IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Neo Wireless LLC, Plaintiff, v. Dell Technologies Inc. and Dell Inc., Defendants.	C.A. NO. 1:22-cv-60-DAE JURY TRIAL DEMANDED

PLAINTIFF NEO WIRELESS LLC'S RESPONSE TO DEFENDANTS'
SUPPLEMENTAL CLAIM CONSTRUCTION BRIEF

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I. INTRODUCTION

Dell's "supplemental" briefing on claim construction adds nothing to the parties' briefing that concluded in December. Instead, Dell injects unnecessary confusion to issues that were already fully fleshed out, or raises non-issues that were properly ignored, in the initial claim construction briefing. The statements by Neo that form the basis of Dell's brief are not "recent,' but were made over five months ago, in December 2021. Yet, Dell failed to mention anything about Neo's POPRs, let alone indicate its desire for additional briefing, until the parties exchanged draft Scheduling Recommendations on **April 21, 2022**. This new brief is just Dell's latest effort to push back adjudication on the meaning of the claims and delay the progress of the case.

Indeed, the issues Dell raises were immaterial until an opportunity for delay arose. Dell complains that it did not have the opportunity to address Neo's POPR statements because they were filed after Dell's Reply Claim Construction Brief. Dkt. 83 ("Suppl.") at 1 n.1. But the record reflects that Dell had ample opportunity and time to raise these issues well before now. For example, had this case not been transferred on January 20, 2022, the parties were due to attend a Markman hearing before Judge Albright just days later on January 26th. Yet Dell had never once raised these allegedly "new" issues between the December POPRs and the imminent January hearing. Dell was prepared to attend the Markman hearing without ever alerting Judge Albright to these supposedly critical developments. Moreover, once the case was transferred, Dell elected to wait over two months to finally raise the issue in the Scheduling Recommendation phase (when, for all Dell knew, the Court may have been actively resolving the parties' previously briefed Markman disputes without a hearing). This was also nearly two months after Dell filed its Motion to Stay the case, which included citing the same POPRs in

support. *See* Dkt. 68, Exs. I and K. In the end, Neo is grateful for the opportunity to more fully brief the claim construction disputes the Court must decide, but the fact that Dell never raised these "new" issues sooner casts significant doubt on their materiality.

In any case, Dell's suggestion that Neo's arguments in the IPRs, which simply and properly ***responded to Dell's new arguments raised in those IPRs***, somehow "contradicted" Neo's "position in the district court" makes no sense. *See Vivid Techs., Inc. v. Am. Sci. & Eng'g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999) (claim terms need be construed in a case "only to the extent necessary to resolve the controversy" raised in that case). In the IPRs, Neo explained the plain and ordinary meaning of the claim language to the extent necessary to respond to Dell's IPR arguments, but any alleged "contradictions" are manufactured by Dell. Dell cherry picks a few lines from lengthy POPRs, takes them out of context, and argues that Neo somehow limited the scope of the claims. But when placed in the proper context and applying the proper legal standard, Neo's statements were entirely consistent with its claim construction positions in this Court, and provide no support for Dell's constructions. Instead, as further evidenced in the prior briefing, Dell's constructions are overly narrow, inconsistent with the plain and ordinary meaning, and would serve only to introduce confusion in the jury's understanding of the claim elements.

II. LEGAL PRINCIPLES

"[T]he words of a claim 'are generally given their ordinary and customary meaning' ... that [they] would have to a person of ordinary skill in the art in question at the time of the invention." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–13 (Fed.Cir.2005) (en banc) (quoting *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed.Cir.1996)) "Absent a special and particular definition created by the patent applicant, terms in a claim are to be given their

ordinary and accustomed meaning." *Renishaw PLC v. Marposs Societa Per Azioni*, 158 F.3d 1243, 1249 (Fed. Cir. 1998). And "the ordinary and accustomed meaning of a disputed claim term is presumed to be the correct one . . . ." *K-2 Corp. v. Salomon S.A.*, 191 F.3d 1356, 1362–63 (Fed. Cir. 1999)

The doctrine of prosecution disclaimer precludes a patentee "from recapturing through claim interpretation specific meanings disclaimed during prosecution." *Opticurrent, LLC v. Power Integrations, Inc.*, No. 2021-1712, 2022 WL 539158, at *5 (Fed. Cir. Feb. 23, 2022) (quoting *Omega Eng'g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1323 (Fed. Cir. 2003)). To invoke prosecution history disclaimer, the patentee's disavowal of claim scope must "be both clear and unmistakable." *Omega Eng'g*, 334 F.3d at 1326. "An ambiguous disclaimer" will not "limit a claim term's ordinary meaning." *SanDisk Corp. v. Memorex Prods., Inc.*, 415 F.3d 1278, 1287 (Fed. Cir. 2005). That is, if an IPR "argument is subject to more than one reasonable interpretation, one of which is consistent with a proffered meaning of the disputed term," then there is no "clear and unmistakable" disclaimer. *Id.*; *Aylus Networks, Inc. v. Apple Inc.*, 856 F.3d 1353 (Fed. Cir. 2017); *see also SEVEN Networks, LLC v. Apple Inc.*, No. 2:19-CV-115-JRG, 2020 WL 1536152 at *10–11 (E.D. Tex. Mar. 31, 2020) (rejecting theory of prosecution history disclaimer after finding IPR statements immaterial to defendant's proposed construction).

III. ARGUMENT

A. Disputed Terms from U.S. Patent No. 10,075,941

1. *"the mobile station-specific transmission parameters indicate […] a corresponding subchannel configuration […] the corresponding subchannel configuration characterized by distributed subcarriers or localized subcarriers in the frequency domain"*

Dell	The mobile station-specific transmission parameters indicate whether the subchannels are either distributed subcarriers, or localized subcarriers in the frequency domain
Neo Wireless	Plain and ordinary meaning, and no construction necessary.

Dell's claim construction is improper because neither Neo's POPR statements nor the prosecution history qualify as prosecution history disclaimer. Contrary to Dell's characterizations, Neo's position has been clear from the start:

> Neo does not dispute that the claim requires the **parameters be capable of indicating** (alternatively) both a distributed and localized subcarrier configuration. But **nothing in the plain language of the claim requires a separate piece of information** indicating which has been chosen.

Dkt. 45 ("Resp.") at 23 (emphasis added). And Dell has acknowledged that the core dispute between the parties relates to that last sentence: whether the claims require a "separate piece of information" or "affirmative indication" of a distributed/localized configuration:

> The **only dispute** remaining is **whether the transmission parameters must affirmatively indicate this feature**. Dell maintains that the prosecution history requires **an affirmative indication** of whether the subcarriers are distributed or localized.

Dkt. 48 ("Reply") at 13 (emphasis added).

Neo has *never* argued, in prosecution, prior briefing, or the IPRs, that the claims require a separate piece of information or affirmative indication, and Dell does not point to any instance where Neo has used those words, or others like them. Instead, as it did in its prior briefing with respect to the original prosecution history, Dell intentionally sows confusion around Neo's mere use of the word "whether," and argues that the use of the word "whether," regardless of the specific context, unequivocally implies an "affirmative indication." But this is all hand-waving. In truth, the core claim construction dispute (whether there is an "affirmative indication" or not) bears only a tangential relation to the prosecution history and Neo's POPR statements. Indeed,

all Neo did in its POPR was to explain the scope of the claim's plain and ordinary meaning with respect to localized versus distributed subcarriers *generally*, without commenting at all on the concept of a separate piece of information designating one or the other. Dkt. 68-9 ('941 POPR) at 23–27.

Neo's original briefing explained how the earlier prosecution history did not constitute prosecution history disclaimer to require the "affirmative" indication of "localized" or "distributed" subcarriers. Resp. at 23–24; Dkt. 54 ("Sur-Reply") at 11–13. In particular, the patentee in prosecution distinguished the Wilson reference by pointing out that "Wilson is solely directed to the transmission of pilot information." Resp. at 23–24 (quoting Dkt. 44-4 at 9). The only clear distinction made in the prosecution history is that pilot information alone does not disclose the subchannel configuration information required by the claims—for example, because pilot information could not be "characterized by distributed subcarriers or localized subcarriers." *Id*. In contrast, transmission parameters that *do* indicate a subchannel configuration can be so characterized based on the allocation of resources across the subcarriers determined by subchannel configuration. *Id*. In other words, Wilson did not disclose the *option* of localized versus distributed subcarriers at all. Thus, as highlighted in the earlier briefing, the specific requirement Dell attempts to impose is not implicated in this prosecution history, since that distinction was irrelevant to the patentee's statements distinguishing Wilson. *Id*.

Neo's statements in the '941 POPR are similarly disjoint from Dell's alleged disclaimer arguments. Like Wilson, the IPR prior art reference "Airy is not said to use *any* particular configuration of subcarriers." Dkt. 68-9 at 27. Thus, "Airy does not disclose whether a mobile device's subcarriers are localized …; or distributed …; or, for that matter, neither of the above."

Id. at 25.[1] This statement merely points out the obvious: if Airy does not disclose any type of grouping, it cannot disclose "transmission parameters [that] indicate […] a corresponding subchannel configuration," particularly where that configuration is "characterized by distributed subcarriers or localized subcarriers in the frequency domain," as recited in claim 1.

And as with the earlier prosecution history, these statements do not rise to the level of disclaimer or otherwise justify Dell's position. In the context of the entire section of the POPR, Neo's statements distinguish Airy in the same way as Wilson. That is, neither Airy nor Wilson disclose anything about subcarrier configurations, and thus do not disclose transmission parameters indicating any subcarrier configuration, regardless of that configuration being characterized as a localized or distributed configuration. This is precisely what Neo meant when it said "*Airy* [that is, the prior art reference] does not disclose whether [the subcarriers are localized or distributed]." But Dell would have the Court believe that Neo actually meant "Airy does not meet *the patent's requirement that a separate piece of information must indicate* whether the subcarriers are localized or distributed." This is simply wrong for the reasons above. But regardless of Dell's interpretation, Neo's statements are subject to a reasonable interpretation consistent with Neo's claim construction position, and therefore cannot constitute disclaimer. *See SanDisk Corp. v. Memorex Prods., Inc.*, 415 F.3d 1278, 1287 (Fed. Cir. 2005) (if an "argument

[1] Dell's additional briefing attempts to segregate this specific sentence in Neo's POPR as an entirely separate ground of distinction of the claims over Airy. *See* Suppl. at 7. But in reality, it is part of a singular argument mirroring the earlier prosecution history statements over Wilson: "The Petition's Theory Can Be Distinguished In The Same Way As In The Original Prosecution Because Petitioner, Here, Offers No Reason To Send A Transmission Parameter With The Subchannel Configuration In A System That Is Said To Have Only One Configuration," as that section of the POPR is titled. Accordingly, this is not an argument where a patentee or patent owner distinguishes the alleged prior art from that limitation in multiple, distinct ways in the IPR POPR. *See e.g., SpeedTrack Inc. v. Amazon.com,* 998 F.3d 1373, 1380 (Fed. Cir. 2021).

is subject to more than one reasonable interpretation, one of which is consistent with a proffered meaning of the disputed term," then there is no "clear and unmistakable" disclaimer).

Furthermore, Dell's arguments are undercut by its overreliance on statements by the IPR panel, rather than Neo. For example, Dell discusses the IPR panel's interpretation of the claim. But even this interpretation does not align with Dell's requested construction. On its face, it uses the same words, "indicate whether," but the Panel does not address what Dell identifies as the "only dispute": whether "the transmission parameters" affirmatively specify "localized" or "distributed" as a separate piece of information. In particular, the panel's denial of institution, states:

> Based on the language of claim 1 when viewed in the context of the '941 patent's Specification, we understand the argued limitation to require that the mobile station-specific transmission parameters contained in the control message **would indicate[] 'a corresponding subchannel configuration,'** ***<u>and as such</u>***, would indicate whether the subchannel configuration for a subsequent transmission is either 'characterized by distributed subcarriers or localized subcarriers in the frequency domain.'

Suppl., Ex. F at 15 (emphasis added). In other words, the Panel specifically acknowledged that the characteristic of localized or distributed subcarriers could be inherently indicated ("as such") based only on the indicated subchannel configuration. But under Dell's proposal, the claim would expressly exclude the PTAB's contemplated embodiment by requiring "the transmission parameters must affirmatively indicate" localized or distributed subcarriers. *See SynQor, Inc. v. Artesyn Techs*., Inc., 709 F.3d 1365, 1378–79 (Fed. Cir. 2013) ("A claim construction that 'excludes the preferred embodiment is rarely, if ever, correct and would require highly persuasive evidentiary support.'" (quoting *Adams Respiratory Therapeutics, Inc. v. Perrigo Co.*, 616 F.3d 1283, 1290 (Fed. Cir. 2010))).

Lastly, Dell's reliance on the panel's use of the dictionary definition of "indicate" is misplaced. Even if indicate did mean "to state or express briefly" in the context of this patent, the actual claim language just requires, in pertinent part, that the transmission parameters "indicate" *a subchannel configuration*, and that said subchannel configuration is "*characterized*" by distributed or localized subcarriers. Thus, the claims do not even expressly require parameters that "indicate" the localized/distributed election—that election is an ancillary "characteri[stic]" of the indicated subchannel configuration, consistent with Neo's position. It also bears noting that neither party in the IPR took claim construction positions or briefed any specific claim terms. As such, the Panel interpreted the claims in light of arguments made with respect to the limited challenges to patentability and specific art refences. In contrast, the Court will have the benefit of the full briefing by the parties are terms identified by the parties as being relevant to the adjudication of this case. And while dictionary definitions, especially technical dictionary definitions, have been used in claim construction, primacy is given to the intrinsic record, which does not support Dell's strained and preclusive definition.

B. Disputed Terms from U.S. Patent No. 10,447,450

Dell's Supplemental Briefing uses the additional space to not only introduce two, entirely new '450 patent claim terms for construction, but also uses those additional terms to justify Dell's rewriting of a third term. Again, Neo's POPR statements do not rise to the level of prosecution disclaimer, nor are Dell's newly proposed constructions helpful to a jury in actually understanding the meaning of the terms. As such, Neo requests each of the three terms be given their plain and ordinary meaning consistent with Neo's statements and earlier claim construction briefing.

1. "time-frequency coordinate" – claim 7

Dell	A coordinate having a combined one-dimensional measurement of time and frequency that transforms separate time and frequency measurements, instead of having separate time and frequency measurements.
Neo Wireless	Plain and ordinary meaning, and no construction necessary.

2. ""time-frequency resource unit" – claim 7

Dell	A resource unit having a combined one-dimensional measurement of time and frequency that transforms separate time and frequency measurements, instead of having separate time and frequency measurements.
Neo Wireless	Plain and ordinary meaning, and no construction necessary.

As apparent from Dell's briefing, these first two terms are brand new, being absent from the parties' earlier identification of terms, exchange of proposals, and briefing. Dell is now attempting to rewrite the claims based on a flawed interpretation of Neo's statements in its '450 POPR. Instead, the Court should give these terms their plain and ordinary meanings, which are readily apparent on the face of the terms. In particular, a "time-frequency coordinate" is a coordinate which indicates a location in both time and frequency space. Similarly, a "time-frequency resource unit" is a resource unit having both time and frequency dimensions. There is no need for Dell's tortured constructions to explain these meanings to a jury nor to define the boundary of infringement. *See Interactive Gift Exp., Inc. v. Compuserve Inc.*, 256 F.3d 1323, 1331 (Fed. Cir. 2001) ("If the claim language is clear on its face, then our consideration of the rest of the intrinsic evidence is restricted to determining if a deviation from the clear language of the claims is specified.").

Neo's POPR statements are consistent with the plain meaning on the face of these claim terms. In short, Neo's POPR explained that an art reference disclosing two separate values, a starting time value and a starting frequency value, does not disclose a "starting time-frequency coordinate" because it did not disclose a coordinate which specified the starting location in both

time and frequency. Dkt. 68-11 ('450 POPR) at 12–13. The POPR further explains how the '450 patent accomplishes this, for example, by using predefined structures in time-frequency dimensions, in a way that results in less overhead. *Id.* at 13–15. And of course, the POPR tied this to the benefit of the '450 patent's inventions—by adopting the use of "time-frequency" coordinates and resource elements, there is no need to send multiple separate parameters for time and frequency, as was required in Dell's art reference. *See, e.g.*, *id.* at 8–10. Accordingly, the statements Dell attempts to rely on merely reflect the plain and ordinary meaning of the terms as described above. *See SanDisk Corp.*, 415 F.3d at 1287 (no "clear and unmistakable" disclaimer if statements consistent with a proffered meaning of the term).

Dell's arguments also fail to explain how Neo's statements allegedly disclaim claim scope in a way that is consistent with Dell's proposed constructions. Dell begins with the premise (which Neo does not dispute in the abstract) that "a time-frequency resource unit having one combined dimension is part of the claims." Suppl. at 8 (quotations omitted). But Dell's proposed construction goes much further, and introduces specific additional elements like "measurement" and "transform[ation]" that will only lead to confusion. Dell presents a false dichotomy: either "time-frequency coordinate" encompasses two separate time and frequency coordinates, or it must be interpreted according to Dell's overly convoluted proposed constructions. But, as outlined above, the plain and ordinary meaning of these terms, without further complexity, is compatible with Neo's POPR statements. And again, it was Dell's choice to present those art references in the IPRs without any proposed claim constructions. Accordingly, Dell's proposed constructions should be rejected for at least the reason that Dell cannot show Neo's statements amount to a disclaimer that supports Dell's proposed constructions at all.

The Court should further reject Dell's proposed constructions because they are both internally inconsistent and incongruous with the rest of the claim in which they are found. For example, Dell proposes the same construction for "time-frequency coordinate" and "time-frequency resource unit" except for the words "coordinate" and "resource unit." And as a result, Dell's proposed constructions merely cram in new words into the claim while simultaneously offering the jury no guidance as to the difference between a "coordinate" and a "resource unit" — the words that actually appear in the claim and the only words that are different between the two claim terms. It is further unclear how Dell would explain that a "coordinate" or "resource unit" has a "one dimensional *measurement* of time and frequency."

Not only did Dell fail to propose coherent constructions, Dell's constructions also do not make sense in context of the surrounding claim language.

For example, claim 7 of the '450 patent states:

> 7. A mobile device in a wireless packet system using a frame structure of multiple frames for transmission, each frame comprising a plurality of time intervals, each time interval comprising a plurality of orthogonal frequency division multiplexing (OFDM) symbols, and each OFDM symbol containing a plurality of frequency subcarriers, the mobile device configured to:
>
> receive an identifier from a base station in a cell in which the mobile device is operating; and
>
> receive a signal containing information from the base station over a segment of time-frequency resource, the segment having a starting **time-frequency coordinate** and the segment comprising N **time-frequency resource units** within a time interval, each unit containing a set of frequency subcarriers in a group of OFDM symbols, where N=2, 4, or 8; and
>
> recover the information from the received signal using the **starting time-frequency coordinate** and N in conjunction with the received identifier.

’450 Patent at 13:15–33 (emphasis added). As laid out in the claim, the mobile device receives a signal over a segment of time-frequency resource and the segment has a “starting time-frequency coordinate.” The claim further specifies that the segment has “N time-frequency resources units within a time interval . . . .” The mobile device can recover the information from the signal “using the starting time-frequency coordinate” with other pieces of information. Attempting to reconcile Dell’s construction into this framework, such as by substituting the proposed construction into the claim itself, is simply unworkable. The introduction of the “transforms” and “measurement” language creates uncertainty about what is needed to show infringement (or invalidity). In contrast, leaving the claim language as it was originally written provides transparency as to what the claim is directed towards and what is required for infringement.

3. “the segment having a starting time-frequency coordinate”

Dell	Information that identifies the starting time-frequency offset for the segment
Neo Wireless	Plain and ordinary meaning, and no construction necessary.

Most of what Dell argues for this term in its supplemental briefing is merely rehashing the arguments presented in the original set of briefing. *See* Suppl. at 11–13. But that does not change the fact that Dell’s proposed construction is inconsistent with the plain and ordinary meaning. Specifically, it rewrites the claim element to require the additional limitation where the “segment” must “have the identifier—not just the physical property.” Reply at 14–15. This is wrong. As explained by Neo:

> . . . the claim language is clear—there is a segment of time-frequency resource,” and that segment “ha[s] a “starting time-frequency coordinate” and “compris[es] N time-frequency resource units.” . . . [I]t does not follow that the recited mobile device obtains the “starting time-frequency coordinate” as a unique piece of data.

Sur-Reply at 12–13. Additionally, Dell has continued to fail to justify the inclusion of the word "offset" in its construction, which appears nowhere in the claims and only in Dell's citation of Neo's POPR statement's description of previously known techniques. Accordingly, Dell's proposed construction should be rejected as unnecessary and inconsistent with the plain language of the claim element.

Moreover, none of Neo's statements in the POPR justify Dell's proposed construction. Neo argued in the POPR that the prior art failed to disclose the entire concept of a "time-frequency coordinate," which the '450 patent uses instead of separate time and frequency coordinates. Dkt. 68-11 at 11–17. This is entirely consistent with Neo's argument in this Court that this coordinate need not be communicated as a separate piece of information, and can instead be derived from the transmitted segment itself.

Dell's argument to the contrary is befuddling. If Neo can understand it, Dell seems to contend that since "it [is] possible to derive a combined starting coordinate for the prior art," Suppl. at 14, but Neo nevertheless argued that the prior art lacks the claimed starting time-frequency coordinate, it follows that Neo has conceded that the coordinate needs to be something more than merely a derivation—that is, it must be separately communicated piece of information. *Id.* at 13–14. But this is a complete red herring, and Dell's first premise is incorrect. The fact that two *separate* values in the prior art could be derived and then *theoretically* combined to create the composite coordinate of the claimed system is not sufficient to show that the prior art in fact discloses such a coordinate. On the contrary, Neo's argument in the POPR was precisely the opposite—that the prior art did *not* contemplate a composite coordinate (that would combine time and frequency into a single dimension) at all, however it might be obtained,

and thus could not meet this claim limitation according to either Neo's or Dell's constructions.[2] That is, regardless of whether the time-frequency coordinate is supposed to be derived from the segment or communicated as an explicit piece of information, the concept of a time-frequency coordinate did not *exist* in the cited art, and thus the claim was not met. Accordingly, Neo's position in the POPR was completely agnostic regarding the current dispute. There was certainly no clear and unmistakable disclaimer of claim scope supporting Dell's narrow construction, particularly given that even Dell's attempt to explain the alleged disclaimer is far from clear.

For at least these reasons, the term, "the segment having a starting time-frequency coordinate" should be given its plain and ordinary meaning and Dell's unnecessarily narrow proposed construction should be rejected.

IV. CONCLUSION

As demonstrated above, none of the statements Dell points to constitute prosecution history disclaimer. Accordingly, Dell's arguments and proposed constructions relying on those statements should be rejected. And, as explained in the earlier set of briefs, Dell's proposed constructions introduce unnecessary limitations and wording that limits the claims to exclude covered embodiments and typically introduce contradictions into the claims. Dell's proposed constructions should be further rejected as being inconsistent with the plain and ordinary meaning of the claim elements and failing to provide any benefit to the jury in understanding the scope of the claims.

Neo respectfully requests the Court accord these terms their plain and ordinary meanings.

[2] The PTAB agreed, and specifically rejected that the separate time and frequency starting offset disclosed a "starting time-frequency coordinate." Suppl., Ex. G at 27. The PTAB found that Dell's art references teach "only of independent time and frequency coordinates and independent time and frequency units akin to those described in the Background section of the '450 patent. *Id.* at 26.

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CERTIFICATE OF SERVICE

The undersigned certifies that counsel of record is being served with a copy of the foregoing document via the Court's CM/ECF system on this 8th day of June, 2022.

/s/ *Jason D. Cassady*
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