purely subjective”

and depend “on the unpredictable vagaries of any one person’s opinion” are indefinite. *Id.* at 1347-1348. “As with any question of claim construction, the intrinsic record—the patent’s claims, written description, and prosecution history—along with any relevant extrinsic evidence can provide or help identify the necessary objective boundaries for claim scope.” *Id.* at 1349.

Here, the claim language on its face provides objective boundaries for what is claimed. The claim recites that the cross linking density must be “sufficient to prevent the soft-projectiles from breaking apart when launched from the projectile launcher.” JXM-0001 (’282 patent) at cl. 13. A POSITA would readily understand the plain language of this claim and what it requires: soft projectiles that do not break apart when launched from the projectile launcher because they have a sufficient amount of cross linking density to prevent the breakage from occurring. In other words, the claims themselves contain objective bounds for the scope of the invention. *See* Ex. 1 (Fuller Decl.) at ¶¶ 27-28.

Second, the specification further explains the same objective boundaries that are already apparent from claim’s plain language. For example, the specification explains the relationship between cross linking density of a SAP projectile and its ability to withstand pressure:

High cross-link density polymers exhibit lower absorbent capacity and swell. The gel strength is firmer and can maintain particle shape even under higher pressures. *Consequently, by using a SAP with a higher cross-link density, a soft-projectile can be made to fly farther and faster without breaking apart and have a stronger impact.* In contrast, soft-projectiles made from a SAP with a lower cross-link density will break apart more easily and have a much softer impact.

JXM-0001 (’282 patent) at 4:5-14. The emphasized portion teaches that the cross linking density will determine the soft projectile’s ability to be launched from the projectile launcher without breaking apart. Additionally, the specification states that “[t]he soft-projectile 16 will tend to

retain its shape, especially if the cross-link [sic] density is high. However, if the soft-projectile 16 is nicked, scratched, or damaged by the barrel as it accelerates, it may disintegrate prior to exiting the barrel 15, especially if the cross-link [sic] density is low.” *Id.* at 7:8-13.

A POSITA would understand from these teachings that for the SAP projectiles to satisfy the claims (be launched from the projectile launcher without breaking apart), the cross linking density would need to be appropriately adjusted because this property affects how easily the soft projectiles deform and, ultimately, break apart. The patents’ teachings are consistent with the objective boundaries that the claim language itself recites. Moreover, a POSITA would understand from the specification that the cross linking density could be such that the SAP projectiles *would* break apart upon launch. *See Id.* at 7:8-13. Thus, a POSITA would understand that adjusting the cross-linking density lower such that the SAP soft projectiles break apart when launched does not fall within the scope of the claims. This guidance is clear and objective.

2. Numerical Precision is Not Required for Definiteness

To the extent that Staff argues that this term is indefinite because it does not specify numerical values for cross linking density, there is no legal requirement for specific numerical values. “Reasonable certainty’ does not require ‘absolute or mathematical precision.’” *BASF Corp. v. Johnson Matthew Inc.*, 875 F.3d 1360, 1365 (Fed. Cir. 2017) (citing *Biosig Instruments, Inc. v. Nautilus, Inc.*, 783 F.3d 1374, 1381 (Fed. Cir. 2015)). “While there must be objective boundaries . . . a patentee need not define his invention with mathematical precision in order to comply with the definiteness requirement.” *Niazi Licensing Corp.*, 30 F.4th at 1347 (citation and quotation omitted); *see also In re Packard*, 751 F.3d 1307, 1313 (Fed. Cir. 2014) (“The [definiteness] requirement, applied to the real world of modern technology, does not contemplate

in every case a verbal precision of the kind found in mathematics. . . . Rather, [it] necessarily invokes some standard of reasonable precision in the use of language in the context of the circumstances.”).

To the extent Staff argues that the breadth permitted by the lack of numerical values makes the claims indefinite, breadth is a different question from indefiniteness. The focus of the indefiniteness inquiry “is not the potential breadth of [] claims” but “whether the use of descriptive phrasing in the claim results in a claim that ‘fail[s] to inform, with reasonable certainty, those skilled in the art about the scope of the invention.’” *Id.* (citing *Nautilus*, 572 U.S. at 901). As explained above, the claim terms provide those skilled in the art reasonable certainty about the scope of the invention. They provide objective standards for determining the scope of infringement, namely, the level of cross linking density or absorbency in a soft projectile in relation to whether it breaks apart when launched.

Further, that the appropriate level of cross linking density may vary depending on the force that a projectile launcher applies to the soft projectile does not make the claims indefinite because the claims are still bound by objective standards, not “purely subjective” ones. *Niazi Licensing Corp.*, 30 F.4th at 1347-48. A claim is not indefinite simply because an element may vary depending on other considerations, as long as the interpretation of the claim will not “depend solely on the unrestrained, subjective opinion of a particular individual purportedly practicing the invention.” *Enzo Biochem, Inc. v. Applera Corp.*, 599 F.3d 1325, 1330, 1335-36 (Fed. Cir. 2010) (holding that claims directed to reactions between DNA strands were not indefinite even though the binding strength of a DNA strand may vary based on the length and sequence of the strand); *see also Nevro Corp.*, 955 F.3d at 40 (“That a given signal will eliminate

paresthesia in some patients, but not others, does not render the claims indefinite.”). The cross linking density claim, even if it covers different values depending on the projectile launching mechanism, is still bound by objective standards—for a given projectile launching mechanism, are the soft projectiles designed with an appropriate level of cross linking density that allows them to be launched without breaking apart? That determination is not based on the subjective opinion of a POSITA practicing the invention; it is an objective, observable measure.

Therefore, Staff cannot show by clear and convincing evidence that the cross linking density terms are indefinite, and the ALJ should adopt Complainants and Respondents’ proposal that these terms do not require construction and are not indefinite.

D. “a firing mechanism that directly applies a force to” a soft-projectile/the ammunition” (’282 patent, claim 17; ’683 patent, claim 14)

Complainants’ Proposal	Respondents’ Proposal	Staff’s Proposal
Plain and ordinary meaning, i.e., “a firing mechanism that directly applies a force to a soft-projectile / the ammunition”	“a firing mechanism that directly applies a force to a soft-projectile / the ammunition (not via an intermediary)”	Plain and ordinary meaning

Although Complainants’ and Respondents’ proposed constructions are separated by only a four-word parenthetical, the difference appears to be significant. Complainants’ proposal reflects the plain and ordinary meaning of the term “a firing mechanism that directly applies a force to a soft-projectile.” Respondents, through their added parenthetical, appear to read a negative limitation into the claim, i.e., “not via an intermediary.” See Ex. 2 (10-20-2022 Email fr. Cutri to Zhang) at 1-2. In doing so, Respondents seek to make the force applied by a firing mechanism a binary force—the firing mechanism can apply either a direct force or an indirect

force, but cannot apply both. That is not only contrary to the intrinsic evidence, causing unnecessary confusion with respect to the scope of this term, but also would explicitly read in a negative limitation that does not exist in the claim language.

Nothing in the claims or the specification precludes the claimed firing mechanism from applying a direct force *and* an indirect force to a soft-projectile or ammunition. Indeed, the claims are open ended “comprising” claims, so by claiming one type of force (direct), they by definition do not foreclose another (indirect). *See Multilayer Stretch Cling Film Holdings, Inc. v. Berry Plastics Corp.*, 831 F.3d 1350, 1358 (Fed. Cir. 2016) (noting that the “transitional term ‘comprising’ creates a presumption that the recited elements are only a part of the device, that the claim does not exclude additional, unrecited elements”); *see also Convolve, Inc. v. Compaq Computer Corp.*, 812 F.3d 1313, 1321 (Fed. Cir. 2016). Claim 17 of the ’282 patent recites “[t]he projectile launcher of claim 8, further *comprising* a firing mechanism that *directly applies a force* to a soft-projectile” and claim 14 of the ’683 patent recites “[t]he system of claim 1, wherein the projectile launcher *comprises* a firing mechanism that *directly applies a force* to the ammunition.” Neither claim 17 of the ’282 patent nor claim 14 of the ’683 patent recites any limitation that prevents the firing mechanism from applying *both* a direct and an indirect force onto the soft-projectile. JXM-0001 (’282 patent), cl. 17; JXM-0003 (’683 patent), cl. 14.

The specification also does not indicate that the presence of a direct force precludes the firing mechanism from also applying an indirect force (or vice versa). In *meet and confers* for this term, Respondents focused on the presence or absence of a soft-projectile holder or any other intermediary between the firing mechanism and soft projectile found in the preferred embodiments. But the presence of such an intermediary does not preclude the firing mechanism

from applying other forces (including direct forces) to the projectile. Nor should the preferred embodiments be used to limit the claims. *See, e.g., Littelfuse, Inc. v. Mersen USA EP Corp.*, 29 F.4th 1376, 1381 (Fed. Cir. 2022) (“[C]ourts ordinarily should not limit the claimed invention to preferred embodiments or specific examples in the specification.”) (internal quotations omitted); *Altiris, Inc. v. Symantec Corp.*, 318 F.3d 1363, 1370 (Fed. Cir. 2003) (“[T]he number of embodiments disclosed in the specification is not determinative of the meaning of disputed claim terms. . . . Nor are claims ordinarily limited in scope to the preferred embodiment.”).

Put differently, Respondents’ interpretation would effectively rewrite the claim to insert the word “only” where it does not appear: the claim does not read “the projectile launcher of claim 8, further comprising a firing mechanism that only directly applies a force” The plain language of the claims does not support such a reading. Nor is there anything to even suggest such a disavowal of claim scope. *See, e.g., Convolv*, 812 F.3d at 1321 (“ . . . absent a clear intent in the claims themselves, the specification, or the prosecution history, we interpret ‘a processor’ as ‘one or more processors.’”).

Thus, the meaning of the term “a firing mechanism that directly applies a force to” a soft-projectile / the ammunition should not be construed as including a negative limitation, i.e., “not via an intermediary.” Complainants respectfully ask the ALJ to accept its proposed construction of plain and ordinary meaning.

E. “the absorbency of the super absorbent polymer is sufficiently limited to allow the soft-projectiles to be launched from the projectile launcher without breaking apart” (’282 patent, claim 21)

Complainants’ Proposal	Respondents’ Proposal	Staff’s Proposal
No construction needed	No construction needed	Indefinite

This term (“the absorbency term”) is not indefinite for the same reasons that the cross linking density term is not indefinite. The dispute regarding these two terms is the same—Staff contends that the claims do not provide adequate guidance as to the amount of cross linking density or absorbency needed to prevent the soft-projectile from breaking apart. The specification states that the cross linking density and absorbency are inversely related to each other. *See* JXM-0001 (’282 patent) at 3:67-4:1 (“The lower the density of the cross-linking the higher the absorbent capacity of the SAP.”); *see also* Ex. 1 (Fuller Decl.) at ¶ 26. Therefore, while the cross linking density term requires that the cross linking density be sufficiently high, the absorbency term requires that the absorbency be sufficiently low for the soft-projectiles to not break apart when being launched. *See* Ex. 1 (Fuller Decl.) at ¶¶ 27-28. As discussed for the cross linking density term, the absorbency term’s plain language and the specification’s teachings about the effect of cross linking density, and inversely, the absorbency, of a soft-projectile on its ability to be launched without breaking apart, provide a POSITA with reasonable certainty about the scope of the claim. *See supra*, Section IV.C. The absorbency term provides objective standards for determining its scope, and case law does not require precise numerical values for definiteness. *See supra*, Section IV.C.1-2.

As such, Staff cannot show by clear and convincing evidence that the absorbency term is indefinite, and the ALJ should adopt the Complainants and Respondents' proposal that this term does not require construction and is not indefinite.

V. CONCLUSION

For the forgoing reasons, Complainants respectfully request that the ALJ adopt Complainants' proposed construction for each of the disputed terms.

Dated: November 2, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing document, **COMPLAINANTS HASBRO INC. AND SPIN MASTER INC.'S CLAIM CONSTRUCTION BRIEF**, has been filed and served on November 2, 2022, on the following:

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