**UNITED STATES INTERNATIONAL TRADE COMMISSION**
**WASHINGTON DC**

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

| | |
|---|---|
| **In the Matter of**<br><br>**CERTAIN SOFT PROJECTILE LAUNCHING DEVICES, COMPONENTS THEREOF, AMMUNITION, AND PRODUCTS CONTAINING SAME** | **Investigation No. 337-TA-1325** |

# RESPONDENTS' REPLY CLAIM CONSTRUCTION BRIEF



HASBRO 2004
GEL BLASTER v. HASBRO
IPR2023-00302

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| RXM-0015 | U.S. Patent No. 9,849,439 B2 |
| RXM-0016 | U.S. Patent No. 10,052,611 B2 |
| RXM-0017 | United States Patent Application Publication No. 2012/0289607 A1 |
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Pursuant to the ALJ's direction at the *Markman* hearing held November 17, 2022 (Tr. at 162:6–), Respondents Splat-R-Ball, LLC, Daisy Manufacturing Company, and S-Beam Precision Products Ltd. (collectively, "Splat-R-Ball Respondents"); Respondents Gel Blaster, Inc., Shenzhen Yi Jin Electronics Science and Technology Co., Ltd., Guangdong Yu Lee Technology Corporation, and Yu Lee Company Ltd. (collectively, "Gel Blaster Respondents"); and Respondents Prime Time Toys LLC, Prime Time Toys Ltd., Easebon Services Ltd. (collectively, "PTT Respondents") (all respondents collectively, "Respondents") submit their Reply Claim Construction Brief.

## Disputed Terms In The Asserted Patents

## I. "SUPER ABSORBENT POLYMER" (ALL CLAIMS)

### A. Gel Blaster Respondents' Position

Complainants recognize that "super absorbent polymer" ("SAP") has an indefiniteness problem because they try to limit and define that term in two ways—which contradict each other. Complainants first offer a construction that purports to define SAP as a "polymer that can absorb an extremely large amount of liquid relative to its own mass." This proposed construction, however, is no more definite than the term SAP itself. Second, admitting that SAP needs a lower boundary, Complainants propose requiring an SAP to absorb at least 10 times its original weight. But no intrinsic evidence supports that lower bound. The extrinsic evidence is also unhelpful in showing lower figures all over the map. And such a lower bound would not satisfy Complainant's proposed construction, a polymer that can absorb an "extremely large amount of liquid relative to its own mass." Moreover, Complainants' proposed lower bound would improperly cause the claim term SAP to read on unquestionably non-SAPs, such as cotton balls. When presented with a similar scenario having multiple possible bounds for a claim term, the court in *U.S. Well Services, Inc. v. Halliburton Company*, Case No. 6:21-CV-00367-ADA, 2022 WL 819548, at *5–9 (W.D. Tex.

Jan. 17, 2022), found the term "high pressure" indefinite. And the *U.S. Well Services* court placed responsibility on the patentee to describe the metes and bounds of its claim terms in its patent, finding that the patentee could have avoided indefiniteness by simply identifying the claim boundary in the patent. Accordingly, the intrinsic and extrinsic evidence here clearly and convincingly shows that the term SAP does not have a generally accepted, objective lower absorbency boundary. It is therefore indefinite.

In an effort to fix SAP's indefiniteness problem, Complainants construct a two-prong approach, which falls apart under scrutiny. First, Complainants offer a construction, a "polymer that can absorb an extremely large amount of liquid relative to its own mass." But rather than illuminating the scope of this term, this construction further demonstrates its indefiniteness. Complainants' proposed construction would leave the factfinder to determine what qualifies as an "extremely large" absorbency, despite no guidance from the specification or any other evidence. "Extremely large" is less a claim construction than a term needing construction itself. Indeed, Complainants' proposed construction highlights the lack of the reasonable, objective boundaries required to properly delineate the scope of this term.

Second, Complainants seek to rescue this term by appending a lower absorbency bound of 10 times original weight to its proposed construction. By adding this limitation to SAP, Complainants acknowledge that without a lower absorbency bound, this term is indefinite. But their attempt to rescue this term fails because nothing in the claims, specification, or file history (i.e., the intrinsic evidence) supports a lower bound of 10 times original weight or anything close to that.

In fact, the shared specification of the Asserted Patents never discusses any lower bound for an SAP's absorptive capacity, let alone one of 10 times of the SAP's own mass. *See generally*

JXM-0001 ('282 Patent). Instead, the specification provides only one example of a hydrated SAP with a much higher absorption capacity—of 500 times its dry weight. *See id.* at 4:55–59. Moreover, a lower bound of 10 times dry weight is inconsistent with the claim language, which requires SAPs to be "soft" and polymers with an absorptive capacity of only ten times their own weight would be ***harder*** than SAPs with a greater absorbency.

The extrinsic evidence also fails to support a lower bound of 10 times absorbency. Accepting Complainants' proposed lower bound leads to the untenable result that the claim term SAP reads on indisputably non-SAPs. Complainants' own evidence shows that several common non-SAPs, i.e., regular absorbents, have an absorbency greater than 10 times their original weight, including common polymers like a cotton ball. RXM-0018, ¶18–19; *see also* RXM-0018, ¶20. Thus, any evidence purporting to show that SAPs can absorb as little as 10 times their original weight should be ignored as inconsistent with the claim language. Indeed, the bulk of the other extrinsic evidence shows that SAPs have a lower bound of at least 100 times original weight. See RXM-0018, ¶10; RXM-0006–0009, 0011–0017. If the ALJ is inclined to find a lower bound, at least 100 times original weight is the minimum supported by the totality of the evidence. Moreover, allowing polymers with only 10 times absorbency to be SAPs is also inconsistent with Complainants' proposed construction because 10 times absorbency is not "extremely large," especially given the non-SAPs in the record that have greater absorbency.

Next, Complainants assert that SAP is a common term in the art and thus cannot be indefinite. Complainants Br. at 6–7. To be clear, Gel Blaster does not, and has not, disputed that SAP is a commonly used term of art. But being a common term does not exempt SAP from the requirement that it reasonably inform those of skill in the art of its objective boundaries. *See Interval Licensing LLC v. AOL, Inc.*, 766 F.3d 1364, 1371 (Fed. Cir. 2014). Indeed, courts have

found very common terms to be indefinite if they do not reasonably define the bounds of the claim. *Saso Golf, Inc. v. Nike, Inc.*, 843 F. App'x 291, 296–97 (Fed. Cir. 2021) (nonprecedential) (finding "toe" and "heel" indefinite where "there are multiple methods of calculating the radii of curvature because the calculations depend on pinpointing the locations of the toe and heel"); *GE Lighting Solutions, LLC v. Lights Of America, Inc., et al.*, 663 Fed. App'x 938, 940–41 (Fed. Cir. 2016) (nonprecedential) ("elongated" was indefinite); *IBSA Institut Biochimique, S.A. v. Teva Pharmaceuticals USA, Inc.*, 966 F.3d 1374, 1378–81 (Fed. Cir. 2020) ("half-liquid" was indefinite); *cf. Infinity Computer Products v. Oki Data Americas*, 987 F.3d 1053, 1062 (Fed. Cir. 2021) (finding "computer" indefinite due to inconsistent statements in the prosecution history); *U.S. Well Services*, Case No. 6:21-CV-00367-ADA, 2022 WL 819548, at *5–9 ("high pressure" was indefinite); *CA, INC. et al. v. Netflix, Inc.*, Case No. 2:21-CV-00080-JRG-RSP, 2021 WL 5323413, at *14–16 (E.D. Tex. 2021) ("maximizing," 'minimiz[es/ing]" "substantially minimizes" were all indefinite); *In re Neurografix ('360) Patent Litigation*, 13-2432-RGS, 2016 WL 4425712, at *13–14 (D. Mass. 2016) ("near" was indefinite). In sum, that a term is common is irrelevant if the evidence does not identify the necessary objective boundaries for the term. As in these cases, the term SAP is indefinite because the art offers many possible lower absorbency bounds for SAP with no indication in the Asserted Patents or in the art which one should apply—*i.e.*, the art does not recognize a single, generally accepted lower bound of absorbency to qualify as a "super" instead of a regular absorbent. Moreover, that fact does not change just because Gel Blaster is one of the parties who have used this common term. *See* CDX-0001 at 9.

In a case directly on point, a district court found a common term indefinite in the face of conflicting extrinsic evidence that identified multiple possible values for the term without indicating which value should apply. In *U.S. Well Services*, Case No. 6:21-CV-00367-ADA, 2022

WL 819548, at *5–9, the court found "high pressure" indefinite because of the range of values in the evidence:

> there are hundreds of U.S. patents and patent publications cited on the covers of the Asserted USWS Patents (particularly the '308 Patent). USWS selects one prior art reference but ignores the hundreds of other references cited on the covers of the Asserted USWS Patents. Defendants argue that several references cited on the cover of at least the '308 Patent (and other Asserted USWS Patents) that specify 'high pressure' as 20,000 psi. Defendants further argue that there are other examples of intrinsic references cited on the covers of the Asserted USWS Patents that specify 'high pressure' as 15,000 psi. Defendants further contend that there are other examples of intrinsic evidence cited on the covers of the Asserted USWS Patents that provide examples of 'high pressure' pumps as low as 1,000 psi.

*Id.* at *8 (internal citations omitted). *U.S. Well Services* also properly placed responsibility for defining a term's "objective boundaries" on the patentee: "the inventors could have provided some objective boundaries for what they considered 'high pressure' to mean. Indeed, this is exactly what the prior art cited on the face of the Asserted USWS Patents did in fact do as it relates to the scope of each respective patent. But this is not the case for the Asserted USWS Patents." *Id.* at *9 (internal citations omitted).

Similar to *U.S. Well Services*, the extrinsic evidence here shows multiple possible lower bounds, and the patentee failed to define this claim term's objective boundary in the Asserted Patents. Indeed, the indefiniteness of SAP here is even more pronounced than "high pressure" in *U.S. Well Services* because, as discussed above, Complainants rely on evidence that would make non-SAPs falls within the meaning of SAPs. As in the *U.S. Well Services* case, the evidence cited here "'indicat[es] that there is a [sic] indefiniteness problem' because 'the claim language might mean several different things and no informed and confident choice is available among the contending definitions.'" *Id.* at *9 (*quoting Interval Licensing*, 766 F.3d at 1371).

Consistent with that last point in *U.S. Well Services*, the Federal Circuit recently promulgated a test for circumstances analogous to the situation here: "a claim may be invalid as

indefinite when (1) different known methods exist for calculating a claimed parameter, (2) nothing in the record suggests using one method in particular, and (3) application of the different methods result in materially different outcomes for the claim's scope." *Saso Golf*, 843 Fed.Appx. at 296. This test demonstrates the indefiniteness of the term SAP. First, like the "different known methods" in *Saso Golf*, the extrinsic evidence in this Investigation identifies multiple, different lower absorbency bounds, from 1x (CXM-0016) to 500x (RXM-0012, 0014, 0015, 0016) original weight. Second, nothing in the record suggests using one particular lower bound (RXM-0018, ¶9), and some of the lower bounds of record would lead to claims that are so overbroad that they cover indisputably non-SAPs (see RXM-0018, ¶¶18–20). Third, the different lower bounds in the extrinsic evidence would result in materially different claim scope (*i.e.*, whether this claim covers absorbents capable of absorbing more than 1x their original weight or more than 500 times their original weight). This test demonstrates that SAP is indefinite.

The evidence clearly and convincingly shows that the term "super absorbent polymer" is indefinite because it has no generally accepted lower bound. Complainants' proposed "extremely large" construction is a case study in indefiniteness itself. Complainants' reliance on evidence reflecting a 10 times lower absorbency bound for an SAP contradicts other evidence showing that non-SAPs can absorb more than that. The remaining evidence shows a lower bound of at least 100 times original weight. Moreover, conflicting evidence about a claim's boundary renders the term indefinite. For all these reasons, the ALJ should find SAP to be indefinite.

## II. THE PREAMBLE, "AMMUNITION <u>CONFIGURED FOR USE WITH A PROJECTILE LAUNCHER</u>" ('282 PATENT CLAIMS 1 AND ASSERTED DEPENDENT CLAIMS) IS LIMITING FOR DEPENDENT CLAIM 3, AND NOT LIMITING FOR DEPENDENT CLAIMS 6, 8, 13, 14, 15, 17, 19, 20, AND 21

| Claim Language | Complainants' Proposal | Respondents' Proposals | Staff's Proposal |
|---|---|---|---|

| | | | |
|---|---|---|---|
| "ammunition configured for use with a projectile launcher"<br><br>'282 Patent, all claims | Limiting | Preamble of '282 Patent, claim 1 is not limiting as to claims 6, 8, 13, 14, 15, 17, 19, 20, and 21<br><br>Preamble of '282 Patent, claim 1 is limiting for dependent claim 3 | Limiting |

The dispute here is narrow—whether the "configured for use with a projectile launcher" preamble of claim 1 of the '282 Patent is limiting for claims 6 and 8 (and its dependents) when "a projectile launcher" does not supply any antecedent basis for claims 6 or 8 (or its dependents) and those claims recite a structurally complete invention. The parties agree that the preamble is limiting for dependent claim 3 because the preamble for claim 1 provides antecedent basis for "the projectile launcher" appearing in claim 3: "The ammunition of claim 2, wherein the feed chamber is in selective communication with a barrel of ***the projectile launcher***." This is not true for claims 6 or 8. There is no basis to find the preamble limiting as to all asserted claims when only ***one*** asserted claim requires the limitation. As indicated in Respondents' initial brief, finding a single claim in a set to be limited by an independent claim's preamble is consistent with Federal Circuit precedent and district court cases deciding this precise issue.

### A. Dependent Claims 6 and 8 Recite Structurally Complete Inventions

At the outset, the preamble of claim 1 of the '282 Patent is not limiting for claims 6 or 8 because both claims recite structurally complete inventions without the preamble: "[A] preamble is ***not limiting*** 'where a patentee defines a structurally complete invention in the claim body and uses the preamble only to state a purpose or intended use for the invention.'" *Shoes by Firebug LLC v. Stride Rite Children's Grp., LLC*, 962 F.3d 1362, 1367 (Fed. Cir. 2020) (emphasis added).

**i.** Claim 6

Beginning with claim 6, and consistent with the ALJ's request for "precise factual analogies," the Federal Circuit's decision in *Shoes by Firebug* is directly analogous to the question of whether claim 6 recites a structurally complete invention or is limited by the preamble. In that case, the Federal Circuit examined the exact same preamble language ("An internally illuminated textile footwear") in two different claims in two related patents with identical disclosures. 962 F.3d at 1364 n.1[1] ("the '038 and '574 patents share a substantially identical written description").

| **'038 Patent** | **'574 Patent** |
|---|---|
| 1. An internally illuminated textile footwear comprises:<br><br><u>a footwear</u>; the footwear comprises a sole and an upper; …<br><br>the upper being light diffusing … | 1. An internally illuminated textile footwear comprises:<br><br>a sole and an upper;<br><br>the upper being a light diffusing section;<br><br>an illumination system; … the illumination system being housed within <u>the footwear</u>; … |

The Federal Circuit found the preamble limiting in the '574 Patent because it provided antecedent basis for "the footwear" which appeared in the body of the claim. *Id.* at 1368. In the '038 Patent, however, the preamble language was not limiting because it did not provide antecedent basis for terms in the body of the claim and the body of the claim language recited a structurally complete invention:

> Notably, the first limitation of the body of claim 1 of the '038 patent reintroduces "a footwear" which "comprises a sole and an upper." The preamble, then, cannot be said to provide essential structure or necessary meaning to the claimed invention because the same element—the footwear—is independently recited in the body of the claim.

[1] The only difference between the specifications was the recitation of the priority chain. *Compare* U.S. Patent No. 8,992,038 ("the '032 Patent") *with* U.S. Patent No. 9,301,574 ("the '574 Patent").

*Id.* at 1367–68. "We conclude that the body of claim 1 of the '038 patent recites a structurally complete invention, and therefore the preamble's recitation of an 'internally illuminated textile footwear' is merely an intended purpose that does not limit the claims." *Id.* at 1367.

Analogously, the body of Claim 6 of the '282 Patent recites a structurally complete invention without reference to "the projectile launcher" recited in the preamble.[2] Claim 6 depends from Claim 4 which in turn depends from Claim 1. These three claims are set forth below with the non-preamble language bolded:

> 1. Ammunition configured for use with a projectile launcher comprising: ***a plurality of soft-projectiles having the same shape, each soft projectile being formed from hydrated super absorbent polymer.***
>
> 4. The ammunition of claim 1, ***wherein the soft-projectiles are substantially spherical.***
>
> 6. The ammunition of claim 4, ***wherein the soft-projectiles have a diameter greater than about 4 mm and less than about 9 mm.***

JXM-0001 ('282 Patent) at claims 1, 4, 6. The language in the body of the claim recites a structurally complete invention, namely, a plurality of soft-projectiles having the same substantially spherical shape, each soft projectile being formed from hydrated super absorbent

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[2] Complainants assert that recitation of "the ammunition of claim 1" and similar phrases also cause the dependent claims to require claim 1's preamble for antecedent basis. *See* Complainants Br. at 13–14; Tr. at 23:8–25. As discussed at the hearing, this argument is nonsensical; if recitations of dependency in a claim depending from another claim constituted "antecedent basis" for purposes of determining whether a preamble is limiting, then every independent claim that had at least one dependent claim would always have a limiting preamble.. And the Federal Circuit, as well as countless district courts and ALJ's in the ITC, have found dependent claims ***not limited*** even where they recite almost the identical language as the independent claim's preamble when reciting from which claim they depend. *See, e.g.*, *Arctic Cat Inc. v. GEP Power Prods.*, 919 F.3d 1320, 1329–30 (Fed. Cir. 2019) (finding dependent claims not limited by independent claim's preamble though they recited "***[t]he*** personal recreational vehicle of claim [1/3]"); *Howmedica Osteonics Corp. v Zimmer, Inc.*, 640 F. App'x 951, 955–56 (Fed. Cir. 2016) (same for "[t]he medical implant"); *Pacing Techs., LLC v. Garmin Int'l Inc.*, 778 F.3d 1021, 1025 (Fed. Cir. 2015) (preamble limited dependent claim due to recitation of "***the*** repetitive motion pacing system" in the body of the claim, ***not*** in recitation of "[t]he repetitive motion pacing system of claim 25").

polymer and each having a diameter greater than about 4 mm and less than about 9 mm. *Id.* The preamble does not provide antecedent basis for any element in the body of the claim. This language merely states an ***intended use*** for the soft-projectiles, namely, as ammunition ***for use with*** a projectile launcher. *See Shoes by Firebug*, 962 F.3d at 1367 ("[A] preamble is ***not limiting*** 'where a patentee defines a structurally complete invention in the claim body and uses the preamble only to state a purpose or intended use for the invention.'").

Complainants argued at the hearing that "[t]he rest of the claim body, if the preamble didn't exist, recites a pile of soft-projectiles, a plurality having the same shape being made of hydrated super absorbent polymers. There is no reference to projectile. There is no reference to the inventive concept of putting the SAP ammunition in that projectile launcher." Tr. at 26:21–27:1. Complainants' own statements demonstrate that is not true: the body of the claim recites soft-***projectiles*** made from a super absorbent polymer. *Id.*; JXM-0001 ('282 Patent) at claim 1, 4, 6. The body of the claim therefore includes expressly the term "soft-projectiles." *Id.*

At the hearing, it became clear that Hasbro intends to try to use the "configured for use" language to try to import various limitations into the claims. As Hasbro's counsel explained it:

> ***What does it mean to be configured***? Well, the patent teaches us that there's a subset of SAP projectiles that can be ***designed to break down at different pressures*** based on their composition. They can have ***different cross-linking densities***, which enables them to fly farther and faster without breaking, or maybe you want to dial that down so you can have a projectile launcher that's more appropriate for younger children, for example.
>
> So you are able to ***tailor that SAP*** ammunition for this context. And ***the claim requires that that tailoring occur***.

Tr. at 28:22–29:8 (emphasis added). But this argument is wrong for several reasons. First, Hasbro's assertion that the the patent teaches that a "subset of SAP projectiles" can break down at different densities and "have different cross-linking densities" is simply wrong. Rather, as the Court observed, there is simply a generic discussion of cross-linking, but the shared specification does

not supply numerical boundaries for cross-linking density (or, indeed, even a description of how the crosslinking density is related to the absorbency). Tr. at 85:2–18. Moreover, Complainants informed Respondents and Staff that the only claims that include the term "cross-linking density" (*see* JXM-0001('282 Patent) at claim 13, JXM-0003 ('683 Patent) at claim 10) are no longer asserted by Complainants, in the apparent recognition that those claims are hopelessly indefinite.

Second, even if that concept were adequately spelled out, the "configured for use with a projectile launcher" language does not come anywhere close to making this supposed "tailoring" a requirement of the claims; had the patentee intended to claim language used in the specification, they plainly knew how to write that language and could have done so. Further, this "tailoring" is not essential to realizing the stated purpose of the claims. This is proven by the fact that the supposed "tailoring" is only required in two out of 21 claims of the '282 Patent (Claims 13 and 21). Claim 13 states that "the super absorbent polymer has a ***cross linking density*** sufficient to prevent the soft-projectiles from breaking apart when launched from the projectile launcher." JXM-0001 ('282 Patent) at claim 13 (emphasis added). Claim 21 states the same concept in a different way, namely, "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." *Id.* at claim 21.

Finally, Hasbro's argument that the "claim requires that [] tailoring occur" must be rejected for the same reasons the Federal Circuit rejected the analogous argument that "textile footwear" should be added as a requirement to the claim in *Firebug*:

> Firebug argues that the written description treats the use of textile footwear as an important aspect of the disclosure, and therefore the recitation of "textile footwear" in the preamble should be treated as limiting. The written description explains that "[t]he present invention focuses on the adoption and improvement of internally illuminated footwear ... by providing a light diffusing textile upper." '038 patent col. 1 ll. 37–39. ***In addition to the general disfavor of importing language from***

> ***the written description into the claims***, *see SuperGuide Corp. v. DirecTV Enters., Inc.*, 358 F.3d 870, 875 (Fed. Cir. 2004), ***we disagree with Firebug that the use of textile footwear is essential*** to realizing the stated purpose of the invention.

*Shoes by Firebug*, 962 F.3d at 1368. The same is true here. Hasbro's attempt to add a requirement to Claim 6 that the SAP be "tailored" is simply an improper attempt to rewrite its claims. Accordingly, because the body of claim 1 of the '282 patent "recites a structurally complete article" and tailoring the SAP "is not otherwise necessary to the claimed invention," the preamble of claim 1 does not limit claim 6 of the '282 patent. *Shoes by Firebug*, 962 F.3d at 1368.

**ii.** Claim 8 (And Its Dependents)

*Shoes By Firebug* is also directly analogous for claim 8. The Federal Circuit found the preamble of the '038 Patent at issue in that case to not be limiting because it did not provide antecedent basis for terms in the body of the claim and the body of the claim language recited a structurally complete invention:

> Notably, the first limitation of the body of claim 1 of the '038 patent reintroduces "a footwear" which "comprises a sole and an upper." The preamble, then, cannot be said to provide essential structure or necessary meaning to the claimed invention because the same element—the footwear—is independently recited in the body of the claim.

*Id.* at 1367–68. The same is true here with respect to claim 8 of the '282 Patent. The claim begins by reciting "[a] projectile launcher": "***A projectile launcher*** including the ammunition of claim 1 disposed within a feed chamber of the projectile launcher, and wherein the projectile launcher is adapted to load a soft-projectile from the feed chamber to a firing position." JXM-0001, '282 Patent at claim 8. The preamble of claim 1 therefore does not "provide essential structure or necessary meaning to the claimed invention," because claim 8 recites a projectile launcher itself, and thus has no need to reference the "projectile launcher" in the preamble of claim 1. As was the case for claim 1 of the '038 patent in *Shoes by Firebug*, the "preamble [of claim 8], then, cannot be said to provide essential structure or necessary meaning to the claimed invention because the

same element—[a 'projectile launcher']—is independently recited in the body of the claim." *See Shoes by Firebug LLC*, 962 F.3d at 1367–68. Claims 13, 14, 15, 17, 19, 20, and 21 all depend on Claim 8, so do not require the preamble of Claim 1 to provide antecedent basis for any recitations of "the projectile launcher" for the same reason.

**B. The Preamble Can Limit One Claim In A Claim Set**

As discussed in Respondents' initial brief, a central issue here is whether or not the preamble of claim 1 can be found to limit claim 3 but none of the other asserted claims. *See, e.g.*, Respondents Br. at 39–40. In particular, Respondents discussed Judge Andrews' decision in *TQ Delta, LLC v. 2WIRE, Inc.*, finding a dependent claim to be limited by the independent claim's preamble but that the preamble was not limiting for the independent claim. Case No. 1:13-cv-01835-RGA, 2018 WL 4062617, at *4–5 (D. Del. Aug. 24, 2018); Respondents Br. at 39–40. Respondents also cited three other cases that followed Judge Andrew's reasoning: *PACT XPP Schweiz AG v Intel Corp.*, Case No. 1:19-cv-01006-JDW, 2020 WL 5821723, at *2 (D. Del. Sept. 30, 2020); *SEVEN Networks, LLC v. Apple Inc.*, Case No. 2:19-CV-115-JRG, 2020 WL 1536152, at *32–33 (E.D. Tex. Mar. 31, 2020); and *Super Interconnect Techs. LLC v. Huawei Device Co.*, Case No. 2:18-CV-462-JRG, 2020 WL 60145, at *12 (E.D. Tex. Jan. 5, 2020).

Complainants represented at the hearing that these cases do not, in fact, support the *TQ Delta* decision. This is incorrect. For example, counsel for Complainants represented at the hearing that "in the *PACT XXP* case the Court there just makes a passing reference to the *TQ Delta* decision. . . . and, in fact, he goes on to say in that case that whether a dependent claim may be limiting in some circumstances and not limiting—or, excuse me, the preamble may be limiting in some circumstances but not the others was not before the Court in that case." Tr. at 56:13–23. This is simply not what the court said. In *PACT XPP*, the plaintiff argued that the independent claim's "preamble must be limiting because two dependent claims, Claims 20 and 50, refer back to it."

*PACT XPP Schweiz AG*, Case No. 1:19-cv-01006-JDW, 2020 WL 5821723, at *2. The issue of whether the preamble indeed limited those two dependent claims was not before the court. *Id.* However, the issue of whether the independent claim was limited by its preamble due to the fact that those dependent claims might be limited by the preamble *was* directly before the Court. *Id.* However, the Court noted that "language in a preamble can be limiting as to a dependent claim but not as to the independent claim from which it derives." *Id.* The Court expressly relied upon this proposition, citing to *TQ Delta*, to state that "even if the preamble is limiting as to dependent Claims 20 and 50, it is not limiting as to independent Claims 1 and 31." *Id.*

In the *SEVEN Networks, LLC v Apple Inc.* decision referenced by Respondents, defendants argued that those preambles were limiting because "they provide the sole antecedent basis for essential structural components (servers) recited in dependent claims." Case No. 2:19-CV-115-JRG, 2020 WL 1536152, at *32 (E.D. Tex. March 31, 2020). The plaintiff argued that the preambles of two independent claims were not limiting and, to the extent they were limiting as to dependent claims, that did not change that they were not limiting for the independent claims. *Id.* The Court analyzed both the independent claims and the dependent claims relied upon by defendants, noting cases (including *TQ Delta*) in which courts had found that a preamble may limit a dependent claim but not limit the independent claim. *Id.* The Court then noted that "[t]his approach appears to comport with the general principle, for example, that '[e]ach claim of a patent (whether in independent, dependent, or multiple dependent form) shall be presumed valid independently of the validity of other claims'" *Id.* (quoting 35 U.S.C. § 282). The Court also acknowledged other authority in which the preamble providing antecedent basis ***supported*** a court's conclusion that the preambles limited the independent claim. *Id.* However, the sole reason for finding the preamble limiting was not the dependent claims themselves. *Id.* Rather, in *SEVEN*

*Networks*, the recitals that provided antecedent basis for dependent claims "also do more than merely provide 'reference points . . . that aid in defining' the claimed invention." *Id.* (quoting *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1350 (Fed. Cir. 1998)). The same analysis was conducted in the *Super Interconnect Technologies* case. Again, the parties disputed whether a dependent claim's dependence upon an independent claim's preamble for antecedent basis means that the preamble must also limit the independent claim for which it does not provide antecedent basis. *Super Interconnect Technologies LLC v. Huawei Device Co. Ltd.*, Case No. 2:18-CV-462-JRG, 2020 WL 60145, at *10 (E.D. Tex. Jan. 6, 2020). The Court noted the same caselaw as in *SEVEN Networks*. *Compare id.* at *11, *with SEVEN Networks*, 2020 WL 1536152, at *32. And, again, the Court found that the preambles were required to give life, meaning, and vitality to the claim, but notably did not rely solely on the fact that the preamble was limiting in certain dependent claims to reach its decision. *Super Interconnect Tech.*, 2020 WL 60142, at *12. Complainants were therefore incorrect to imply at the hearing that these cases support their supposition that an entire claim set must be limited by the preamble if even a single claim in that set is limited; these courts held precisely the opposite. *See* Tr. at 56:24–57:7.

Complainants also implied that *TQ Delta* is not instructive here because it "is still pending, so it hasn't even been subject to an approval or argument before the Federal Circuit." Tr. at 31:16–18. But notably, Judge Andrews reviewed and surveyed Federal Circuit caselaw in reaching his decision and found that it was supported by the Federal Circuit's holdings. *TQ Delta, LLC v. 2WIRE, Inc.*, Case No. 1:13-cv-01835-RGA, 2018 WL 4062617, at *4–5. And notably, Complainants did not cite to any Federal Circuit caselaw that would undermine the holding in *TQ Delta.* Indeed, *CreAgri, Inc. v. Pinnaclife Inc.* suggests that there is none. In that case, the defendant argued—relying on *Catalina Mktg. Int'l, Inc. v. Coolsavings.com, Inc.*, 289 F.3d 801

(Fed. Cir. 2002) as Complainants do here—that the preamble of two independent claims was limiting to those two independent claims because a dependent claim required the language of the preamble for antecedent basis. *CreAgri, Inc. v. Pinnaclife Inc.*, Case No. 11–CV–6635–LHK, 2013 WL 1663611, at *7 (N.D. Cal. April 16, 2013). Judge Koh examined the independent claims and noted that they did not require their preambles for antecedent basis. *Id.* But, as the Court noted, the defendant

> failed to cite, and the Court is unaware of, any authority for the proposition that a preamble phrase appearing in an independent claim should be construed as limiting that independent claim simply because that phrase appears in both the preamble and the body of a dependent claim. *Catalina* did not address this issue as the *Catalina* Court considered only whether the preamble found in independent Claim 25 was limiting where it appeared in both the preamble and the body of *that* claim. Thus, the Court is not persuaded that the preamble "a dietary supplement" should be construed as limiting Claims 1 and 5 (or the Patent as a whole) simply because it appears in the preamble and the body of dependent Claim 3. The claim language therefore does not support [defendant's] argument that the preamble is limiting.

*Id.* at *8. The plaintiff appealed to the Federal Circuit after the case had run its course and, in a non-precedential opinion, the ultimate verdict was affirmed. *Creagri, Inc. v. Pinnaclife, Inc.*, 579 Fed. App'x 1003 (Fed. Cir. 2014). While the issue of the preamble was not before the Federal Circuit, the case is not still pending and neither party appealed the issue to the Federal Circuit. A similar result was reached in *Expact, Inc. v. Shannon*, where the Court rejected the argument that an independent claim was limited by its preamble because a dependent claim required the preamble for antecedent basis, noting "the Court finds that the antecedent basis for the 'wing-spar cap angle,' the 'upper edge' and the 'lower edge' recited in claim 10 are limiting—***but only as to the invention of dependent claim 10***." Case No. 6:11-cv-84-GAP-KRS, 2011 WL 6010441, at *7–8 (M.D. Fla. Nov. 30, 2011); *see also Freeny v. Murphy USA Inc.*, Case No. 2:13–CV–791–RSP, 2015 WL 294102, at *6 (E.D. Tex. Jan. 21, 2015) (dependent claims not limited by preamble where each independent claim "includes in the preamble the following phrase: '[a]n automated product pricing

system.' Further, each dependent claim includes a reference to the 'automated product pricing system' that it is dependent upon. Not one claim refers back to the 'automated' term appearing in the preamble.").

The bottom line is that, to date, Complainants have failed to provide case law supporting the notion that a dependent claim's reliance on an independent claim's preamble for antecedent basis is, by itself, sufficient basis to find the preamble limiting for an independent claim that ***does not*** need its preamble for antecedent basis. To the contrary, consistent with the claim-by-claim analysis for validity mandated by statute and Federal Circuit precedent, a claim-by-claim analysis of limitation by the preamble is the correct approach.

### C. The Prosecution History Amendment To Claim 1 Does Not Demonstrate Clear Reliance on the Preamble to Obtain Allowability

Complainants and Staff rely upon the Examiner's revision of the preamble prior to allowing the claims as evidence that the preamble was intended to be limiting for those claims. *See, e.g.*, Complainants' Br. at 14–15; Staff Br. at 9–11; Tr. at 24:2–25:13. Complainants' reliance is premised upon *Catalina Marketing*, which notes that "clear reliance on the preamble during prosecution to ***distinguish the claimed invention from the prior art*** transforms the preamble into a claim limitation. *Catalina Mktg. Int'l, Inc. v. Coolsavings.com, Inc.*, 289 F.3d 801, 808 (Fed. Cir. 2002) (emphasis added); *see also* CDX-22. Here, as noted during the hearing, the applicant never relied upon the preamble to overcome prior art, nor made any other statements in reliance upon the preamble to obtain allowance. Tr. at 46:1–47:8; *see generally* JXM-0002 ('282 File History). Regardless, even considering the amendments made to the preamble during prosecution, it is not clear why the changes were made. *See* JXM-0002 ('282 File History), Notice of Allowability at 2 (PDF p. 173 (Oct. 11, 2012)). Though the Examiner notes they were approved during a telephone interview with the applicant, the reasoning for the changes is not discussed. *Id.* Moreover, as both

Complainants and Staff acknowledged at the hearing, the file history here is anything but clear as to why the Examiner made the amendments. Tr. at 58:11–13 (Complainants' counsel noting "[I]t's not clear precisely why the examiner thought it was necessary to amend the claims[.]"), 65:22 (Staff noting "it's a messy file history."). This is a far cry from demonstration of "clear intent" of the examiner or "clear and unmistakable disavowal" by the applicant required to make the preamble limiting.

Staff also relies upon the revision itself as evidence that the preamble "captures an important aspect of the invention." Staff Br. at 10. But in the case Staff relies upon, the Court noted that "the written description and ***applicant's statements during prosecution*** emphasize" the recited "portability" characteristic recited in the preamble. *Computer Docking Station Corp. v. Dell, Inc.*, 519 F.3d 1366, 1375 (Fed. Cir. 2008). Again, the applicant made ***no statements*** during prosecution here. Tr. at 46:1–47:8; *see generally* JXM-0002 ('282 File History).

To the contrary, to the extent the intent of the Examiner is to be divined from the fact of the amendments itself, they tend to show that the Examiner did ***not*** intend for the preamble to be limiting as to all claims. At the same time the Examiner amended the preamble of what would issue as claim 1 from "[a]mmunition for a projectile launcher" to "[a]mmunition <u>configured</u> for <u>use with</u> a projectile launcher," the Examiner amended what would issue as claim 2 from "a feed chamber of ***a*** projectile launcher" to "a feed chamber of ***the*** projectile launcher." *See* JXM-0002 ('282 File History), Notice of Allowability at 2 (PDF p. 173 (Oct. 11, 2012)). Thus, the Examiner actively and purposefully amended what would issue as claim 2 to require the preamble of claim 1 for antecedent basis. *Id.* Thus, the Examiner knew how to amend the claims to require antecedent basis but ***chose not to do so*** for the remaining dependent claims.

### D. The Restriction Requirement In The Prosecution History Supports Respondents' Position That The Preamble Is Not Limiting As To Claims 6 and 8 (and its dependents)

The prosecution history supports Respondents' position that the preamble is not limiting because it makes clear that the Examiner believed claims directed to ammunition to be separate and distinct from claims directed to a projectile launcher and claims directed to the combination of a projectile launcher and ammunition together.

The first office action in the prosecution history of the '282 Patent was the Examiner's issuance of election/restriction requirements. *See* JXM-0002 ('282 File History), Office Action at 2 (PDF p. 60) (Feb. 2, 2012). The election/restriction requirement identified five separate categories of inventions in the applicant's claims: (1) projectile launcher, (2) ammunition, (3) a magazine or ammunition holder, (4) a method of making projectiles, and (5) a kit for making projectiles. *Id.* The Examiner's identification of claims covering a projectile launcher and claims covering ammunition as separate and distinct inventions tends to demonstrate that the Examiner did not believe the projectile launcher to be required for the ammunition claims.

In response to that election/restriction requirement, the applicant elected the group directed to ammunition claims, amended some of the remaining claims, and added additional claims to the application. *Id.*, Response to Restriction Requirement (PDF p. 68) (March 2, 2012). Upon considering the applicant's claim amendments and additions, the Examiner once again issued an election/restriction requirement, this time identifying three categories of invention: (1) ammunition and a magazine/container, (2) ammunition, and (3) a launcher and ammunition. Again, the Examiner's identification of claims covering ammunition and claims covering a launcher and ammunition together as separate and distinct inventions tends to demonstrate that the Examiner did not believe the projectile launcher was required for the ammunition claims. In response to this second election/restriction requirement, the applicant once more chose the group

of claims directed to ammunition for continued prosecution. *Id.*, Response to Restriction Requirement (PDF p. 93) (Aug. 3, 2012).

[Didn't the staff say something about this at the hearing? And should we address it?]

## III. "A FIRING MECHANISM THAT DIRECTLY APPLIES A FORCE TO" A SOFT-PROJECTILE / THE AMMUNITION ('282 PATENT CLAIM 17, '683 PATENT CLAIM 14) MEANS "A FIRING MECHANISM THAT DIRECTLY APPLIES A FORCE TO [A SOFT-PROJECTILE / THE AMMUNITION] (NOT VIA AN INTERMEDIARY)"

| Claim Language | Complainants' Proposal | Respondents' Proposals | Staff's Proposal |
|---|---|---|---|
| "a firing mechanism that directly applies a force to a soft-projectile"<br><br>'282 Patent, claim 17 | Plain and ordinary meaning, i.e., "a firing mechanism that directly applies a force to a soft-projectile" | "a firing mechanism that directly applies a force to a soft-projectile (not via an intermediary)" | Plain and ordinary meaning |
| "a firing mechanism that directly applies a force to the ammunition"<br>'683 Patent, claim 14 | Plain and ordinary meaning, i.e., "a firing mechanism that directly applies a force to the ammunition" | "a firing mechanism that directly applies a force to the ammunition (not via an intermediary)" | Plain and ordinary meaning |

This term should not be in dispute. Complainants' counsel has not engaged in the discussion of what the ***meaning*** of "directly" is, but instead spent their time arguing whether or not a hypothetical firing mechanism described nowhere in the specification that applies both a direct and indirect force is covered by the claims (*i.e.*, claim ***application*** rather than claim *construction*). *See generally* Complainants Br. at 22–24; Tr. at 135:14–139:22, 142:18–146:5, 151:11–152:7. However, the parties do agree that the meaning of the term "directly" is "not via an intermediary." Complainants' counsel repeatedly stated that "direct" and "indirect" are opposite concepts and that a force cannot be both "direct" and "indirect" at the same time. *See, e.g.*, Tr. at 136:19–21. Staff, too, indicated that the infringement evaluation would be a consideration of

whether or not there is an intermediary present between the firing mechanism and the ammunition. *See id.* at 146:18–147:2.

This is because the plain meaning of the term "directly" cannot seriously be argued. Time and time again the term "directly" has been construed to require that there not be intervening structures or intermediaries between components—because this is the plain and ordinary meaning of the term. *See Immersion Corporation v. Samsung Electronics America, Inc.*, Case No. 2:17-CV-572-JRG LEAD, 2018 WL 5005791, at *7–11 (E.D. Tex. Oct. 16, 2018) ("[T]he Court hereby construes "outputting a force ***directly*** on said touch input device" to mean "outputting a force on the touch input device ***without intervening structure***.") (emphasis added); *Immersion Corporation v HTC Corporation*, Case No. 12–259–RGA, 2015 WL 581572, at *5 (D. Del. Feb. 11, 2015) ("The Court agrees with Defendants, that i***n order for the actuator to impart forces directly***, there must be ***no intervening structure*** between the touch screen and the actuator.") (emphasis added); *see also Certain Blowers and Components Thereof*, Inv. No. 337-TA-1217, Order No. 23 at 1 (U.S.I.T.C. July 13, 2021) ("'direct contact' does not include or mean 'indirect contact'"); *Smith Int'l, Inc. v. Baker Hughes Inc.*, Case No 16-56, 2018 WL 3381299, at *3 (D. Del. July 11, 2018) ("By its plain meaning, in order for the tool to be 'directly above' the drill bit, there must be no additional structures between the tool and drill bit."); *Askeladden LLC v. Endoditech, LLC*, IPR2017-00452, Decision Denying Institution of *Inter Partes Review*, Paper 8 at 10–11 (U.S.P.T.O. May 22, 2017) (finding the plain and ordinary meaning of "directly" in the term "transmitting a first request signal . . . directly to the second mobile station" "is transmission from one mobile station to another without any intermediates."); *Neurovision Medical Prods., Inc. v. Medtronic Public Limited Company*, Case No. 2:16-cv-127-JRG-RSP, 2016 WL 6277241, at *19 (E.D. Tex. Oct. 27, 2016) ("The electrode or trace of the claims is applied to the surface of the

tube without an intervening layer—which the Court understands is the plain and ordinary meaning of 'applied . . . directly to' the surface."); *Lindsay Corp. v. Valmont Industries, Inc.*, IPR2015-01039, Final Written Decision, Paper 37 at 9 (U.S.P.T.O. Sept. 14, 2016) ("In the Decision on Institution, we construed the term 'directly' to mean 'with no intermediary.' The parties do not dispute that construction, and we see no reason now to deviate from that construction") (internal citations omitted).

The proper construction of "directly applies a force" is applying a force "not via an intermediary."

The only potential dispute between the parties, then, is whether the application of that plain and ordinary meaning allows for the firing mechanism to apply both a direct and an indirect force to the ammunition at the same time or in series (it is not entirely clear what Complainants are arguing, as again, there is nothing they have pointed to that would define this hypothetical firing mechanism). *See* Tr. at 137:1–6 (Complainants' counsel explaining their position that Respondents' proposed construction is incorrect because "the firing mechanism cannot apply both a direct force and an indirect force at the same time."). Review of the claims, the specification, and the plain and ordinary meaning of applying a direct force reveals that the firing mechanism, as described and claimed in the Asserted Patents, cannot apply both a direct force and an indirect force on the ammunition at the same time. As the ALJ correctly noted at the hearing, Complainants could not be arguing that the direct and indirect forces Complainants contend are covered by the word "directly" were covered by the same force. Tr. at 149:17–24 ("[T]hey certainly are not trying to claim simultaneity of direct and indirect force. You can't do that."). However, Complainants' counsel made clear that is exactly the claim scope they seek. For example, Complainants' counsel provided, as an example allegedly covered by the claims, an undisclosed embodiment wherein the

soft-projectile holder is "smaller." *See id.* at 144:25–145:7. Complainants' counsel later also provided the Court with "a very simple example to illustrate how indirect force and a direct force can be present ***at the same time***." *See id.* at 151:11–14. This dispute about hypothetical, undisclosed firing mechanisms is merely an attempt by Complainants to recapture in the "directly applies a force" claims the scope of the "indirectly applies a force" claims they dropped from this investigation. Order No. 10; JXM-0001 at claim 18; JXM-0003 at claim 15.

The analysis conducted by Judge Gilstrap in *Immersion Corp. v. Samsung Elecs. America, Inc.* is instructive as to the appropriate interpretation of "directly" here. In *Immersion Corp.*, the parties disputed the meaning of the claim term "outputting a force directly on said touch input device." Case No. 2:17-CV-572-JRG LEAD, 2018 WL 5005791, at *4–5. Plaintiff proposed that the term should not be construed but, if it were, the plain and ordinary meaning is "outputting a force on the touch input device either through connected rigid bodies [*e.g.*, intermediaries/intervening structures] or without intervening structure." *Id.* Defendants proposed construing the term to require the force be output on the touch input device without intervening structure. *Id.* Plaintiffs made a similar argument to Complainants' here, namely that because the specification did not explicitly ***exclude*** indirect application of force it was encompassed by the claims. *Compare id.* at *5, *with* Tr. at 143:2–4 ("there is nothing in the specification that limits the claimed firing mechanism to be only imparting one force at a time"), 145:21–25 ("the specification does not say that there can only be a direct force or only an indirect force at once"); *see also* Complainants Br. at 23–24.

Judge Gilstrap ultimately adopted the defendants' proposed construction based both upon intrinsic and extrinsic evidence. First, an understanding that "directly" refers to the absence of intervening structures (or intermediaries) was consistent with the specification. *See Immersion*

*Corp.*, Case No. 2:17-CV-572-JRG LEAD, 2018 WL 5005791, at *8–9. Similarly, here, an understanding that "directly" does not include intermediaries or indirect force is consistent with the shared specification of the Asserted Patents. The patents disclose a "soft-projectile holder **14**" intended to carry the soft-projectile while it is in the barrel of the projection device 12 to, among other things, transfer force from the firing mechanism to the soft-projectile, and to distribute force evenly across the soft-projectile. *See, e.g.*, JXM-0001, '282 Patent at 5:57–67, 7:3–13, 7:25–37. Thus, the described embodiments set forth in the '282 Patent use an intermediary to indirectly apply a force to the SAP projectile. *Id.* at 7:25–32; Tr. at 144:17–21 (Complainants' counsel agreeing the soft-projectile holder is the intermediary). These embodiments are consistent with Complainants' previously proposed construction for "a firing mechanism that indirectly applies a force to a soft-projectile": the firing mechanism applies a force to a soft-projectile "via an intermediary." *See* Respondents Br. at 45–46; RDX-0001 at 73. During the parties' meet and confer, Complainants' counsel contended that "indirectly" referred to the use of the soft-projectile holder 14 and that was why Complainants proposed "via an intermediary" as the meaning of "indirectly" in the context of the claim.

As for "directly" applying a force, there is only one passing reference to this concept:

> In addition to projection devices designed specifically to launch soft-projectiles **16**, embodiments of the present patent document include adaption devices to adapt existing projectile toys and weaponry to launch soft-projectiles **16**. Adaption devices attach to the firing mechanism of the existing toy or weaponry and allow the transfer of energy from the firing mechanism into kinetic motion of the SAP projectile **16** without damaging the SAP projectile **16**. Preferably, ***soft-projectile holders 14, similar to those of FIGS. 1 and 2, are retrofit to the existing toys and/or weaponry to protect the soft-projectile made from a SAP 16***. However, ***<u>such holders are not required</u>***, and other methods may be used without departing from the scope of the embodiments of the present patent document.

JXM-0001, '282 Patent at 9:5–18 (emphasis added). Thus, to be consistent with Complainants' interpretation of "indirect," a "direct" application of force is one that is not applied via an

intermediary. *See id.* As such, both the plain language of the claim and the specification confirm that "a firing mechanism that directly applies a force to a soft-projectile" means "a firing mechanism that directly applies a force to a soft-projectile (not via an intermediary)." As noted by Judge Gilstrap, "[t]he absence of any disclosure of intervening structures" in the context of the only disclosure of "directly applying a force" "is unsurprising given the common meaning of 'directly.'" *See Immersion Corp.*, Case No. 2:17-CV-572-JRG LEAD, 2018 WL 5005791, at *9.

The Asserted Patents only disclose using an intermediary to indirectly apply force to the ammunition or removing the intermediary to apply a direct force; there is no disclosure of an embodiment wherein the firing mechanism applies both a direct and an indirect force. *See* Respondents' Br. at 42–47. "On one hand, 'it is improper to read limitations from a preferred embodiment described in the specification—even if it is the only embodiment—into the claims absent a clear indication in the intrinsic record that the patentee intended the claims to be so limited.'" *Immersion Corp.*, Case No. 2:17-CV-572-JRG LEAD, 2018 WL 5005791, at *9 (quoting *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 913 (Fed. Cir. 2004)). But, "[o]n the other hand, '[i]n some cases, the ordinary meaning of claim language as understood by a person of skill in the art may be readily apparent even to lay judges, and claim construction in such cases involves little more than the application of the widely accepted meaning of commonly understood words.'" *Id.* (quoting *Phillips v. AWH Corp.*, 415 F.3d 1303, 1314 (Fed. Cir. 2005)).

Here, the plain and ordinary meaning of "direct" and "indirect" is as opposites that are mutually exclusive of one another. *See, e.g.*, Tr. at 136:19–21 ("[W]hen talking about a particular force, there's no question that the force is either an indirect force or a direct force."); RXM-0003 (identifying "indirect" as the only antonym for "direct"); RXM-0004 (identifying "direct" as the only antonym for "indirect"). And extrinsic evidence likewise confirms the common-sense notion

that "direct" means directly (*i.e.*, without an intermediary), where indirectly requires an intermediary. *See, e.g.*, RXM-0001 (defining "direct" as "marked by absence of an intervening agency, instrumentality, or influence"); RXM-0002 (defining "direct" as "without any intervening agency or instrumentality or determining influence : without any intermediate step"); RXM-0003 (defining "direct" as "with nothing intervening" and noting "indirect" as the only antonym for "direct"); RXM-0004 (defining "indirect" as "not proceeding straight to a destination" and noting "direct" as the only antonym for "indirect"). Similar to the plaintiff in *Immersion Corp. v. Samsung*, Complainants here have not "shown that the specification discloses any other type of arrangement for 'directly' imparting a force, such as an embodiment with intervening structures." *Immersion Corp.*, Case No. 2:17-CV-572-JRG LEAD, 2018 WL 5005791, at *9. The specification only describes embodiments in which a force is applied indirectly via an intermediary and where a force is applied directly because the intermediary is removed. *See* Respondents' Br. at 42–47. In cases such as these, where the plain meaning of the claims is not contradicted by disclosure within the specification, it must control. Thus, "directly" and "indirectly" applying a force cannot occur simultaneously. *See Immersion Corp.*, Case No. 2:17-CV-572-JRG LEAD, 2018 WL 5005791, at *9.

Finally, there is likewise nothing in the specification discussing a sequential application of direct and indirect (or vice-versa) forces by a firing mechanism. To the extent a construction permitted the claim to cover such a firing mechanism, the claim would be rendered invalid for lack of written description, as there is no evidence that the named inventors "had possession of" such a firing at the time of the alleged invention. *Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) ("[T]he test for sufficiency is whether the disclosure of the application relied

upon reasonably conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date.”).

## CONCLUSION

Respondents’ proposed constructions are supported by the intrinsic and extrinsic evidence and should be adopted.

Dated: November 29, 2022

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Celina M. Moo-Penn, hereby certify that on November 29, 2022, copies of the foregoing document were filed and served upon the following parties as indicated:

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