

**UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON DC**

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

In the Matter of

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

Investigation No. 337-TA-1325

**RESPONDENTS' OPPOSITION TO COMPLAINANTS'
MOTION FOR SUMMARY DETERMINATION [EDIS No. 792610]**

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Abbreviation	Description
Mot.	Complainants' Brief in support of their Motion for Summary Judgment [EDIS No. 792610]
CSMF	Complainants' Statement of Material Facts
RSMF	Respondents' Statement of Material Facts
RCSMF	Respondents' Responses to Complainants' Statement of Material Facts
RMSD	Respondents' Brief in support of their Motion for Summary Judgment [EDIS No. 792634-2]
JCCB	Joint Claim Construction Brief (EDIS No. 782596)
COMB	Complainants' Opening <i>Markman</i> Brief (EDIS No. 783646)
ROMB	Respondents' Opening <i>Markman</i> Brief (EDIS No. 783649)
CRMB	Complainants' Reply <i>Markman</i> Brief (EDIS No. 785334)
RRMB	Respondents' Reply <i>Markman</i> Brief (EDIS No. 785338)
POSITA	Person of Ordinary Skill in the Art
SAP	Super Absorbent Polymer

I. INTRODUCTION

Complainants are correct there is a legal dispute over the meaning of “super absorbent polymer” (SAP)—which appears in each Asserted Claim¹—and that the resolution of this dispute is a legal question for the ALJ. But Complainants’ legal arguments fail, and it is Respondents, not Complainants, who are entitled to Summary Determination of *noninfringement*, as set forth in Respondents’ co-pending Motion for Summary Determination. Specifically, as explained therein, the intrinsic evidence—which is consistent with the term’s plain and ordinary meaning—makes clear that a person having ordinary skill in the art at the time of the alleged invention (“POSITA”) would understand “extremely large” in the Court’s construction of SAP (adopted hours before this brief was filed, Order 28 at 14) to require a minimum absorption of hundreds of times its own weight in water. Complainants concede, and there is no genuine dispute, that all of the accused products’ ammunition absorb far less than 100 times their own weight in water. Therefore, under any proposed construction, summary determination of non-infringement is warranted, and Complainants’ motion should be denied.

Perhaps recognizing the weakness of their position on the merits of the absorption level required for the claimed SAP, Complainants ask the ALJ to construe the term without even considering Respondents’ argument that under the proper interpretation an SAP has a lower absorbency bound of 100 times its dry weight. But Complainants’ insistence that Respondents waived this allegedly “new” argument that they “never” raised during the November 2022 *Markman* process is easily disproved. Just last week, Complaints admitted outright that Respondents had, in fact, “announced its ‘100 times original weight’ position on November 29,

¹ The “Asserted Claims” are claims 6, 8, 19, and 20 of U.S. Patent No. 8,371,282 (the “’282 Patent”) and claims 1, 5, 11, and 14 of U.S. Patent No. 8,640,683 (the “’683 Patent”). Complainants do not seek summary determination on Claim 14 of the ’683 Patent.

2022.” Ex. 57, POPR at 11-12. In fact, Complainants themselves never asserted their competing “10 times” interpretation as a claim construction for SAP, but did so for the first time when serving opening expert reports. Complainants insist that because they mentioned their 10 times interpretation in the *Markman* process (without arguing SAP should have this construction), they were free to adopt it as a new claim construction for SAP at the expert phase. If so, Respondents should be free to respond with the 100 times position Complainants admit Respondents “announced” during *Markman*. Complainants’ attempt to avoid reaching the merits of the proper interpretation of SAP (which spans nearly 9 pages) fails, especially because Complainants’ new proposed construction of ten times does not appear even in the post-hearing Joint Claim Construction Chart. (EDIS Doc #785045.)

In their Motion for Summary Determination, Respondents set forth a strong case (RMSD at 3-4, 14-20), while Complainants spend only a single paragraph in their MSD actually addressing the meaning of “extremely large” on the merits (Mot. at 19-20). The reason for this approach is obvious: Complainants know that their revised construction is wrong.

Ultimately, Complainants’ request that the ALJ ignore the dispute as to the meaning of the “extremely large” and simply adopt Complainants’ clearly incorrect interpretation is an invitation to error. *O2 Micro Int’l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1360 (Fed. Cir. 2008) (“When the parties raise an actual dispute regarding the proper scope of these claims, the court, not the jury, must resolve that dispute.”); *Certain Oil-Vaping Cartridges, Components Thereof, and Products Containing The Same*, Inv. No. 337-TA-1286, Order No. 37 (Jul. 28, 2022) at 4-5 (denying motion *in limine* to preclude Respondents “from offering testimony regarding the construction of claim terms that were not briefed for the claim construction hearing” because “[t]he record supports a finding that Respondents disclosed the claim construction positions at issue in

[REDACTED]

their answers to interrogatories propounded by [Complainant] seeking Respondents’ noninfringement and invalidity contentions. Moreover, Respondents’ expert witnesses opined on these claim construction positions in their expert reports and at their depositions,” citing *O2 Micro* and noting that “I must resolve” that claim-meaning dispute); *Certain Mobile Devices With Multifunction Emulators*, Inv. No. 337-TA-1170, Comm’n Op. at 11 (July 16, 2021) (finding “the ALJ prudently asked the parties to propose constructions ... in their post-hearing briefs” for a disputed term that “was not presented for construction during the Markman hearing”).

The undisputed facts show Complainants have been well-aware of Respondents’ arguments relating to the SAP term, and have not articulated any harm it would suffer if the ALJ were to consider them. As no claim construction has been issued, there is simply no justification to try to preclude the ALJ from considering all of relevant arguments in determining the proper scope of the disputed claim term.

Complainants’ motion is also premised on the incorrect assertion that Respondents have “only *one* defense to infringement” and, if the ALJ rules in Complainants’ favor as to the meaning of “super absorbent polymer,” Complainants should be granted summary determination of infringement. (Mot. at 1.) That is wrong. Regardless of the ALJ’s determination as to the meaning of “super absorbent polymer,” Complainants are not entitled to summary determination of infringement of *any* asserted claim, because factual disputes remain as to the issue of infringement with respect to other limitations based on new positions Complainants’ own expert has taken in an effort to avoid the prior art. Specifically, Respondents have set forth a strong invalidity case, including by identifying a 2008 public use and prior invention of a hydrated SAP launching system by Steve Spangler. As of May 28, 2008, Mr. Spangler had developed and shared with a toy company, Be Amazing Toys, his concept for a “Jelly Marble Launcher” (“Jelly Marbles” is another

name for “Clear Spheres” (Ex. 52 (Spangler Dep. Tr.) at 78:2-8)):

Product Ideas

Snow Maker

Holiday Character with a scoop and vessel

Snow Making Machine as a toy

Potato Gun - Launcher – License concerns with 3rd party

Shooting Jelly Marbles – Jelly Marble kit component

Clear Spheres

Cool Science Line

Lab in a Bag

Jelly Marble Blaster (Weltster 3000) with PVC or clear Plexi (safety concerns)

(Ex. 53 (SPANGLER_000000160) at 160, 162; Ex. 52 (Spangler Dep. Tr.) at 51:4-18). And on July 10, 2010, Mr. Spangler publicly demonstrated this Clear Spheres launcher to a large Science in the Rockies 2008 audience. (Ex. 52 (Spangler Dep. Tr.) at 46:16-49:18). And Clear Spheres absorb far more water than Respondents’ ammunition, and in excess of 100 times their own mass in water. (Ex. 54 (Dr. Reitman Rep.), ¶ 99).

In an effort to avoid a finding of invalidity, Complainants’ expert advanced a number of arguments that effectively amount to untimely claim construction arguments which, if adopted, render the claims not infringed. Specifically, Complainants’ expert (1) purported to develop a test for the “softness” required for the claimed “soft-projectile” (which appears in *each* Asserted Claim) and which he failed to establish was met by any of Respondents’ ammunition, (2) advanced an argument that “Clear Spheres” are not “substantially spherical”—as required by each Asserted Claim of the ’683 Patent and claim 6 of the ’282 Patent—which, if correct, would likewise render these claims not infringed, and (3) argued that, even though Clear Spheres indisputably

successfully launch out of the Clear Spheres launcher, that somehow Clear Spheres are not “configured for use” with that launcher as required by each Asserted Claim of the ’282 Patent because the claims contain a secret requirement that the ammunition must be “designed” and “intended” to be used with a launcher (Ex. 55 (Kudrowitz Reb. Rpt.), ¶¶ 57-62; Ex. 56 (Kudrowitz Dep. Tr.) at 135:21-136:6). Although this new claim construction position finds no credible support, if it were adopted, Respondents’ ammunition would not be “configured for use” with the accused products because Respondents purchase off-the-shelf SAPs that happen to work in their guns and the SAPs were not “designed” and “intended” to be used with those guns. Even if the ALJ adopts Complainants’ new proposal that “SAP” means a “polymer that can absorb at least 10 times its own mass in liquid,” factual disputes preclude a grant of summary determination.

II. ARGUMENT

Complainants’ motion should be denied because they fail to show a lack of “a genuine issue as to any material fact,” especially when “[t]he evidence [is] viewed in the light most favorable to” Respondents and any “doubt [must be] resolved in favor of” Respondents. *Certain UV Curable Coatings for Optical Fibers, Coated Optical Fibers, & Prods. Containing Same*, Inv. No. 337-TA-1031, Order No. 31, 2017 WL 3188646, at *2 (July 5, 2017); *Certain Comput. Network Sec. Equip. & Sys., Related Software, Components Thereof, & Prods. Containing Same*, Inv. No. 337-TA-1314, Order No. 38 (Feb. 22, 2023) (“all justifiable inferences are to be drawn in [non-movant’s] favor”); 19 C.F.R. § 210.18.

A. The Accused Ammunition Does Not Meet the SAP Limitation Under Any Party’s Proposed Construction

Complainants argue “there is no dispute that Respondents’ Ammunitions is formed from a ‘SAP’ under” both “Complainants’ proposed construction” (Mot. at 9-10) and “Respondents’ Proposed Construction” (*id.* at 10-14). But as Respondents explained in their own motion for

[REDACTED]

summary determination, a POSITA would understand the “polymer that can absorb an extremely large amount of liquid relative to its own mass” (Order 28 at 14) to “require absorption of at least hundreds of times the dry mass in water.” (RMSD at 9.) Under this proper understanding of SAP, there can be no finding of infringement, and instead, summary determination of non-infringement in favor of Respondents is warranted. (*See id.* § III.)

1. That the Accused Ammunitions Comprise [REDACTED] Is Not a *Material* Fact Because It Is Irrelevant to the Issue of Infringement

Complainants argue “there is no dispute that Respondents’ ammunition is formed from [REDACTED], as shown in the safety data sheets for all of the ammunition,” and that “there is no genuine dispute that [REDACTED] is a well-known ‘super absorbent polymer.’” (Mot. at 8). Complainants also point to certain of Respondents’ documents and non-POSITA lay witness testimony stating [REDACTED] is an SAP. (*Id.*) To be clear, there is no dispute that the accused ammunitions comprise [REDACTED]. (RCSMF # 17, 20, 22). But as explained in Respondents’ motion for summary determination, the fact that the accused ammunition contains [REDACTED] is insufficient to even create a genuine issue of fact as to *non-infringement*—and certainly does not warrant summary determination of infringement. Complainants’ own expert, Dr. Gerald Fuller, admitted that not all [REDACTED] satisfy the SAP limitation. (*See* RMSD at 13-14 and RSMF #37 (Dr. Fuller admitting that “[t]he fact that a material is [REDACTED] [REDACTED] itself does not itself determine whether that product meets the SAP limitation in the asserted claims.”).) Dr. Fuller also admitted that a POSITA “would *have to* look at the *absorbency* of [a] material” in order to know if it is an SAP—which confirms that resolving the *legal* dispute as to the meaning of “super absorbent polymer” is necessary. (RCSMF # 16). Simply put, Respondents’ ammunitions containing [REDACTED] does not establish that the accused ammunition meets the SAP limitation.

2. There Can Be No Infringement As a Matter of Law Under Complainants' Proposed "Extremely Large" Construction

During claim construction, Complainants proposed the term "SAP" means "an extremely large amount of liquid relative to its own mass," which the ALJ adopted on the date of filing this brief. Order 28 at 14. But the parties dispute the meaning of "extremely large," such that a derivative construction is appropriate here (*see* Section II.C, below). Complainants now ask the ALJ to adopt a new interpretation, namely that Complainants' "'extremely large' [construction] means 'at least ten times its weight.'" (Mot. at 9-10). Respondents explained in detail in their motion for summary determination why a POSITA, reading the intrinsic evidence, would understand that "extremely large" means at least hundreds of times the dry mass in water. (RMSD at 8-9). Complainants and their expert Dr. Fuller, on the other hand, ignore the intrinsic evidence, and instead rely on a few articles and one diaper patent publication to advance a 10x construction. (*See* RMSD at 11; RSMF # 25). But as explained in Respondents' Motion, while some sources appear to suggest a 10x absorbency lower bound, the weight of the extrinsic evidence confirms that the absorbency for the SAP in the Asserted Patents is at least hundreds of times. (*See* RMSD at 11-12; RSMF #27 (Ex. 13 (RMX-0006) at 1 (an SAP "can absorb *hundreds* to thousands of times its weight"), Ex. 14 (RMX-0009) at 2 (SAPs are "capable of absorbing water around *100 times* of their own weight") and *Superabsorbent Polymers from South Korea*, Inv. No. 731-TA-1574 (Final), Pub. 5388, at I-7 (Dec. 2022) ("SAP is insoluble in water but can absorb and retain from *100 to 1,000 times its own weight in water.*"")))).

Complainants posit that "[t]o argue that 'SAP' has a different meaning and requires a higher level of absorbency in the context of the asserted patents (e.g., in the hundreds, as Dr. Reitman asserts), Respondents would need to show a clear and unmistakable disclaimer." (Mot. at 20.) Complainants thus propose ignoring the teachings of the specification—*i.e.*, a sole

preferred embodiment having 500 times absorption of distilled water, and a reference to SAPs created by the USDA and commonly used in personal hygiene product known to have hundreds to over a thousand times absorption of water (*see* RMSD at 8-9)—as well the extrinsic evidence that supports a minimum absorption in the hundreds of times, all in favor of what Complainants could muster by way of several narrow, cherry-picked pieces of extrinsic evidence. That is incorrect as a matter of law. The Federal Circuit has repeatedly confirmed that proper claim construction relies on the intrinsic evidence. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1317 (Fed. Cir. 2005) (en banc) (“[E]xtrinsic evidence [is] less significant than the intrinsic record in determining ‘the legally operative meaning of claim language.’”); *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1583 (Fed. Cir. 1996) (“In most situations, an analysis of the intrinsic evidence alone will resolve any ambiguity in a disputed claim term. In such circumstances, it is improper to rely on extrinsic evidence.”). Ignoring the specification’s disclosure in favor of a tiny number of extrinsic citations is clearly wrong. *Vitronics*, 90 F.3d at 1576 (extrinsic evidence “may not be used to vary or contradict the claim language” or “the import of other parts of the specification”).

That is especially so given three of the extrinsic documents Complainants rely on do not come close to establishing that a POSITA would understand “extremely large” for an SAP *in general* to be 10 times, rather, they merely clarify that the *specific polymers* in *specific applications* being discussed in them have a lower absorption boundary of 10 times. (*See* RMSD Ex. 12 (CXM-0015) at [0005] (discussing “[d]isposable absorbent garments” noting “*the* superabsorbent material [*i.e.*, that which is used in the prior art diapers being discussed] generally is a water-insoluble but water-swellable polymeric substance capable of absorbing water in an amount which is at least ten times the weight of the substance in its dry form”); RMSD Ex. 11 (CXM-0007) (discussing specific “[s]uperabsorbent polymers [that]

are very high molecular mass, cross-linked Polyelectrolytes (qv) that can absorb or imbibe more than ten times their mass of water or aqueous solutions”)); RMSD Ex. 10 (CXM-0005) at 4 (discussing a “tea-bag method” testing water absorption in specific SAPs)).

The discussions of SAPs Complainants’ extrinsic evidence never suggest that an SAP being used as ammunition in a children’s toy should use an SAP with a low absorbency level of 10x. As Dr. Reitman explained in her rebuttal expert report—discussed in detail below in Section II.A.3—“SAPs are a large class of materials that are *not rigidly defined by any technical specification*,” and “[w]hile *the extrinsic evidence provides many mass absorbency ranges* to describe water uptake by SAPs *used in various applications*, the intrinsic evidence of the specification of the Asserted Patents” which relates to the use of SAPs as a soft-projectile “specifically identifies SAPs for the application of the claimed invention in terms of a 500 g/g mass absorbency preferred example and the up to 1000 g/g or more mass absorbency of the USDA patent related to ‘Super Slurpers.’” (Mot. Ex. 2, ¶ 32). Thus, to the extent extrinsic evidence is relevant at all to determining the plain and ordinary understanding of the *claimed* SAP’s lower absorption boundary, a POSITA would be guided by the disclosures of the intrinsic record, including the specific application as a “soft-projectile” and the fact that the only disclosures are of SAPs having hundreds of times absorption capacity. Thus, a POSITA would understand “extremely large” consistent with the extrinsic evidence that teaches a lower absorption of hundreds of times. (See RSMF # 27 (citing RMSD Ex. 13 (RMX-0006) at 1 (a SAP “can absorb hundreds to thousands of times its weight”), RMSD Ex. 14 (RMX-0009) at 2 (SAPs are “capable of absorbing water around 100 times of their own weight”) and *Superabsorbent Polymers from South Korea*, Inv. No. 731-TA-1574 (Final), Pub. 5388, at I-7 (Dec. 2022) (“SAP is insoluble in water but can absorb and retain from 100 to 1,000 times its own weight in water.”))).

As explained in Respondents' own summary determination motion, Respondents' expert, Dr. Reitman, sets forth in detail in her rebuttal expert report that Respondents' ammunition does not satisfy the "SAP" limitation under Complainants' proposed (and adopted) construction. (See RMSD at 8-9). She explains that the intrinsic evidence makes unambiguously clear to a POSITA that the lower absorption capacity of the claimed SAP would be hundreds of times in water, and since all of the accused ammunition absorb much less than 100 times their own weight in water, there is no genuine dispute that none of the accused products absorb an "extremely large amount" of water. (*Id.*; *id.*, § III.B.2 (explaining why Complainants' infringement arguments do not raise a genuine dispute of material fact)).

Complainants admit in their motion that "the parties do not dispute how much water Respondents' ammunition can absorb," all of which absorb on average between around 23x-53x based on Dr. Fuller's testing. (Mot. at 9). Under the correct understanding of the minimum absorption requirement for SAP, there is no genuine dispute of material fact that none of the accused ammunition meet the SAP limitation, as none of it is anywhere close to 100 times. Complainants' motion should be denied.

3. There Can Be No Infringement if the Common Industry Usage of SAP is Applied Under Splat-R-Ball's, PTT's, And Staff's Proposals

Complainants argue summary determination of infringement is warranted even "under Respondents' proposal that no construction is necessary because 'SAP' is a term of art." (Mot. 10). But this is incorrect. As an initial matter, the ALJ did not adopt this construction (Order 28 at 14), so the argument is moot, but Respondents address it for completeness. Complainants attempt to take a quote from Respondents' expert Dr. Maureen Reitman out of context and, from there, mischaracterize her opinions by claiming she "concedes that industry usage of 'SAP,' as reflected in the literature, classifies ammunition that absorbs more than ten times its own mass

[REDACTED]

(10g/g) as a SAP.” (Mot. at 10.) Complainants then allege Dr. Reitman “concedes that Respondents’ ammunition qualifies as a ‘SAP’ under the common industry usage of the term.” (Mot. at 10). This is wrong. Complainants quote a selective portion of Dr. Reitman’s rebuttal expert report where she acknowledges that *some* publications “refer to water absorbencies as low as 10 g/g as ‘super absorbent polymers’” but she goes on in the very next paragraph of her report to point out that many other publications specify a higher absorption capacity of at least 100 or “hundreds.” (Mot. at 11 (quoting Dr. Reitman rebuttal expert report ¶ 32); Mot., Ex. 2, ¶ 33, n.27).

Dr. Reitman makes clear in her report that:

SAPs are a large class of materials that are *not rigidly defined by any technical specification*, but are instead a classification of polymers that tend to have certain behaviors. While *the extrinsic evidence provides many mass absorbency ranges* to describe water uptake by SAPs *used in various applications*, the intrinsic evidence of the specification of the Asserted Patents specifically identifies SAPs for the application of the claimed invention in terms of a 500 g/g mass absorbency preferred example and the up to 1000 g/g or more mass absorbency of the USDA patent related to “Super Slurpers.” Therefore, *in my opinion, in the event that there is no construction of “super absorbent polymer,” a polymer with a 23-53 times initial mass maximum absorbency does not meet the limitation “soft-projectile[s] [] formed from hydrated super absorbent polymer”* [citing claim 1 of both asserted patents] based on the intrinsic evidence offered by the Asserted Patents’ specification.

(Mot. Ex. 2, ¶ 32). This portion of Dr. Reitman’s report (which Complainants do not provide) makes clear a POSITA would understand that the commonly understood absorption capacity of an SAP depends on its application, as the extrinsic evidence confirms. And based on the Asserted Patents’ application of an SAP used as a “soft projectile” with the only descriptions of an SAP in the intrinsic record having absorption capacities no less than hundreds of times their own mass, Dr. Reitman’s opinion is that, without any construction, a POSITA would understand the ordinary and customary meaning of the claimed SAP term is one that requires absorption of at least

hundreds of times its own mass in water. (*Id.*) And she makes clear that this opinion is consistent with the common usage of the term in the industry, with numerous sources specifying a minimum absorption capacity of “100” or “hundreds.” (Mot., Ex. 2, ¶ 33, n.27)). This in no way is a concession that Complainants’ proposed 10x absorption construction is correct or that Respondents’ ammunitions meet the SAP term under the common industry usage of the term. Rather, it explains precisely why Respondents’ proposal that the common usage would be understood to require an absorption capacity of an SAP to be no less than hundreds of times its weight in water.

Complainants argue Dr. Reitman’s non-infringement opinion, as explained above, “does not apply Respondents’ proposed construction of ‘no construction necessary.’” (Mot. at 14). This, too, is false. Complainants base this argument on its assertion that “Dr. Reitman goes on to assert noninfringement by alleging that ‘SAP’ has a different meaning in the context of the asserted patents.” (*Id.*) But this argument is premised on Complainants’ assertion in its brief that immediately precedes this quote where they claim Dr. Reitman “confirm[ed] that Dr. Fuller’s opinions about the industry usage of ‘SAP’ were correct.” (*Id.*) As already explained above, this assertion is not true. Dr. Reitman *disagrees* with Dr. Fuller’s decision to rely on several articles and one personal hygiene patent publication to advance his opinion. Instead, after determining the industry usage of the term varies depending on application, Dr. Reitman considers the intrinsic evidence, including the specific application in which the claimed SAP is used in the claims and specification, and concludes that this application is consistent with the common industry usage of the SAP term that refers to polymers that absorb hundreds of times their own weight in water. (Mot. Ex. 2, ¶ 32). Thus, Dr. Reitman’s non-infringement opinion is consistent with the relevant industry usage, and she applied that industry usage and confirmed that, in her opinion,

Respondents' ammunition does not meet the "super absorbent polymer" limitation. (*Id.*)

Complainants also point to Respondents' post-priority-date documents and lay witness testimony referring to ammunitions as SAPs to support their argument that Respondents' ammunitions meet the SAP limitation if industry usage of the term applies. (Mot. at 11-14). But as explained in Respondents' own motion for summary determination and above, this evidence is irrelevant in determining whether Respondents' ammunitions are SAPs as claimed in the Asserted Patents when properly construed, and they are likewise irrelevant to determining what a POSITA would understand the term SAP to mean at the time of the alleged invention. (*See* RMSD at 14); *Vasudevan Software, Inc. v. MicroStrategy, Inc.*, 782 F.3d 671, 678 (Fed. Cir. 2015) (declining to rely on marketing materials for claim construction because "[l]anguage used in marketing materials directed to potential customers can mean something quite different from the language used in a patent directed to persons skilled in the art" and "[m]oreover, the marketing materials referenced by VSi are not contemporaneous with the patents-in-suit"); *Schering Corp. v. Amgen Inc.*, 222 F.3d 1347, 1353 (Fed. Cir. 2000) (excluding post-filing extrinsic evidence since the "court must determine what the term meant at the time the patentee filed the [patent] application"); *Sundance, Inc. v. DeMonte Fabricating Ltd.*, 550 F.3d 1356, 1363 (Fed. Cir. 2008) ("[W]here an issue calls for consideration of evidence from the perspective of one of ordinary skill in the art, it is contradictory to Rule 702 to allow a witness to testify on the issue who is not qualified as a technical expert in that art.").

Even if no construction were adopted, the undisputed facts establish non-infringement.

B. Complainants Have Long Understood Respondents' Arguments Concerning The Plain Meaning Of SAP

Complainants allege Respondents' non-infringement argument is based on a new and untimely claim construction and should be considered waived. (Mot. at 14-19). But Complainants'

assertions are provably wrong.

1. Respondents Provided Their Understanding of the Plain Meaning of SAP Before and During the *Markman* Process

Complainants insist that “Respondents never offered a construction of ‘SAP’ during the *Markman* process” and that “[i]f Respondents had an opinion that ‘SAP’ had a special meaning in the context of the asserted patents (e.g., to require any particular level of absorbency) based on the intrinsic evidence, they were required to disclose that position as part of the *Markman* process” but that “Respondents expressly declined to do so.” (Mot. at 3, 17). Complainants go further, claiming that “Respondents did not raise their new claim construction, which attempts to limit the claims based on a preferred embodiment, at that [*Markman*] hearing. *Nor did Respondents raise the issue in their reply Markman brief filed on November 29, 2022.*” (*Id.* at 17).

The facts show otherwise. Last week, Complainants told the Patent Office they knew all about the supposedly “new” positions Respondents allegedly “never” disclosed during *Markman*. In their Patent Owner Preliminary Responses (POPR) filed March 23, 2023, Complainants (represented by the same attorneys who signed the Motion for Summary Determination) insist that the 100 times issue was disclosed during the *Markman* process, in the very same November 29, 2022 *Markman* reply brief Complainants claim “did [not] raise the issue.” In those IPR filings, which concern the Asserted Patents, Complainants revealed they understood and appreciated the 100 times issue during *Markman*, by no later than Respondents’ November 29, 2022 reply:

In the ITC investigation, as an alternative to their indefiniteness position, Petitioner [Gel Blaster, a Respondent here] and [Gel Blaster’s expert] tried to argue that a “super absorbent polymer” under each of these competing constructions [i.e., both Complainants’ and Respondents’] ***has a minimum absorbency threshold corresponding to a multiple of its original mass*** . . . [Respondent Gel Blaster] said, “[i]f the ALJ is inclined to find a lower bound, at least 100 times original weight is the minimum supported by the totality of the evidence, (EX2004 [Respondents’ November 29, 2022 Claim Construction Reply], p. 11). ***[Respondent Gel Blaster] announced its “100 times original weight” position on November 29, 2022....***

[REDACTED]

(Ex. 57 (POPR) at 11-12) (emphasis altered)). Complainants’ insistence to the ALJ that they somehow did not know about Respondents’ “100 times” position during *Markman* and that Respondents did not “raise the issue in their reply *Markman* brief filed on November 29, 2022” (Mot. at 17) is completely undermined by Complainants’ statements to the Patent Office. To be clear, Respondents’ November 29, 2022 reply *Markman* brief does indeed state that “the bulk of the other extrinsic evidence shows that SAPs have a lower bound of at least 100 times original weight. See RXM-0018, ¶10; RXM-0006–0009, 0011–0017. If the ALJ is inclined to find a lower bound, at least 100 times original weight is the minimum supported by the totality of the evidence.” (EDIS 785338 at 3). And Respondents’ experts are relying on precisely the same evidence in their reports that was cited in that November 29, 2022 *Markman* reply brief. (See Mot., Ex. 2, ¶ 33, nn.26-27 (citing RXM-0018, RMX-0006, RMX-0011-13, RMX-0017). Thus, the premise of Complainants’ argument—that Respondents failed to alert Complainants or the ALJ to this issue—is plainly wrong. Complainants were fully aware of the “100 times” issue as of the *Markman* reply briefs when Respondents “*announced [it] ... on November 29, 2022.*” (Ex. 57 (POPR) at 11-12).

Worse, Complainants knew about these positions earlier. On November 15, 2022, all Respondents served non-infringement interrogatory contentions putting Complainants on notice that none of the accused products infringe the SAP term under because the ammunition absorption levels (all between 34x-52x their own weight in water based on Complainants’ own infringement contentions) do not amount to “an extremely large amount of liquid relative to [their] own mass.” (CXM-0052C (2022-11-15 Gel Blaster Resp. Rog. 22) at 12-13; CXM-0053C (2022-11-15 PTT Resp. Rog. 22) at 12; CXM-0054C (2022-11-15 Spat-R-Ball Resp. Rog. 22) at 22-23). And Complainants were clearly aware of Respondents’ position regarding the scope of the SAP term, as Complainants cited these interrogatory responses in their *Markman* reply brief. (See CRMB at

5).

These issues are not “new” and were not hidden from the ALJ nor Complainants during *Markman*. Complainants confirmed as much in their filings at the Patent Office and the record is undisputedly clear that Complainants knew about the 100 times issue. On this basis alone, Complainants’ waiver arguments fail.

2. Complainants’ One-Sided Interpretation Of Rule 1.14 Is Unavailing

Complainants appear to suggest they advanced their “10x” position as a construction during *Markman*, while Respondents hid their 100x position. For example, Complainants argue they “had explained all throughout the *Markman* process that their construction of ‘an extremely large amount of liquid relative to its own mass’ referred to polymers that can absorb at least ‘ten times’ their initial mass.” (Mot. at 18, n.10). Elsewhere, Complainants insist that “[d]uring the *Markman* process, Complainants cited numerous industry publications showing that a POSITA would consider ‘SAPs’ to be polymers that absorb a least ten times their initial mass (like Respondents’ ammunition).” (*Id.* at 17.) Complainants point to Rule 1.14 and suggest they followed this rule because they actually proposed their 10x construction for the SAP term. (*Id.*) From there, Complainants argue Respondents’ 100 times interpretation was not disclosed and the ALJ should not consider it now. (*Id.* at 17-19). This argument is fundamentally wrong in numerous respects.

First, as shown above, Complainants fully understood Respondents’ 100 times argument, which Complainants admit Respondents “announced” in their *Markman* reply brief. (*See infra* Section II.B.1). Second, Complainants never once explicitly asserted 10x as their claim construction position for SAP. Instead, Complainants set forth one—and only one—construction for the term SAP: “[p]lain and ordinary meaning, i.e., ‘polymer that can absorb an extremely large amount of liquid relative to its own mass.’” (EDIS Doc. 782596 at 3, 5). In the post-hearing Joint Claim Construction Chart, Complainants set forth the same construction, with no reference to a

10x absorbency limit. (EDIS Doc. 785045 at 2, 4.) Indeed, during claim construction, Complainants repeatedly insisted that they were *not* advancing a 10x construction, rather, only pointing to 10x in response to any indefiniteness argument. In their opening *Markman* brief, Complainants advanced the construction in the Joint Claim Construction Chart and made references to 10x *solely* in response to indefiniteness arguments. (See COMB at 4-5 (not mentioning 10x in affirmative construction argument), 6-12 (referring to 10x in response to indefiniteness arguments; *see also id.* Ex. 1 (Dr. Fuller Claim Construction Declaration), ¶¶ 20-22 (opining he agrees with Complainants’ “extremely large” claim construction proposal without reference to 10x minimum absorption), ¶¶ 23-24 (responding to indefiniteness arguments while referencing a 10x minimum absorption noting “*to the extent it is necessary to define what it means to absorb an extremely large amount of liquid relative to its own mass*, a POSITA would understand ... it would mean the polymer should absorb at least 10 times its own mass”)).

Thus, the same rule that Complainants cite against Respondents makes it clear that *Complainants* cannot “*subsequently elaborate* or rely on a different proposed construction *absent advance approval from the Administrative Law Judge.*” (G.R. 1.14; Mot. at 7, n.7, 17). But that is clearly what Complainants have done. Recognizing that, in an art where absorbencies can be in excess of *1,000 times* the starting dry mass (*see, e.g.,* RSMF # 12), there is no reasonable application of that construction in which Respondents’ absorbencies of 23-53 times their dry mass are “extremely large,” Complainants have in their expert reports and now in their motion “elaborate[d]” on their construction. But Complainants cannot interpret Rule 1.14 one way for themselves (*i.e.*, a party can list a construction in the Joint Claim Construction Chart that does not include a 10x absorbency, but is free to elaborate on it later so long as the absorbency limit was mentioned during *Markman*) and another for Respondents (*i.e.*, even if a party explicitly discloses

[REDACTED]

a 100x absorbency limit during *Markman*, further reliance on that limit is an improper “elaboration” unless the limit was explicitly set forth as a construction). Fairness dictates that because Respondents put Complainants on notice of the 100 times issue during *Markman* by, as Complainants admit, “announcing” it in their November 29, 2022 Reply (and, in fact did so even earlier in their November 15, 2022 non-infringement contentions) Rule 1.14 does not operate to waive that position.

Complainants argue that because Respondents raised the fact that Complainants appeared to be offering a new claim construction position, this is “further evidence that Respondents and Dr. Reitman are pursuing a new construction.” (Mot. at 18). Not so. As Respondents’ email raising this issue explained, Respondents were of the view that Complainants had advanced “a new construction for ‘super absorbent polymer’ of ‘a polymer that absorbs at least ten times its weight in water’ in their Reply Brief.” (Mot., Ex. 1). During the meet and confer, Complainants insisted they were not actually advancing a 10x construction and that their only construction was “extremely large” and, therefore, they did not need to seek leave under rule 1.14 to elaborate on that construction. Complainants also argued during the meet and confer that the ALJ had the parties’ respective positions, including by way of Respondents’ November 29, 2022 *Markman* reply brief—the same brief Complainants admitted to the Patent Office raised Respondents’ 100 times interpretation—such that no further briefing was necessary. Respondents accepted this explanation, did not file their supplemental briefing request, and proceeded with expert reports with the understanding that neither party would later argue that the 10x or 100x positions were untimely nor waived.

Complainants’ December 19, 2022 opening infringement expert reports later made clear that Complainants were, in fact, advancing a new 10x minimum absorption construction in an attempt to prove infringement. (RSMF # 23; RMSD Ex. 6 (Dr. Fuller Op. Rpt.) at 16 (opining that

“a POSITA would understand that the minimum absorbency (mass of hydrated material divided by mass of dry material) for a ‘super absorbent polymer’ to be [sic] at least ten times its own mass in water”)). Indeed, Dr. Fuller stated outright in his deposition that he was advancing a new interpretation of SAP that depended solely on a 10x absorbency. (RMSD Ex. 3 (Dr. Fuller Dp. Tr.) at 70:12-71:11). Respondents obviously disagreed with this amended construction, as their November 15, 2022 non-infringement interrogatory contentions had explained months earlier. Consistent with this position, Respondents provided responsive expert reports explaining why a POSITA would not understand “extremely large” to refer to a minimum 10x absorption, and why the plain and ordinary meaning of the term—which is consistent with the intrinsic evidence—refers to polymers that can absorb a minimum of hundreds of times their weight in water. (See RMSD at 8-9).

In their motion, Complainants have now done a complete about-face on the question of whether they were asserting a 10x construction. Complainants now insist that 10x is indeed a construction, are asking that the ALJ adopt this construction, and, incredibly, are pretending that they had advanced it as a construction during *Markman*. Worse yet, Complainants are trying to capitalize on their changed claim construction by arguing “Respondents cannot advance [their alleged] new theory,” and therefore, summary determination should be granted in its favor under Complainants’ own new theory without any consideration of the merits by the ALJ. (Mot. at 19). The below timeline summarizes all of these relevant facts and dates:

Date	Event
October 18, 2022	Parties submit Joint Claim Construction Chart (EDIS No. 782596) - Complainants’ Proposed “SAP” construction: “Plain and ordinary meaning, i.e., ‘polymer that can absorb an extremely large amount of liquid relative to its own mass’” - PTT and Splat-R-Ball Respondents’ Proposed “SAP” construction: “No construction necessary; term of art



Date	Event
	known to those skilled in the art at the time of the alleged invention” • Gel Blaster Proposed “SAP” construction: “Indefinite”
November 2, 2022	Parties submit Opening <i>Markman</i> Briefs (EDIS Nos. 783646, 783649) • Complainants maintain same “extremely large” proposed construction. Only reference “10 times” in response to Gel Blaster’s indefiniteness arguments. • Respondents maintain their proposed constructions. Only Gel Blaster references “10 times” in regards to its indefiniteness arguments
November 15, 2022	Respondents served supplemental non-infringement interrogatory responses contending none of the accused ammo meet the “SAP” limitation because they only absorb between 34x-52x their own weight in water based on Complainants’ own infringement contentions, explicitly contending the accused ammo therefore do not absorb an “extremely large amount of water” (Exs. 58-60)
November 17, 2022	<i>Markman</i> hearing held
November 22, 2022	Parties submitted Post-Hearing Joint Claim Construction Chart (EDIS No. 785045) • Complainants maintain same “extremely large” proposed construction with no reference to “10 times” • Respondents all maintain their proposed constructions.
November 29, 2022	Parties submit Reply <i>Markman</i> Briefs (EDIS Nos. 785334, 785338) • Complainants claim, for the first time, that “an ‘extremely large amount of liquid relative to their own mass’ within Complainants’ proposed construction is a polymer that absorbs at least ten times its weight in water.” • Respondents’ brief, addressing Complainants “10 times” argument states that the intrinsic and extrinsic evidence “shows that SAPs have a lower bound of at least 100 times original weight” Complainants later admit to Patent Office that Respondents’ brief “announced its ‘100 times original weight’ position”
December 14, 2022	Respondents email Complainants requesting a meet and confer regarding intent to seek leave to file an additional claim construction brief to address Complainants’ new “10 times” claim



Date	Event
	construction
December 16, 2022	Parties meet and confer, and Complainants argue that their lower absorption capacity arguments are not an improper new or elaborated construction and that the ALJ already has the parties' competing positions.
December 19, 2022	Opening expert reports served (Complainants' infringement, and Respondents' invalidity)
January 6, 2023	Rebuttal expert reports served (Complainants' validity, and Respondents' non-infringement)
January 19, 2023	Reply expert reports served (Complainants' infringement, and Respondents' invalidity)
March 16, 2023	Motions for Summary Determination filed. Complainants assert that Respondents' 100 times position is an allegedly "new construction" and should be considered waived

At bottom, there is no more basis to exclude Respondents' arguments regarding a POSITA's understanding "extremely large" in the Court's construction of SAP than there is to exclude Complainants' arguments about at least 10 times absorbency. As explained in Respondents' own motion for summary determination, as well as above, this dispute over the lower bound absorbency of the claimed SAP began during *Markman* and crystalized during expert discovery, resulting in both parties' experts arriving at different conclusions upon applying the same proposed (now, adopted) construction. (*See* RMSD, § III.D). For the same reasons explained in Respondents' motion, it is the ALJ's role to resolve this legal dispute. (*See id.* at 16 (quoting *O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1360 (Fed. Cir. 2008) and other cases clarifying it is the court's role, not the jury, to resolve claim construction disputes no matter when they arise). This is true even where the ALJ already construed the term when a dispute exists as to the meaning of that construction, as here.² *See Certain LTE- & 3G-Compliant Cellular*

² A couple hours before this brief was filed, the ALJ issued a *Markman* order.

Commc'ns Devices, Inv. No. 337-TA-1138, Order No. 52, 2019 WL 4744859 (Sept. 13, 2019) (McNamara, ALJ) (“clarifying claim construction underpinning for denial of respondents’ motion for summary determination of noninfringement”).

C. The ALJ Should Address All Claim Construction Arguments, Even If Complainants Are Correct That The Dispute Arose After *Markman*

Even if Respondents were setting forth a new claim construction argument—they are not, for the reasons explained above—the ALJ should still resolve the parties’ dispute as to the legal meaning of the parties’ proposed “extremely large” construction. Indeed, when legal disputes arise as to the meaning of a construction, courts often engage in a derivative construction (*i.e.*, “construing the construction”) to satisfy their obligation to resolve disputes as to the scope of the patent claims. “Again, the court’s obligation is to ensure that questions of the scope of the patent claims are not left to the jury.... In order to fulfill this obligation, the court must see to it that disputes concerning the scope of the patent claims are fully resolved.” *Every Penny Counts, Inc. v. Am. Express Co.*, 563 F.3d 1378, 1383 (Fed. Cir. 2009). In *Every Penny*, the Federal Circuit rejected the patent owner’s argument that the district court erred by spending a portion of the claim construction hearing considering the meaning of a disputed phrase that was contained within the patent owner’s proposed claim construction of another term. *Id.* The Federal Circuit explained that it is the district court’s duty to understand a proposed claim construction in order to render a proper construction. *Id.* Similarly here, a dispute has arisen between the parties as to what the term “extremely large” that is found in Complainants’ proposed construction would mean, as well as what a POSITA would understand about the common industry use of the SAP term. It is up to the ALJ, not a jury, to resolve this dispute. *See Edward Lifesciences LLC v. Cook Inc.*, 582 F.3d 1322, 1334 (Fed. Cir. 2009) (rejecting argument that the district court erred in looking to the specification to clarify the meaning of the word “malleable” which was not a claim term, but a word used by

[REDACTED]

the district court in construing a disputed claim limitation); *TNS Media Rsch., LLC v. Tivo Rsch. & Analytics, Inc.*, 629 F. App'x 916, 933-35 (Fed. Cir. 2015) (vacating a summary judgment of noninfringement since the district court procedurally erred in refining the parties' stipulated construction of a claim limitation without permitting the parties to be heard on the modification); *Fractus, S.A. v. ZTE Corp.*, 2019 WL 5267426, at *5-6 (N.D. Tex. Oct. 16, 2019) (after the parties agreed to a term's meaning where the construction included the term "same type," the court found that a noninfringement summary judgment dispute showed that there was a new underlying issue of claim construction remaining as to the "same type" requirement of the construction, and finding this presented an issue of claim construction for the court to resolve, and not a fact issue as to how to apply the court's construction).

Furthermore, Complainants have not articulated any harm they would suffer that warrants exclusion of Respondents' arguments. Complainants cannot argue they are unfairly surprised or prejudiced by Respondents' argument as to the meaning of "extremely large." As noted above in Section II.B.1, Complainants' have known about Respondents' position as to the required minimum absorption capacity of the claimed SAP since at least Respondents' November 15, 2022 non-infringement contention interrogatory responses (which were served before the *Markman* hearing) and certainly by no later than Complainants' November 29, 2022 *Markman* reply brief. This was well before the end of fact discovery, and expert discovery. Complainants have had an opportunity to depose Respondents' fact and expert witnesses since being put on notice of Respondents' non-infringement position. Therefore, there is no justification to exclude any of Respondents' evidence and arguments as to how the SAP term would be understood by a POSITA at the time of the alleged invention.

D. Factual Disputes Remain For Other Claim Limitations That Preclude Summary Determination For Complainants

Complainants spend the last section of their brief arguing there are no other disputed claim terms relevant to infringement issues relating to claims 6, 8, 19, and 20 of the '282 patent and claims 1, 5, and 11 of the '683 patent. (Mot. at 20-25). But this is not true. There are genuine issues as to material facts relevant to whether a number of other claim terms are met by the accused products, including “soft-projectile” / “soft projectiles,” “substantially spherical,” and “configured for use.”

The issues of material facts boil down to a classic case of Complainants trying to have their cake and eat it, too. Complainants’ strategy in attempting to argue there are no genuine issues of material fact relating to infringement on these claim limitations is to simply point out an alleged lack of an affirmative dispute by Respondents’ experts, all while *ignoring the clear factual disputes* relating to these limitations arising from their validity-driven interpretations relating to those very same limitations. Specifically, Respondents and their experts argue that all asserted claims are invalid as being anticipated and/or rendered obvious by the prior art Clear Spheres and SpitBalls SAP products. (RCSMF # 9; Ex. 67 (Delman Rep.) ¶¶34-36). To rebut invalidity, Complainants and their experts take a number of positions as to the scope of these limitations in order to argue the prior art SAPs do not teach the limitations. Respondents obviously disagree with Complainants’ interpretation of the claim limitations when it comes to the invalidity challenges, but to the extent Complainants’ invalidity positions are correct, they would be clear admissions that Respondents’ ammunitions do not meet the limitations for the same reasons. On the other hand, if Complainants are correct that the accused products meet these limitations, then they are admitting the prior art SAP products also meet the same limitations, and they should not be heard to dispute these limitations are taught by the asserted SAP prior art. But at this point, Complainants

still dispute these limitations are taught by the asserted SAP prior art, and these disputes themselves give rise to genuine issues of material fact relating to infringement of those same claims such that summary determination should be denied.

Complainants also argue that Respondents' expert "Dr. Delman, explicitly testified that the 'SAP' limitation was the only limitation on which he provided a noninfringement position." (Mot. at 20.) But this ignores the factual dispute raised by Complainants' own expert. Mr. Delman's deposition was taken on January 24, 2023, before Dr. Kudrowitz's January 26-27th deposition. Mr. Delman therefore was not able to consider the full extent of the new *de facto* claim construction positions Dr. Kudrowitz applied for the "soft-projectile," "substantially spherical," and "configured for use" terms. And Mr. Delman expressly "reserve[d] the right" to address "additional information that becomes known to me." ((Ex. 67 (Delman Rep.) ¶ 4). To be clear, Mr. Delman's opinion is that the prior art discloses these limitations and renders the claims invalid. But to the extent Complainants and Dr. Kudrowitz's attempt to avoid invalidity through Dr. Kudrowitz's new positions, then the accused products likewise do not infringe. *CommScope Techs. LLC v. Dali Wireless Inc.*, 10 F.4th 1289, 1299 (Fed. Cir. 2021) (reversing denial of JMOL of noninfringement because a "patent may not, like a nose of wax, be twisted one way to avoid anticipation and another to find infringement," and that Patent Owner "cannot simultaneously argue: (1) that the FlexWave infringes by using a switch that is effectively nonoperating for a single power amplifier when feeding back the signal for the other power amplifier, and (2) that Wright does not anticipate, given it has a switch that operates identically").

1. "Soft-Projectile" Claim Limitation

Claim 1 of each of Asserted Patent requires ammunition comprising "[a] soft-projectile(s)." (RMSD Ex. 1 ('282 Patent), Cl. 1; *id.* Ex. 2 ('683 Patent), Cl. 1). Since for each Asserted Patent, all claims depend from claim 1, the "soft-projectile" limitation is required for every Asserted

Claim. To argue Respondents' accused ammunitions are "soft-projectiles," Complainants expert Barry Kudrowtiz simply asserts "[w]hen hydrated, the [accused ammo] become soft-projectiles" that are "soft to the touch" and "break apart upon impact." (Ex. 61 (Kudrowitz Rp.), ¶¶ 63, 139, 251.)

However, to argue against invalidity of claim 6 of the '282 Patent based on Clear Spheres that are grown to about 6 mm in diameter, after **not** disputing they are hydrated SAPs at that point, Dr. Kudrowitz applies a subjective test whereby he personally squeezed the samples of Clear Spheres and concluded that, according to him, they do "not mechanically deform under light touch," but never explains how he reached this conclusion nor how a POSITA could recreate his subjective analysis. (Ex. 55 (Kudrowitz Reb. Rp.), ¶¶ 74, 78). At his deposition, Dr. Kudrowitz admitted at when grown to 6 mm, the Clear Spheres were "hydrated," but in his opinion, they were not "soft" because they were "**mostly** hard" and "if you squeeze them or press them, they didn't deform **as much**" as when they were fully hydrated. (Ex. 56 (Kudrowitz Dep. Tr.) at 235:2-236:12). In other words, according to Dr. Kudrowitz, even though the 6 mm Clear Spheres were softer than and deformed more than before they were hydrated at all, they do not meet the "soft-projectile" limitation because they were not soft **enough** and did not deform as much as Dr. Kudrowitz thought they should.

Complainants' argument to dispute invalidity rests on a claim construction position that it failed to raise during *Markman*, namely that a "soft projectile" is one that meets Dr. Kudrowitz' views about softness and mechanical deformation. In other words, Complainants' position on whether something qualifies as a "soft-projectile" is essentially "it's soft if Dr. Kudrowitz says it is." Dr. Kudrowitz's reports offer no guidance on how to evaluate this issue objectively and indeed, at his deposition, the only way he could offer any opinion on this issue was if he felt each piece of

ammunition. (Ex. 56 (Kudrowitz Dep. Tr.) at 234:7-240:17; Ex. 62, Kudrowitz Dep. Tr. at 279:20-284:8). Not surprisingly, Dr. Kudrowitz concluded that the prior art was not “soft” but that the accused products’ ammunition were.

Respondents disagree that Clear Spheres do not meet the “soft-projectile” limitation relevant to claim 6 of the ’282 Patent simply because they do not meet Dr. Kudrowitz’s results-driven approach. As the ’282 Patent itself makes unambiguously clear, any SAP of any size is considered a “soft-projectile.” (RMSD, Ex. 1 (’282 Patent) at 3:45-49 (“The present patent document discloses and teaches projectile launching devices, such as toys, amateur guns and weaponry that use projectiles formed from a Super absorbent polymer (SAP). *As a result*, the projectiles launched by the devices of the present patent document *are soft-projectiles*.”), 4:24 (“Soft-projectiles made from a SAP *can be any size*.”)).

But for purposes of determining Complainants’ summary determination motion, Complainants’ and their expert’s invalidity position itself creates a genuine dispute of fact subsidiary to claim construction for the ALJ to evaluate at the hearing. According to Complainants, whether something is “soft” is in the eye of the beholder, and so their approach would require the ALJ to not only evaluate whether Respondents’ accused ammunitions are “soft,” but to compare that softness with the softness of the prior art Clear Spheres hydrated SAPs, to determine which are “soft” (if any) and which are not (if any). As such, there can be no finding of infringement under Complainants’ approach to the claims.

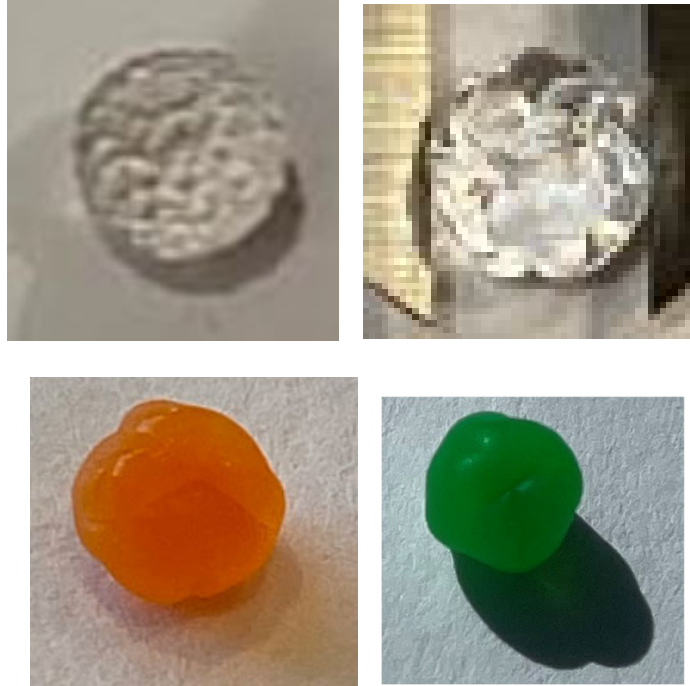
2. “Substantially Spherical” Claim Limitation

Claim 4 of the ’282 Patent (and asserted claim 6 of the ’282 Patent virtue of dependency) and claim 1 of the ’683 Patent (and all asserted claims of the ’683 Patent by virtue of dependency) require the soft-projectiles be “substantially spherical.” (RMSD Ex. 1 (’282 Patent), Cl. 4; *id.* Ex. 2 (’683 Patent), Cl. 1). To argue all of Respondent’s accused ammunitions meet the “substantially

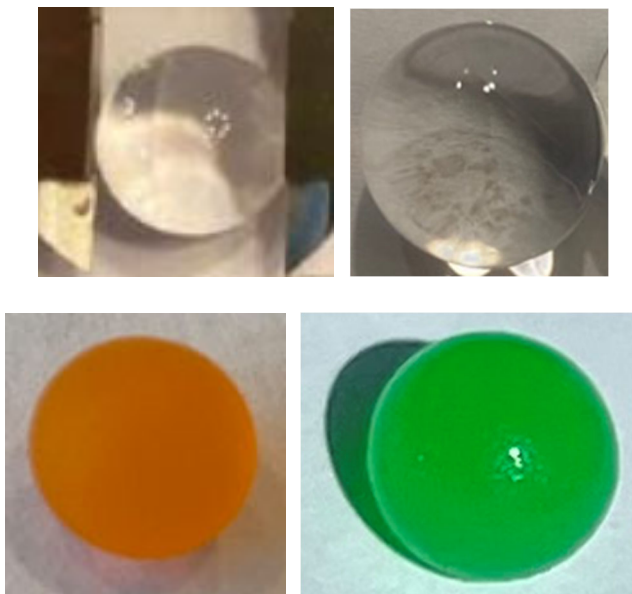
spherical” limitation, Complainants rely on Dr. Kudrowitz’s analysis where he simply observed the ammunitions at their *final* hydration state “are of a spherical shape.” (Ex. 61 (Kudrowitz Rp.), ¶¶ 77, 155, 263).

But to argue against invalidity of the same claim limitation based on the teachings of the prior art SAP Clear Spheres and SpitBalls, Complainants again rely on a claim construction argument that they failed to raise during *Markman* ccording to Complainants, “substantially spherical” apparently means “perfectly spherical throughout the hydration process, with absolutely no apparent changes to the visual or textural shape of the ammunition.” Specifically, Complainants rely on Dr. Kudrowitz’s opinion that neither the Clear Spheres nor the SpitBalls meet this limitation because they are not substantially spherical “*during expansion*,” and at their final hydration state are “at least oblong” and not *perfect spheres*. (Ex. 55 (Kudrowitz Reb. Rp.), ¶¶ 68, 126).

Respondents disagree with Complainants’ invalidity argument, including the belated claim construction interpretation of “substantially spherical” that Complainants are advancing. The shape of all accused ammunitions are comparable to the Clear Spheres and Spitballs prior art, both during the hydration process and after. If the prior art is found to not teach ammunition that is “substantially spherical” as required by the claims, then neither can any of the accused ammunition. According to Complainants, the two products in the top images below do not meet the “substantially spherical” limitation because they have are “textured” when expanding, but the products in the two image at the bottom are “substantially spherical” despite being similarly “textured” while expanding:



(Ex. 55, Kudrowitz Reb. Rep. ¶ 74 (partially-hydrated Clear Spheres); Ex. 67 (Delman Rpt.), ¶ 330 (partially-hydrated SpitBalls); Ex. 68 (partially-hydrated Splat-R-Ball ammo); Ex. 68, partially-hydrated PTT ammo). Likewise, the two products in the top images below are not “substantially spherical” according to Complainants, while the two products in the bottom two image are:



(Ex. 55 (Kudrowitz Reb. Rpt.), ¶ 70 (Clear Spheres fully-hydrated); Ex. 67 (Delman Rpt.), ¶ 328 (SpitBalls fully-hydrated); Ex. 68 (fully-hydrated Splat-R-Ball ammo); Ex. 68, fully-hydrated PTT ammo).

Complainants’ conflicting invalidity and infringement positions raise a genuine dispute of issue as to whether the accused products meet the “substantially spherical” limitation based on Complainants’ conflicting interpretation of the term that the ALJ must evaluate at the hearing. *CommScope Techs. LLC v. Dali Wireless Inc.*, 10 F.4th 1289, 1299 (Fed. Cir. 2021) (affirming denial of JMOL where a patent was “like a nose of wax, twisted one way to avoid anticipation and another to find infringement.”). When “[t]he evidence [is] viewed in the light most favorable to” Respondents, there is undisputable “doubt [as to infringement that must be] resolved in favor of” Respondents. *Certain UV Curable Coatings for Optical Fibers, Coated Optical Fibers, & Prods. Containing Same*, Inv. No. 337-TA-1031, Order No. 31, 2017 WL 3188646, at *2 (July 5, 2017). Thus, Complainants’ summary determination should be denied.

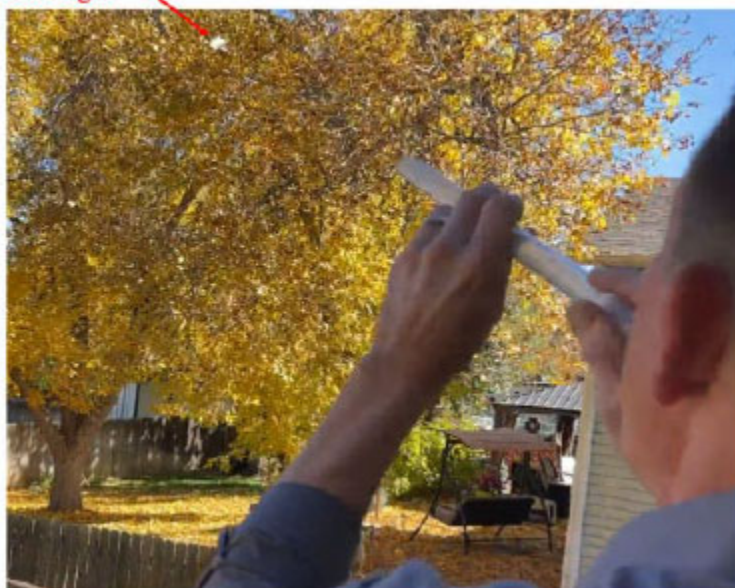
3. “Configured For Use”

The preamble of claim 1 of the ’282 Patent recites ammunition that is “configured for use with a projectile launcher.” (RMSD Ex. 1 (’282 Patent), Cl. 1). Complainants argue the preamble is limiting as to all asserted claims. If the ALJ agrees, then the burden is on Complainants to prove this limitation is met by all accused ammo. (EDIS No. 782596 at 3). However, similar to the above disputed terms, Complainants have taken a position as to what is required to meet this limitation in an attempt to preserve the validity of their claims, which, if the ALJ were to find is correct, would be an admission by Complainants that none of the accused products meet this limitation.

Specifically, to rebut invalidity of their claims, Complainants contend the SAP prior art Clear Spheres and SpitBalls do not teach this limitation, despite recognizing undisputed evidence that at least Clear Spheres were actually used as ammunition with a projectile launcher:



Clear Sphere in
Free Flight



(Ex. 67 (Delman Rep.) ¶203). According to Complainants, in order to be “configured for use with a projectile launcher” those products must have been created with the *specific intent* in the mind of the creator that they be used as ammunition with a projectile launcher. (See Ex. 55 (Kudrowitz Reb. Rp.), ¶¶ 57-62 (opining Clear Spheres do not meet “configured for use” limitation because they were not designed with the specific intent that they be used with a projectile launcher and

[REDACTED]

“simply because something coincidentally is physically capable of being propelled from the end of a tube does not necessarily mean the object is ‘configured for use with a projectile launcher’”), ¶¶ 118-121 (offering similar opinion relating to SpitBalls, arguing “[t]hat something can be ejected from a device does not itself reflect a configuration for use with a projectile launcher”); Ex. 56 (Kudrowitz Dep. Tr.) at 135:21-136:6 (testifying “configured for use” means “designed and intend for a projectile launcher”). In other words, according to Complainants and Dr. Kudrowitz, it is insufficient to meet the “configured for use” limitation if a product, such as an SAP, is first created without the specific intent that it be used as ammunition with a launcher, only to later be found suitable for use as ammunition with a specific launcher.

But if Complainants invalidity position regarding what is required to be “configured for use” is true, then there is a genuine issue of material fact relevant to whether any of the accused ammunition are “configured for use.” This is because all accused ammo is off-the-shelf ammo from suppliers. For example, the Splat-R-Ball Respondents’ corporate representative, Joseph Whiteis, testified explaining how Splat-R-Ball’s accused ammunition was chosen from a number of different off-the-shelf product formulas that already existed in the market, and all Splat-R-Ball did was [REDACTED]

[REDACTED] (Ex. 66 (Whiteis Dep. Tr.) at 43:8-15) ; *see also* Ex 69 (Chia Dep. Tr.) at at 35:13-21, 43:10-12 (similar); Ex. 70 (Wong Dep. Tr.) at 125:13-19 (similar).

There is no genuine dispute that the accused ammunition was *not* initially created with the specific intent they be used with the accused launchers. Rather, just like the asserted prior art, the accused ammunitions just so happened to be capable of being used as ammunition with launchers. Under Complainants’ own interpretation of this limitation, none of the accused ammunitions can infringe this limitation, and thus, Complainants’ summary determination at least with respect to

every asserted claim of the '282 Patent should be denied.

III. CONCLUSION

Complainants' motion should be denied.

Dated: March 27, 2023

Respectfully submitted,

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**Certain Soft Projectile Launching Devices,
Components Thereof, Ammunition, and
Products Containing Same**

Inv. No. 337-TA-1325

CERTIFICATE OF SERVICE

I, Julia T. Weil, hereby certify that on April 3, 2023, copies of the foregoing document were filed and served upon the following parties as indicated:

Katherine Hiner Acting Secretary to the Commission U.S. International Trade Commission 500 E Street, S.W., Room 112 Washington, D.C. 20436	☐ Via First Class Mail ☐ Via Hand Delivery ☐ Via Express Delivery ☒ Via Electronic Filing (EDIS)
Hon. MaryJoan McNamara Administrative Law Judge U.S. International Trade Commission 500 E Street, S.W. Washington, D.C. 20436 McNamara337@usitc.gov	☐ Via First Class Mail ☐ Via Hand Delivery ☐ Via Express Delivery ☒ Via Electronic Mail
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**Certain Soft Projectile Launching Devices,
Components Thereof, Ammunition, and
Products Containing Same**

Inv. No. 337-TA-1325

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**Certain Soft Projectile Launching Devices,
Components Thereof, Ammunition, and
Products Containing Same**

Inv. No. 337-TA-1325

On Behalf of Respondents Gel Blaster, Inc. f/k/a Gel Blaster LLC, Guangdong Yu Lee Technology Corp., Yu Lee Co., Ltd., and Shenzhen Yi Jin Electronics Science and Technology Co., Ltd.

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**Certain Soft Projectile Launching Devices,
Components Thereof, Ammunition, and
Products Containing Same**

Inv. No. 337-TA-1325

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