

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

NINGDE AMPEREX TECHNOLOGY
LIMITED,

Plaintiff,

v.

ZHUHAI COSMX BATTERY CO., LTD.,

Defendant.

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Civil Action No.: 2:22-CV-232

JURY TRIAL DEMANDED

**PATENT RULE 4-3 JOINT CLAIM CONSTRUCTION CHART AND
PREHEARING STATEMENT**

Pursuant to Rule 4-3 of the Local Patent Rules (“P.R.”) of the Eastern District of Texas and the Docket Control Order governing this action (Dkt. No. 60), Plaintiff Ningde Amperex Technology Limited (“ATL”) and Defendant Zhuhai CosMX Battery Co., Ltd. (“CosMX”) have met and conferred and hereby submit this Joint Claim Construction Chart and Prehearing Statement Concerning U.S. Patent No. 11,329,352 (the “’352 Patent”), U.S. Patent No. 10,833,363 (the “’363 Patent”), and U.S. Patent No. 10,964,987 (the “’987 Patent”) (collectively, the “Asserted Patents”).

I. PATENT RULE 4-3(A)(1): CLAIM TERMS ON WHICH THE PARTIES AGREE

The parties agree that no terms in the ’352 Patent require construction.

The parties agree that the term “dv90” as used in the ’987 Patent means “a particle size which reaches 90% of the cumulative volume from the side of small particle size in the granularity distribution on a volume basis,” but disagree whether this term and the claim phrase in which it appears are indefinite.

II. PATENT RULE 4-3(A)(2): PROPOSED CONSTRUCTIONS ON DISPUTED TERMS

ATL’s and CosMX’s proposed claim construction or indefiniteness position for each disputed claim term, phrase, or clause, together with an identification of all references from the specification or prosecution history that support that position, and an identification of any extrinsic evidence known to the party on which it intends to rely either to support its position or to oppose any other party’s position, including, but not limited to, as permitted by law, dictionary definitions, citations to learned treatises and prior art, and testimony of percipient and expert witnesses, is provided in **Appendix A**. All parties reserve the right to rely upon any intrinsic or extrinsic evidence identified by any other party, and any evidence obtained through claim construction discovery.

III. PATENT RULE 4-3(A)(3): ANTICIPATED LENGTH OF CLAIM CONSTRUCTION HEARING

The parties anticipate that the claim construction hearing will take approximately 1-2 hours.

IV. PATENT RULE 4-3(A)(4): LIVE WITNESSES AT THE CLAIM CONSTRUCTION HEARING

The parties do not anticipate calling any live witnesses at the claim construction hearing.

V. PATENT RULES 4-3(A)(5): PREHEARING CONFERENCE

The parties have not identified any other issues which might appropriately be taken up at a prehearing conference prior to the claim construction hearing.

DATED: May 23, 2023

Respectfully submitted,

By: /s/ Michael D. Powell

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Counsel for Defendant Zhuhai CosMX Battery Co., Ltd.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on May 23, 2023, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3).

/s/ Michael D. Powell

Michael D. Powell

QUINN EMANUEL URQUHART & SULLIVAN LLP

Appendix A

Patent	Term	ATL's Proposed Construction and Evidence	CosMX's Proposed Construction and Evidence
10,964,987	"a ratio of Dv90 of the inorganic particles to the thickness of the porous layer is in a range from 0.3 to 3.0" (claim 1)	<u>Proposed Construction:</u> Plain and ordinary meaning. <u>Intrinsic Evidence:</u> Abstract; 1:48-56; 3:57-66; 5:13-61; 10:44-61; 11:10-13:3; Table 1; 15:26-59; Claim 1; Claim 10; 1/15/2020 Non-Final Rejection (ATL_COSMX_00001989-94); 4/10/2020 Applicant Remarks (ATL_COSMX_00001985-88); 8/4/2020 Non-Final Rejection (ATL_COSMX_00001931-39); 11/4/2020 Applicant Remarks (ATL_COSMX_00001907-17); 12/18/2020 Notice of Allowance (ATL_COSMX_00001886-94); 1/22/2021 Notice of Allowance (ATL_COSMX_00001858-64). <u>Extrinsic Evidence:</u> Declaration and/or testimony of Dr. Adam Cohn concerning the '987 Patent.	<u>Proposed Construction:</u> Indefinite. Defendant asserts the '987 patent claims are indefinite because the '987 patent does not inform ordinary artisans how to measure Dv90 and the results can differ depending on how it is measured, as identified in Defendant's January 19, 2023 Invalidity Contentions. <u>Intrinsic Evidence:</u> Abstract; 1:1-10; 1:11-34; 1:36-56; 2:1-6; 3:5-21; 3:34-4: 47; 5:1-61; 10:6-13:3; Table 1; 13:35-14:67; Table 2; 15:26-59; 16:12-17; Figures 1-4; Claims 1-17; 1/15/2020 Non-Final Rejection (ATL_COSMX_00001989-94); 4/10/2020 Applicant Remarks (ATL_COSMX_00001985-88); 4/20/2020 Final Rejection (ATL_COSMX_00001974-80); 6/19/2020 Claim Amendments and Remarks (ATL_COSMX_00001966-72); 6/29/2020 Advisory Action (ATL_COSMX_00001958-61); 7/20/2020 Claim Amendments and Remarks (ATL_COSMX_00001949-56); 8/4/2020 Non-Final Rejection (ATL_COSMX_00001931-39); 11/4/2020 Claim Amendments and Applicant Remarks (ATL_COSMX_00001907-17); 12/18/2020 Notice of Allowance (ATL_COSMX_00001886-94); 1/22/2021 Notice of Allowance (ATL_COSMX_00001858-64).

Patent	Term	ATL's Proposed Construction and Evidence	CosMX's Proposed Construction and Evidence
			<u>Extrinsic Evidence:</u> Prior art listed in Defendant CosMX's invalidity contentions, including Schmitz (COSMX_ATL_00001727-39), Iwai (COSMX_ATL_00002006-18), Akiike (COSMX_ATL_00001758-80), Katayama (COSMX_ATL_00001561-74), Ueki (COSMX_ATL_00001979-93), and/or Nishikawa (COSMX_ATL_00001781-99); Plaintiff ATL's infringement contentions; testimony of Plaintiff, Jianjian Yi, Xinzhi Zhang, Zengbin Wei, and/or Xinghua Tao concerning the '987 patent, including its claims and disclosures and the underlying technology; Prosecution History of Chinese Application 201810321779.5A (COSMX_ATL_00003248-3451) (COSMX_ATL_02248127-213 (TR)); declaration and/or testimony of Dr. Seth Miller concerning the '987 patent, Dv90, particle size distribution measurement techniques, separator materials, including inorganic particles, and their properties and measurement techniques; M. Li et al., <i>Comparison of Particle Size Distributions Measured Using Different Techniques</i>, Particulate Sci. and Tech., 13:265-284 (2005) ("Li 2005") (COSMX_ATL_002247183-203), Henk. G. Merkus, <i>Particle Size Measurements: Fundamentals, Practice, Quality</i>, (2009) ("Merkus") (COSMX_ATL_02247417-951); X. Jia & E. Garboczi, <i>Advances in shape measurement in the digital world</i>, 26 Particuology (2016) ("Jia 2016") (COSMX_ATL_02247967-79); J. Grubbs et al, <i>Comparison of laser diffraction and image analysis techniques for particle size-shape characterization in additive manufacturing applications</i>, 391 Powder Technology (2021) ("Grubbs 2021") (COSMX_ATL_02247980-93); Whiting et al., <i>A comparison of particle size distribution and morphology data acquired</i>

Patent	Term	ATL's Proposed Construction and Evidence	CosMX's Proposed Construction and Evidence
			<i>using lab-based and commercially available techniques: Application to stainless steel powder</i>, 396 Powder Technology 648 (2022) (“Whiting 2022”) (COSMX_ATL_02247952-66); A.P. Tinke et al., <i>Particle shape and orientation in laser diffraction and static image analysis size distribution analysis of micrometer sized rectangular particles</i>, 186 Powder Technology 154 (2008) (“Tinke 2008”) (COSMX_ATL_02247382-95); ASTM E1617-97 (“ASTM 1997”) (COSMX_ATL_02248107-09); ASTM E1617-09 (Reapproved 2014) (“ASTM 2014”) (COSMX_ATL_02248093-99); ASTM E1617-09 (Reapproved 2019) (“ASTM 2019”) (COSMX_ATL_02248100-06); Kelly et al, <i>Commercial Reference Shape Standards Use in the Study of Particle Shape Effect on Laser Diffraction Particle Size Analysis</i>, 7(2) AAPS PharmSciTech E1, (2006) (“Kelly 2006”) (COSMX_ATL_02247396-407); Patchigolla and Wilkinson, <i>Crystal Shape Characterisation of Dry Samples using Microscopic and Dynamic Image Analysis</i> (2009) (“Patchigolla 2009”) (COSMX_ATL_02248055-62); Rühle et al, <i>Workflow towards automated segmentation of agglomerated, non-spherical particles from electron microscopy images using artificial neural networks</i> (2021) (“Rühle 2021”) (COSMX_ATL_02248063-72); Naito et al., <i>Effect of particle shape on the particle size distribution measured with commercial equipment</i>, 100 Powder Technology 52 (1998) (“Naito 1998”) (COSMX_ATL_02247408-16); Raymond Chang, <i>General Chemistry</i> 13-18 (5th ed. 2008) (“Chang”) (COSMX_ATL_02248073-92); U.S. Patent Application No. 2019/0305278 A1 to Saeki et al. (“Saeki”)

Patent	Term	ATL's Proposed Construction and Evidence	CosMX's Proposed Construction and Evidence
			(COSMX_ATL_02248021-54); "Commercial Magnesium Oxide" (https://tateho-chemical.com/products/puremag.html) (COSMX_ATL_02247994-8001); "Commercial Magnesium Hydroxide" (https://tateho-chemical.com/products/puremag-fnm.html) (COSMX_ATL_02248002-09); "Commercial Boehmite" (https://nabaltec.de/fileadmin/user_upload/03_produkte/03-3_boehmit/TDS_Boehmite_LIBS.pdf) (COSMX_ATL_02248019-20); "Commercial Alumina" (https://www.nikkeikin.com/highpurityalumina/ahp200.html) (COSMX_ATL_02248010); Zhang et al., <i>Fast Synthesis of Gibbsite Nanoplates and Process Optimization using Box-Behnken Experimental Design</i>, 17 (12) <i>Crystal Growth & Design</i> 6801 (2017) ("Zhang 2017") (COSMX_ATL_02248011-18); Zhang et al., <i>Size and Morphology Controlled Synthesis of Boehmite Nanoplates and Crystal Growth Mechanisms</i>, 18 <i>Crystal Growth & Design</i> 3596 (2018) ("Zhang 2018") (COSMX_ATL_02248110-20); A. Jilavenkatesa et al, <i>NIST Recommended Practice Guide: Particle Size Characterization</i> (2001) ("Jilavenkatesa" or "NIST") (COSMX_ATL_002247204-379), and materials cited therein.
10,833,363	"dinitrile compound" (claim 1)	<u>Proposed Construction:</u> Plain and ordinary meaning. <u>Intrinsic Evidence:</u> 01:37-56 06:50-07:33 Claims 1-3, 13, 16	<u>Proposed Construction:</u> Plain and ordinary meaning, which is "a compound with two cyano groups" <u>Intrinsic Evidence:</u> Abstract; 1:37-56; 6:50-7:33;

Patent	Term	ATL's Proposed Construction and Evidence	CosMX's Proposed Construction and Evidence
		<u>Extrinsic Evidence:</u> <i>Nitrile</i>, Hawley's Condensed Chemical Dictionary (16th Ed. 2016) (ATL_COSMX_00037776-78) <i>Nitrile</i>, Oxford University Press Dictionary of Chemistry (7th Ed., 2016) (ATL_COSMX_00037779-81)	24:51-67; 26:66-27:20; Table 1-1; Table 1-2; Table 2; Claims 1-3, 13, 16; 5/26/2020 Non-Final Rejection (ATL_COSMX_00000717-30); 8/25/2020 Applicant Remarks (ATL_COSMX_00000705-15); 9/22/2020 Notice of Allowability (ATL_COSMX_00000686-93) <u>Extrinsic Evidence:</u> Prior art listed in Defendant CosMX's invalidity contentions, including Hong (COSMX_ATL_00001499-509; COSMX_ATL_00003876-87(TR)), Kim '268 (COSMX_ATL_00001836-51), Kim '934 (COSMX_ATL_00001781-99), Ohashi (COSMX_ATL_00001852-76), Tang '036 (COSMX_ATL_00003609-26; COSMX_ATL_00003578-608(TR)), Tang '432 (COSMX_ATL_00002149-62; COSMX_ATL_00002131-48(TR)), Wang '007 (COSMX_ATL_00002453-64), Wang '269 (COSMX_ATL_00002190-203; COSMX_ATL_00002163-89(TR)), Wu (COSMX_ATL_00002578-81; COSMX_ATL_00002582-92(TR)), Xu (COSMX_ATL_00003452-567), Yao (COSMX_ATL_00002593-96; COSMX_ATL_00002597-601(TR)), Zeng (COSMX_ATL_00001490-98; COSMX_ATL_00003627-42(TR)), Zhi (COSMX_ATL_00002019-24), and/or Zhuang

Patent	Term	ATL's Proposed Construction and Evidence	CosMX's Proposed Construction and Evidence
			(COSMX_ATL_00002465-79); Plaintiff ATL's infringement contentions; testimony of Plaintiff, Kefei Wang, Qiao Zeng, Liangzhen Xiao, and/or Fei Wu concerning the '363 patent, including its claims and disclosures and the underlying technology; Hawley's Condensed Chemical Dictionary (16th ed. 2016) (ATL_COSMX_00037776-78; COSMX_ATL_02248121-26); Oxford University Press Dictionary of Chemistry (7th ed., 2016) (ATL_COSMX_00037779-81); Raymond Chang, General Chemistry 43-51 (5th ed. 2008) (COSMX_ATL_02248073-92); declaration and/or testimony of Dr. Seth Miller, concerning organic chemistry, including compound nomenclature, identification, and measurements thereof.
10,833,363	"trinitrile compound" (claim 1)	<u>Proposed Construction:</u> Plain and ordinary meaning. <u>Intrinsic Evidence:</u> 01:37-56 07:34-08:21 Claims 1, 4, 5, 13, 16 <u>Extrinsic Evidence:</u> <i>Nitrile</i>, Hawley's Condensed Chemical Dictionary (16th Ed. 2016) (ATL_COSMX_00037776-78) <i>Nitrile</i>, Oxford University Press Dictionary of Chemistry (7th Ed., 2016) (ATL_COSMX_00037779-81)	<u>Proposed Construction:</u> Plain and ordinary meaning, which is "a compound with three cyano groups" <u>Intrinsic Evidence:</u> Abstract; 1:37-56; 7:34-8:21 24:51-67 26:66-27:20; Table 1-1; Table 1-2; Table 2; Claims 1, 4, 5, 13, 16; 5/26/2020 Non-Final Rejection (ATL_COSMX_00000717-30); 8/25/2020 Applicant Remarks (ATL_COSMX_00000705-

Patent	Term	ATL's Proposed Construction and Evidence	CosMX's Proposed Construction and Evidence
			15); 9/22/2020 Notice of Allowability (ATL_COSMX_00000686-93) <u>Extrinsic Evidence:</u> Hong (COSMX_ATL_00001499-509; COSMX_ATL_00003876-87(TR)), Kim '268 (COSMX_ATL_00001836-51), Kim '934 (COSMX_ATL_00001781-99), Ohashi (COSMX_ATL_00001852-76), Tang '036 (COSMX_ATL_00003609-26; COSMX_ATL_00003578-608(TR)), Tang '432 (COSMX_ATL_00002149-62; COSMX_ATL_00002131-48(TR)), Wang '007 (COSMX_ATL_00002453-64), Wang '269 (COSMX_ATL_00002190-203; COSMX_ATL_00002163-89(TR)), Wu (COSMX_ATL_00002578-81; COSMX_ATL_00002582-92(TR)), Xu (COSMX_ATL_00003452-567), Yao (COSMX_ATL_00002593-96; COSMX_ATL_00002597-601(TR)), Zeng (COSMX_ATL_00001490-98; COSMX_ATL_00003627-42(TR)), Zhi (COSMX_ATL_00002019-24), and/or Zhuang (COSMX_ATL_00002465-79); Plaintiff ATL's infringement contentions; testimony of Plaintiff, Kefei Wang, Qiao Zeng, Liangzhen Xiao, and/or Fei Wu concerning the '363 patent, including its claims and disclosures and the underlying technology; Hawley's Condensed Chemical Dictionary (16th ed. 2016) (ATL_COSMX_00037776-78; COSMX_ATL_02248121-26); Oxford University Press Dictionary of Chemistry (7th ed., 2016) (ATL_COSMX_00037779-81); Raymond Chang, General Chemistry 43-51 (5th ed. 2008) (COSMX_ATL_02248073-92);

Patent	Term	ATL's Proposed Construction and Evidence	CosMX's Proposed Construction and Evidence
			declaration and/or testimony of Dr. Seth Miller, concerning organic chemistry, including compound nomenclature, identification, and measurements thereof.