UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

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

CORRECTED ORDER NO. 28:[1] CONSTRUING CERTAIN TERMS OF THE ASSERTED CLAIMS (*MARKMAN* CLAIM CONSTRUCTION)

(March 27, 2023)

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[1] Only a correction to the date has been made in this corrected version of Order No. 28.

HASBRO 2013
GEL BLASTER v. HASBRO
IPR2023-00302

Table of Abbreviations

Compl.	Complaint
CMBr.	Complainants' *Markman* Brief
RMBr.	Respondents' *Markman* Brief
SMBr.	Staff's *Markman* Brief
CRMBr.	Complainants' Reply *Markman* Brief
RRMBr.	Respondents' Reply *Markman* Brief
SRMBr.	Staff's Reply *Markman* Brief
CXM	Complainants' *Markman* Exhibit
RXM	Respondents' *Markman* Exhibit
SXM	Staff's *Markman* Exhibit
JXM	Joint *Markman* Exhibit
MHr'g Tr.	*Markman* Hearing Transcript

I. BACKGROUND

On August 25, 2022, the Commission instituted this Investigation pursuant to subsection (b) of Section 337 of the Tariff Act of 1930, as amended, to determine:

> whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of one or more of claims 1-15 and 17-21 of the '282 patent and claims 1-6 and 10-15 of the '683 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337[.][2]

87 Fed. Reg. 52595 (Aug. 26, 2022).

The Notice of Investigation ("NOI") names as complainants: Hasbro, Inc. of Pawtucket, RI and Spin Master, Inc. of Los Angeles, CA (collectively, "Complainants"). *Id.* The NOI names as respondents: (i) Shenzhen Yi Jin Electronics Science of Shenzhen City, Guangdong Province, China; Guangdong Yu Lee Technology of Dongguan City, Guangdong Province, China; Yu Lee Company Ltd of Hong Kong; and Gel Blaster, Inc. of Austin, TX ("Gel Blaster Respondents"); (ii) S-Beam Precision Products Ltd. of Zhongshan City, Guangdong Province, China; Daisy Manufacturing Company of Rogers, AK; and Splat-R-Ball, LLC or Rogers, AK ("Splat-R-Ball Respondents"); and (iii) Prime Time Toys Ltd. of Hong Kong SAR; Prime Time Toys LLC of Pompton Lakes, NJ; and Easebon Services Ltd. of Hong Kong SAR ("PTT Respondents") (collectively, "Respondents," and with Complainants, the "Private Parties"). *Id.* Commission Investigative Staff ("Staff," and with the Private Parties, the "Parties") is also a party in this Investigation. *Id.* at 52595-96.

On October 18, 2022, pursuant to Order No. 6 ("Adopted Procedural Schedule"), the Parties filed a Joint Claim Construction Chart ("JCCC"). (Doc. ID No. 782596 (Oct. 18, 2022).).

[2] The asserted patents are U.S. Patent No. 8,371,282 ("the '282 patent") and U.S. Patent No. 8,640,683 ("the '683 patent," and with the '282 patent, the "Asserted Patents").

The JCCC contains 8 disputed claim terms recited in certain asserted claims of the Asserted Patents. (*Id.*).

Additionally, each of the Parties filed a *Markman* Brief. (Doc. ID No. 783646 (Nov. 2, 2022) (CMBr.); Doc. ID No. 783649 (Nov. 2, 2022) (RMBr.); Doc. ID No. 783647 (Nov. 2, 2022) (SMBr.).).

Pursuant to Order No. 12, a *Markman* hearing was held on November 17, 2022 ("*Markman* Hearing"). (Order No. 12 (Nov. 10, 2022); *see also* Doc. ID No. 784788 (Nov. 18, 2022) (MHr'g Tr.).).

On November 22, 2022, the Parties filed a Post-Hearing Joint Claim Construction Chart ("PH JCCC"). (Doc. ID No. 785045 (Nov. 22, 2022).). The PH JCCC contains 8 disputed claim terms upon on which the proposed constructions referenced in this Order are based.

In compliance with instructions given during the *Markman* hearing, each of the Parties filed a reply *Markman* brief. (Doc. ID No. 785334 (Nov. 29, 2022) (CRMBr.); Doc. ID No. 785338 (Nov. 29, 2022) (RRMBr.); Doc. ID No. 785335 (Nov. 29, 2022) (SRMBr.); MHr'g Tr. at 162:6-12.).

Complainants filed two unopposed motions to partially terminate this Investigation by withdrawing certain claims. (Motion Docket Nos. 1325-004 (Oct. 24, 2022), 1325-011 (Jan. 10, 2023).). In their first motion, Complainants sought to withdraw claims 1-2, 4-5, 7, 9-12 and 18 of the '282 patent and claims 13 and 15 of the '683 patent. (Motion Docket Nos. 1325-004 (Oct. 24, 2022).). In their second motion, Complainants sought to withdraw claims 3, 13-15, 17, and 21 of the '282 patent and claims 2-4, 6, 10, and 12 of the '683 patent. (Motion Docket No. 1325-011 (Jan. 10, 2023) at 1.). Both motions were granted. (Order Nos. 10 (Oct. 25, 2022), 21 (Jan. 18, 2023).). Thus, the following claims remain at issue in this Investigation:

- ’282 patent: claims 6, 8, 19, and 20.
- ’683 patent: claims 1, 5, 11, and 14.

As a result, only the following four claim terms are in dispute:

- ’282 patent: (i) “super absorbent polymer”; and (ii) “ammunition configured for use with a projectile launcher.”
- ’683 patent: (i) “super absorbent polymer”; and (ii) “a firing mechanism that directly applies a force to the ammunition.”

II. APPLICABLE LAW

Claim construction begins with the language of the claims themselves. Claims should be given their ordinary and customary meaning as understood by a person of ordinary skill in the art, viewing the claim terms in the context of the entire patent. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312-13 (Fed. Cir. 2005). In some cases, the plain and ordinary meaning of claim language is readily apparent and claim construction will involve little more than “the application of the widely-accepted meaning of commonly understood words.” *Id.* at 1314. In other cases, claim terms have a specialized meaning and it is necessary to determine what a person of ordinary skill in the art would have understood disputed claim language to mean by analyzing “the words of the claims themselves, the remainder of the specification, the prosecution history, and extrinsic evidence concerning relevant scientific principles, as well as the meaning of technical terms, and the state of the art.” *Id*. (quoting *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1116 (Fed. Cir. 2004)).

The claims themselves provide substantial guidance with regard to the meaning of disputed claim language. *Phillips*, 415 F.3d at 1314. “[T]he context in which a term is used in the asserted claim can be highly instructive.” *Id.* Similarly, other claims of the patent at issue, regardless of whether they have been asserted against respondents, may show the scope and meaning of disputed claim language. *Id.*

In cases in which the meaning of a disputed claim term in the context of the patent's claims is uncertain, the specification is the "single best guide to the meaning of a disputed term." *Id.* at 1321. Moreover, "[t]he construction that stays true to the claim language and most naturally aligns with the patent's description of the invention will be, in the end, the correct construction." *Id*. at 1316. As a general rule, however, the particular examples or embodiments discussed in the specification are not to be read into the claims as limitations. *Id.* at 1323.

The prosecution history may also explain the meaning of claim language, although "it often lacks the clarity of the specification and thus is less useful for claim construction purposes." *Id.* at 1317. The prosecution history consists of the complete record of the patent examination proceedings before the U.S. Patent and Trademark Office ("PTO"), including cited prior art. *Id.* The prosecution history may reveal "how the inventor understood the invention and whether the inventor limited the invention in the course of prosecution, making the claim scope narrower than it would otherwise be." *Id.*

If the intrinsic evidence is insufficient to establish the clear meaning of a claim, a court may resort to an examination of the extrinsic evidence. *Zodiac Pool Care, Inc. v. Hoffinger Indus., Inc.*, 206 F.3d 1408, 1414 (Fed. Cir. 2000). Extrinsic evidence may shed light on the relevant art, and "consists of all evidence external to the patent and prosecution history, including expert and inventor testimony, dictionaries, and learned treatises." *Phillips*, 415 F.3d at 1317. In evaluating expert testimony, a court should disregard any expert testimony that is conclusory or "clearly at odds with the claim construction mandated by the claims themselves, the written description, and the prosecution history, in other words, with the written record of the patent." (*Id*. at 1318.). Moreover, expert testimony is only of assistance if, with respect to the disputed claim language, it identifies what the accepted meaning in the field would be to one

skilled in the art. *Symantec Corp. v. Comput. Assocs. Int'l, Inc.*, 522 F.3d 1279, 1289 n.3., 1290-91 (Fed. Cir. 2008). Testimony that recites how each expert would construe the term should be accorded little or no weight. *Id*. Extrinsic evidence is inherently "less reliable" than intrinsic evidence, and "is unlikely to result in a reliable interpretation of patent claim scope unless considered in the context of the intrinsic evidence." *Phillips*, 415 F.3d at 1318-19.

Extrinsic evidence is a last resort: "[i]n those cases where the public record unambiguously describes the scope of the patented invention, reliance on any extrinsic evidence is improper." *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1583 (Fed. Cir. 1996).

III. THE ASSERTED PATENTS AND CLAIMS AT ISSUE

A. The '282 Patent

The '282 patent, entitled "Soft-Projectile Launching Device," was filed on May 10, 2010, as U.S. Patent Application Serial No. 12/777,134 ("the '134 application"). (JXM-0001 ('282 patent) at (21), (22), (54).). The '282 patent issued on February 12, 2013, and names Keith G. Meggs, Ronald Brawer, Michael G. Hoeting, and Neil Hamilton as the inventors. (*Id.* at (45), (75).). Spin Master, Inc. is the current valid assignee of the '282 patent. (*See, e.g.*, Compl. at ¶ 29; *see also id.* at Ex. 3 (assignments).). Hasbro, Inc. is the exclusive licensee of the '282 patent. (*Id.* at ¶ 29; *see also id.* at Ex. 5 (license agreement).).

The '282 patent is generally directed to ammunition for a projectile launching device that is made from hydrated super absorbent polymers (SAP). (JXM-0001 at cl. 1; *see also* Compl. at ¶ 31.). SAPs are polymers that can absorb an extremely large amount of water relative to their own mass. (JXM-0001 at 3:41-44; *see also* Compl. at ¶ 31.). The '282 patent describes that properly designed SAPs are more suitable ammunition in projectile launching devices (e.g., to improve conventional NERF® "blasters" as discussed in the patent) and have advantages compared to projectiles for gaming projectile launching devices that were previously known,

such as paint balls, plastics, and foams. (JXM-0001 at 1:13-60, 1:64-66; *see also* Compl. at ¶ 31.).

The ’282 patent describes the safety benefits of SAP ammunition as compared to paint balls and plastics (e.g., as found in “airsoft” guns). (JXM-0001 at 3:3-6; *see also* Compl. at ¶ 32.). For example, the ’282 patent describes that certain SAP projectiles have beneficial characteristics for use in a projectile launcher used for gaming, in part because SAPs break down at different pressures based on their composition. (JXM-0001 at 3:62-65; *see also* Compl. at ¶ 32.). In one claimed improvement, hydrated SAP projectiles have sufficient cross-linking density such that they are projected from a projectile launching device without breaking apart. (JXM-0001 at 3:67-4:11; *see also* Compl. at ¶ 32.). At the same time, because hydrated SAP projectiles rupture when subjected to excessive pressure, such as when impacting a target after being launched from a projectile launcher, the force at impact is spread over a much wider surface area, thus reducing the likelihood of injury when the target is a person. (*See, e.g.*, JX-0001 at 3:45-4:17.).

B. The ’683 Patent

The ’683 patent, also entitled “Soft-Projectile Launching Device,” was filed on February 6, 2013, as U.S. Patent Application Serial No. 13/761,082 (“the ’082 application”). (JXM-0003 (’683 patent) at (21), (22), (54).). The ’683 patent issued on February 4, 2014, and like the ’282 patent, names Keith G. Meggs, Ronald Brawer, Michael G. Hoeting, and Neil Hamilton as the inventors. (*Id.* at (45), (72).). The ’082 application is a divisional of the ’134 application, which issued as the ’282 patent. (*Id.* at (62).). Like the ’282 patent, Spin Master, Inc. is the current valid assignee of the ’683 patent. (*See, e.g.*, Compl. at ¶ 37; *see also id.* at Exs. 4 and 3A-3E (assignments).). Hasbro, Inc. is the exclusive licensee of the ’683 patent. (*Id.* at ¶ 37; *see also id.* at Ex. 5 (license agreement).).

Similar to the ’283 patent, the’683 patent is generally directed to a projectile launching system including ammunition made from a hydrated SAP. (*Id.* at ¶ 39.). The ’683 patent shares the same specification as the ’282 patent and thus contains the same disclosures as the ’282 patent. (*Id.* at ¶ 40; *see also id.* at ¶¶ 41-42.).

IV. PERSON OF ORDINARY SKILL IN THE ART

A. Legal Standard

A hypothetical person is a person of ordinary skill and “ordinary creativity.” *KSB Int’l Co. v. Teleflex, Inc.*, 550 U.S. 398, 420 (2007). “Factors that may be considered in determining [the] level of ordinary skill in the art include: (1) the educational level of the inventor[s]; (2) type of problems encountered in the art; (3) prior art solutions to the problems; (4) rapidity with which inventions are made; (5) sophistication of the technology; and (6) educational level of active workers in the field.” *Envtl. Designs Ltd. v. Union Oil Co. of California*, 713 F.2d 693, 696-97 (Fed. Cir. 1983) (citations omitted). “These factors are not exhaustive but merely a guide to determining the level of ordinary skill in the art.” *Daiichi Sankyo Co. v. Apotex, Inc.*, 501 F.3d 1254, 1256 (Fed. Cir. 2007).). The hypothetical person of skill is also separately presumed to have knowledge of all the relevant prior art in the field. *Custom Accessories, Inc. v. Jeffrey-Allan Indus., Inc.*, 807 F.2d 693, 697 (Fed. Cir. 1983).

B. The Adopted Definition

Complainants proposed that a person of ordinary skill in the art 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.” (CMBr. at 4.). Complainants also stated that

"equivalent work experience may substitute for educational experience, and vice versa." (*Id.*).

Respondents proposed that a person of ordinary skill in the art would be "(i) an individual with a Bachelor's degree in Industrial Design or Mechanical Engineering or (ii) a toy designer with at least five years' experience designing toys (including launchers), with both of (i) and (ii) having access to a chemist knowledgeable regarding super absorbent polymers." (RMBr. at 14.).

Staff proposed the following definition:

> A person of ordinary skill in the art would have (i) a Bachelor's degree in Mechanical Engineering, Industrial Design, or the equivalent, with at least one year of experience designing toys (including projectile launching systems), or (ii) at least five years of experience designing toys (including projectile launching systems), with both of (i) and (ii) having experience collaborating with individuals with material science or chemistry backgrounds.

(SMBr. at 4.).

As Staff and Respondents note, the three (3) proposed definitions are similar. (*Id.*; RMBr. at 15.). Any differences among the definitions will have little, if any, effect on the claim construction analysis. Thus, all of the proposals are appropriate for a person of ordinary skill in the art for the Asserted Patents.

V. ADOPTED CLAIM TERMS

A. The '282 Patent

1. "super absorbent polymer"[3] (claim 1)[4]

Complainants' Proposed Construction	Respondents' Proposed Construction	Staff's Proposed Construction	Adopted Construction
Plain and ordinary meaning, i.e., "polymer that can	PTT and Splat-R-Ball: No construction necessary; term of art	No construction necessary; term of art known to those	Plain and ordinary meaning, i.e., "polymer that can

[3] The adopted construction and analysis provided below also applies to the same claim term for the '683 patent. Accordingly, there is no separate discussion for this claim term with respect to the '683 patent.

[4] The remaining asserted claims all ultimately depend from claim 1 of the '282 patent.

absorb an extremely large amount of liquid relative to its own mass"	known to those skilled in the art at the time of the alleged invention Gel Blaster: Indefinite	skilled in the art at the time of the alleged invention	absorb an extremely large amount of liquid relative to its own mass"

Complainants' proposed construction of "super absorbent polymer," i.e., "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. Splat-R-Ball Respondents, PTT Respondents, and Staff acknowledge that the term is known to those skilled in the art at the time of the invention. However, as Complainants note, their proposals do not provide guidance concerning what is and is not a SAP. (CMBr. at 4-5.). Gel Blaster Respondents contend that the term is indefinite. To the contrary, intrinsic and extrinsic evidence (including Gel Blaster's own marketing materials) indicate that it is a common term with a commonly understood meaning. For the following reasons, Complainants' proposed definition is adopted.

Sufficient 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 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"); SXM-0008 (Water-Absorbent Polymers: A Patent Survey) at 607 ("Water-absorbent polymers or hydrogels, sometimes defined as superabsorbent polymers (SAP) in the literature, are water-insoluble hydrophilic polymers, able to swell and absorb amounts of water, saline solutions, or physiological fluids as high as 10-1000 times their own weight.").). Additionally, Complainants' construction is consistent with what a person of ordinary skill would understand the term SAP to mean. (CMBr., Ex. 1 (Decl. of Gerald G. Fuller ("Fuller Decl")) at ¶¶ 20-24.).[5]

Gel Blaster Respondents' argument that the term is indefinite disregards the breadth of literature in the field at the time of the invention. At the time of the invention, SAPs were already widely known and used for their super absorbent properties. As noted in the '282 patent, 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 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 inconsistence 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."); CMBr, Ex. 1 (Fuller Decl.) at ¶¶ 19, 21.). Thus, by the time of the '282 and '683 patents, i.e., 2010, a person of ordinary skill would have been familiar with SAP materials.

[5] Complainants retained Dr. Gerald G. Fuller as a technical expert to "render opinions on the proper constructions of certain terms of the patents-in-suit." (CMBr., Ex. 1 (Fuller Decl.) at ¶ 2.).

Moreover, one of ordinary skill would have understood the bounds of what it means to be super absorbent with reasonable certainty. (CMBr., Ex. 1 (Fuller Decl.) at ¶¶ 23-24.). Complainants provided extrinsic evidence which demonstrates that a SAP can absorb liquid anywhere between ten (10) times to a thousand (1,000) 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*** of their original weight or volume) in relatively short periods of time[.]") (emphasis added); CXM-0015 (U.S. Patent App. Pub. No. 2006/0069367) at [0005] (defining a SAP as "a water-insoluble but water-swellable 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") (emphasis added); 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)");[6] 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.") (emphasis added).).

It follows, based on this evidence, that because "the scope of a claim would be reasonably ascertainable by those skilled in the art, then the claim is not indefinite." *Bose Corp. v. JBL, Inc.*, 274 F.3d 1354, 1359 (Fed. Cir. 2001). Therefore, the Gel Blaster Respondents' argument that the term is indefinite fails.

Notably, Gel Blaster Respondents presented extrinsic evidence which confirms the same commonly-understood properties of SAPs identified above. For example, Gel Blaster

[6] 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%. (CMBr., Ex. 1 (Fuller Decl.) at ¶¶ 23-24.).

Respondents 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 Respondents' own extrinsic evidence is consistent with Complainants' extrinsic evidence that demonstrates that one of ordinary skill would have understood with reasonable certainty that a SAP can absorb liquid ten to a thousand times of its own mass.

Gel Blaster Respondents 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. (RMBr. at 30-31 (citing, 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 Respondents also point to a preferred embodiment in the specification which discloses that SAP projectiles "may absorb 500 times their weight, and from 30-60 times their dehydrated volume." (*Id.* at 28 (citing JXM-0001 at 4:57-59).).

However, as Complainants note, these specific examples of SAPs do not render the term indefinite. First, these ranges are consistent with Complainants' proposed construction and the extrinsic evidence, that is, a SAP can absorb "an extremely large amount of liquid relative to its own mass," anywhere between 10 times to 1,000 times of the polymer's own mass. Gel Blaster Respondents' 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. Again, Gel Blaster Respondents' examples are consistent with Complainants' proposed construction and the 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 (quoting *Nevro Corp. v. Bos. Sci. Corp.*, 955 F.3d 35, 41 (Fed. Cir. 2020)) (Sept. 26, 2022). 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 (quoting *Guangdong Alison*, 936 F.3d at 1363) (other citations omitted). Thus, the mere fact that other documentation may point to different, but not inconsistent, ranges of the amount of liquid a SAP can absorb cannot constitute "clear and convincing" evidence of indefiniteness. *See, e.g.*, *Cox Commc'ns, Inc. v. Sprint Commc'ns Co., LP*, 838 F.3d 1224, 1228 (Fed. Cir. 2016).

Splat-R-Ball and PTT Respondents and Staff propose that the term "super absorbent polymer" be given its plain and ordinary meaning without any clarification, which Complainants dispute. Although Complainants agree the term "super absorbent polymer" has a well-understood meaning in the industry, Complainants disagree that no clarification is warranted. Splat-R-Ball and PTT Respondents and Staff's failure to explain what they believe the plain and

ordinary meaning of "super absorbent polymer" is and their unwillingness to adopt Complainants' proposed construction, which flows directly from the specification and is supported by the evidence, indicates there is an underlying claim construction dispute. Where the scope of a claim term is disputed, the trial court should provide a construction. *See, e.g.*, *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.").

For the foregoing reasons, "super absorbent polymer" is given its plain and ordinary meaning, i.e., "polymer that can absorb an extremely large amount of liquid relative to its own mass."

2. "ammunition configured for use with a projectile launcher" (claim 1)

Complainants' Proposed Construction	**Respondents' Proposed Construction**	**Staff's Proposed Construction**	**Adopted Construction**
Limiting	Preamble of claim 1 is not limiting as to claims 6, 8, 13, 14, 15, 17, 19, 20, and 21[7] Preamble of claim 1 is limiting for dependent claim 3[8]	Limiting	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 also agree that the preamble of claim 1 is

[7] The remaining dependent claims are claims 6, 8, 19, and 20.

[8] Since Complainants withdrew claim 3 (*see* Order No. 21), Respondents' position with respect to this claim is moot.

limiting for dependent claim 3, but they disagree that it is limiting with respect to the rest of the dependent claims. Respondents' proposal is rejected because it is contrary to the intrinsic evidence and Federal Circuit precedent.

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. Research 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. U.S.*, 748 F. App'x 301, 306 (Fed. Cir. 2018).

That is the case here. The preamble of claim 1 recites "[a]mmunition configured for use with a projectile launcher . . . ." (JXM-0001 at 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 . . . ."). The preamble of claim 1 also provides antecedent basis for claims 13, 14, 15, 17, 19, 20, and 21 because these claims all depend from claim 8.

Similarly, the term "projectile launcher" provides the antecedent basis for the term "projectile launcher" that is 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 . . . ."). Thus, the preamble of claim 1 is limiting because it provides an 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."). Moreover, there is sufficient evidence to find that the preamble is limiting not only with respect to claim 1 but all dependent claims. *See C.W. Zumbiel Co. v. Kappos*, 702 F.3d 1371, 1385 (Fed. Cir. 2012) (the Federal Circuit noted "that the preamble constitutes a limitation when the claim(s) depend on it for antecedent basis").

Additionally, the file history of the '282 patent, and in particular, prosecution of claim 31 (issued claim 1), supports Complainants' proposed construction. *See Univ. of S. Fla., Bd. of Trustees v. U.S.*, 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."). On March 16, 2012, the applicants amended the application and added the following new application claim 31 (issued claim 1):

> 31. (New) Ammunition for a projectile launcher comprising:
>
> a plurality of soft-projectiles having the same shape, each soft projectile being formed from hydrated super absorbent polymer.

(JXM-0002 at 73 (First Preliminary Amendment) (Mar. 16, 2012).).

On April 13, 2012, the examiner issued an Office Action that subjected application claim 31 and other claims to a restriction requirement. (*Id.* 86-87 (Office Action) (Apr. 13, 2012).). On October 8, 2012, the examiner held a telephone interview with applicants' counsel. (*Id.* at 173 (Notice of Allowability) (Oct. 11, 2012).). With authorization from applicants' counsel, the

examiner then amended the preamble of application claim 31 as follows[9] and allowed the claim:

> 31. 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.

(*Id.*).

The examiner's amendment of claim 32 (issued claim 2) also indicates that the preamble of claim 1 provided antecedent basis for the term "projectile launcher."

> 32. The ammunition of claim 31, wherein the ammunition is disposed within a feed chamber of ~~a~~ the projectile launcher.

(*Id.*).

These amendments demonstrate the examiner's and the patentee's reliance on the preamble in allowing the claimed invention, and that the claim drafter and examiner considered the preamble as a necessary limitation that gives meaning to the claim. *In re Cruciferous Sprout Litig.*, 301 F.3d 1343, 1347–48 (Fed. Cir. 2002) (holding that preamble was limiting in light of arguments made during prosecution "show[ing] a clear reliance by the patentee on the preamble to persuade the Patent Office that the claimed invention is not anticipated by the prior art"). Thus, the preamble of claim 1 was 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); *Comput. Docking Station Corp. v. Dell, Inc.*, 519 F.3d 1366, 1375 (Fed. Cir. 2008).

The specification of the '282 patent also supports the conclusion that the preamble of claim 1 is limiting. The claimed invention concerns a projectile launching device, i.e., a projectile launcher. (*See, e.g.*, JXM-0001 at Abstract ("A device for projecting a soft-

[9] Underlined words were added during prosecution. Stricken words were deleted during prosecution.

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 . . . ."). Specifically, 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 is 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*, 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").

Respondents agree with Complainants and Staff that the preamble of claim 1 is limiting for dependent claim 3 because the preamble provides antecedent basis for "the projectile launcher" recited in claim 3: "The ammunition of claim 2, wherein the feed chamber is in selective communication with a barrel of ***the*** projectile launcher." (RMBr. at 35 (emphasis in original).). However, Respondents argue that the preamble is not limiting for dependent claims 6 and 8 because "a projectile launcher" does not provide an antecedent basis for these claims. (*Id.*). Respondents' argument is not only inconsistent with the intrinsic evidence discussed above but also contradicts the law.

For example, in *Pacing Technologies, LLC v. Garmin International, Inc.*, 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., LLC v. Garmin Int'l, Inc.*, 7778 F.3d 1021, 1024 (Fed. Cir. 2015). Thus, the Federal Circuit found that providing antecedent basis for a dependent claim renders the preamble of the independent claim from which the dependent claim depends also limiting. In *Deere & Co. v. Bush Hog, LLC*, the Federal Circuit found a phrase in the preamble limiting as to claim 1 (and therefore all dependent claims) because of the intrinsic evidence and the fact that the phrase provided antecedent basis for the same phrase in one dependent claim. *Deere*, 703 F.3d at 1357-58.

Furthermore, in *Bio-Rad Laboratories., Inc. v. 10X Genomics Inc.*, the Federal Circuit was "disinclined to sanction finding a preamble 'partially' limiting by splicing it as the district court did" based on District Court's reasoning that preamble was limiting only to the extent that it provided an antecedent basis for certain claim terms. *Bio-Rad Labs., Inc. v. 10X Genomics Inc.*, 967 F.3d 1353, 1371 (Fed. Cir. 2020).

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

B. The '683 Patent

1. "super absorbent polymer" (claim 1)[10]

Complainants' Proposed Construction	Respondents' Proposed Construction	Staff's Proposed Construction	Adopted Construction
Plain and ordinary meaning, i.e., "polymer that can	PTT and Splat-R-Ball: No construction necessary; term of art	No construction necessary; term of art known to those	Plain and ordinary meaning, i.e., "polymer that can

[10] *See* n.2, *supra*.

absorb an extremely large amount of liquid relative to its own mass"	known to those skilled in the art at the time of the alleged invention Gel Blaster: Indefinite	skilled in the art at the time of the alleged invention	absorb an extremely large amount of liquid relative to its own mass"

2. "a firing mechanism that directly applies a force to the ammunition" (claim 14)

Complainants' Proposed Construction	Respondents' Proposed Construction	Staff's Proposed Construction	Adopted Construction
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	Plain and ordinary meaning, i.e. "a firing mechanism that directly applies a force to the ammunition"

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, seek to read a negative limitation into the claim, i.e., "not via an intermediary."[11] Respondents' proposed construction renders 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 claim 14 or the specification of the '683 patent precludes the claimed firing

[11] Respondents' proposed construction appears to be based on a different claim limitation: "a firing mechanism that ***indirectly*** applies a force." (JXM-0001 at cl. 18 (emphasis added); JXM-0003 at cl. 15 (emphasis added).). The claims containing this "indirectly" limitation are no longer asserted. (*See* Order No. 10.). However, Complainants originally proposed that the limitation be construed according to its plain and ordinary meaning to mean "a firing mechanism that applies a force to a soft-projectile via an intermediary." (*See* SMBr. at 17; RMBr. at 45.).

mechanism from applying a direct force and an indirect force to a soft-projectile or ammunition. The claim is an open-ended "comprising" claim. Thus, by claiming one type of force (direct), it, by definition, does 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 Comput. Corp.*, 812 F.3d 1313, 1321 (Fed. Cir. 2016). 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." (JX-0003 at cl. 14 (emphases added).). Claim 14 does not recite a limitation that prevents the firing mechanism from applying both a direct and an indirect force onto the soft-projectile. (*Id.*).

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). Complainants explain that when Complainants met and conferred on 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. (CMBr. at 23.). However, as Complainants note, the presence of such an intermediary does not preclude the firing mechanism from applying other forces (including direct forces) to the projectile. (*Id.* at 23-24.). The preferred embodiments should not 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.”).

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. Similarly, there is no suggestion of such a disavowal of claim scope. *See, e.g.*, *Convolve*, 812 F.3d at 1321 (noting that “absent a clear intent in the claims themselves, the specification, or the prosecution history, we interpret ‘a processor’ as ‘one or more processors’”).

Respondents rely on *Medicines Co. v. Mylan, Inc.* for their contention that the claims should be limited to the specific embodiments where the firing mechanism applies only a direct or an indirect force. (RMBr. at 50 (citing *Medicines Co. v. Mylan, Inc.*, 853 F.3d 1296, 1309 (Fed. Cir. 2017); MHr’g Tr. at 149:10-16.). However, *Medicines* does not support Respondents’ proposed construction. There, the issue was what “efficient mixing” meant in the context of different examples in the specification that described both “efficient mixing” and “inefficient mixing.” *Medicines*, 853 F.3d at 1309. Here, the issue is not what “direct force” means. As Staff notes, there is no claim construction dispute as to what it means to “directly” apply a force to a projectile. (SRMBr. at 1 (citing CDX-0001 at 50 (“No dispute about what it means to ‘directly’ apply a force.”)); MHr’g Tr. at 130:17-19 (Respondents’ counsel stating that “based on what Complainants have put in their slides, there’s not really a dispute as to the meaning of ‘directly’ either”)).).

At issue here is what the overall claim means in the context of Respondents’ proposed construction and whether Respondents’ introduction of a negative limitation is proper. (*See*

MHr'g Tr. at 135:14-136:1.). Respondents have not pointed to any language in the intrinsic record to support a negative limitation. Notably, in *Medicines*, the Federal Circuit rejected the district court's negative construction of "efficient mixing" as "not using inefficient mixing conditions such as described in Example 4." *Medicines*, 853 F.3d at 1308. The Federal Circuit explained that "[a]lthough there is no *per se* rule against negative constructions, . . . Medicines' argument [criticizing the district court's negative construction] carries some force." *Id.* (internal citation omitted). That is the case here.

Moreover, Complainants acknowledge this Court's *Markman* ruling in *Certain Blowers and Components Thereof*, Inv. No. 337-TA-1217, where the term "direct contact" was construed to not mean or include "indirect contact." (CRMBr. at 18 (citing *Certain Blowers and Components Thereof*, Inv. No. 337-TA-1217, Order No. 23 at 1 (July 13, 2021).). That finding is not inconsistent with Complainants' proposed construction here. As Complainants note, they do not contend that "directly" means or includes "indirectly." (*Id.*). Based on the plain language of the claim, Complainants agree that a projectile launcher meets the claims if it includes firing mechanism that applies a direct force. (*Id.*). However, Complainants argue that the projectile launcher should not somehow be taken outside of these claims if the firing mechanism ***also*** applies an indirect force (e.g., via an intermediary). (*Id.*). Again, nothing in the specification or prosecution history suggests that this claim, which requires a "direct" force, affirmatively precludes the presence of a separate, indirect force.

For the foregoing reasons, "a firing mechanism that directly applies a force to the ammunition" is given its plain and ordinary meaning, i.e., "a firing mechanism that directly applies a force to the ammunition."

VI. TERMS CONSTRUED IN THIS ORDER

Claim terms are construed in this Order solely for the purposes of this Section 337

Investigation. Only claim terms in controversy need to be construed, and then only to the extent necessary to resolve the controversy. *Vanderlande Indus. Nederland BV v. Int'l Trade Comm.*, 366 F.3d 1311, 1323 (Fed. Cir. 2004); *Vivid Tech., Inc. v. Am. Sci. & Eng'g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999).

As the Investigation proceeds, including during the evidentiary hearing ("Hearing") scheduled to be held **May 17-19 and 22-23, 2023**, the Parties will be limited to the constructions adopted in this Order. Ground Rule 1.14 states that "[t]he parties will be bound by their claim construction positions set forth on the date they are required to submit a joint list showing each party's final proposed construction of the disputed claim terms and will not be permitted to alter these absent a timely showing of good cause." Modified or new constructions set forth for the first time in post-hearing briefs will be considered waived unless a party agrees with the other on a construction, thereby conceding its position.

Similarly, it will not be appropriate for any party to seek additional claim construction during the Hearing or merely to state that a claim term that may be implicated in an expert report or expert testimony has either a "plain or ordinary" meaning. (*See* G.R. 1.14.). If any party posits a "plain and ordinary meaning," it must be explained with a detailed rationale. (Order No. 9 at 2.). More to the point, there should not be any new, let alone previously disclosed claim terms that have an alleged "plain and ordinary" meaning without clear explanations. *Ipse dixit* arguments are not sufficient.

VII. PROCEEDINGS GOING FORWARD

A. Supplementation in Response to This Order

The Parties may not file supplemental expert reports in response to this Order. No additional discovery will be permitted because of this Order. No re-argument of the claims construed in this Order may occur.

As the Parties proceed in this Investigation, they will be expected to notify Chambers of any issues that have become moot or have been eliminated for any reason through a filing on EDIS. The Parties' required outlines that must identify any issues, claims, defenses, prior art, theories, or any other content that was originally asserted or argued, should identify all issues or contentions and claims that have been dropped or become moot for any reason.

The Parties should redact from expert reports and from any other documents upon which they intend to rely any issues, claims, defenses, prior art, theories, or any other content that has been rendered moot or disallowed as a result of this or other Orders, or termination from this Investigation of patent claims or allegations. The Parties must file on EDIS any expert reports or other documents upon which they intend to rely that have been redacted for the reasons stated above, and send copies to Chambers via McNamara337@usitc.gov.

B. Streamlining the Investigation

To the extent that this *Markman* Order will enable the Parties to streamline the Investigation, the Parties are encouraged to resolve promptly each issue in this Investigation for which there is no reasonable dispute or little, or weak, evidentiary support.

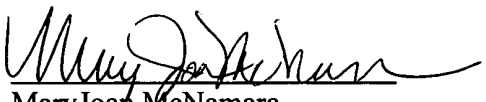
C. Settlement

It is strongly recommended that the Parties take informal opportunities to engage in settlement.

VIII. CONCLUSION

Constructions of the disputed claim terms are hereby adopted by this Order.

SO ORDERED.



MaryJoan McNamara
Administrative Law Judge

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the parties listed have entered an appearance in the above captioned investigation, and a copy of the PUBLIC CERTIFICATE OF SERVICE was served upon the following parties via first class mail and air mail where necessary.

Document	Security	Document Type	Official Rec'd Date	Title
793639	Public	Order	04/04/2023 12:03 PM	(Corrected) Construing Certain Terms of the Asserted Claims (Markman Claim Construction)

Service Date: April 04, 2023

/s/

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