IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

**SECURITY FIRST INNOVATIONS, LLC,**

**Plaintiff,**

**v.**

**GOOGLE LLC,**

**Defendant.**

**Civil Action No. 2:23-cv-00097 (JKW-RJK)**

**GOOGLE LLC'S RESPONSIVE CLAIM CONSTRUCTION BRIEF**


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## NOTE ON CITATIONS

- SFI's Opening Claim Construction Brief, Dkt. 191, is referred to as "SFI Br."
- Google's Opening Claim Construction Brief, Dkt. 184, is referred to as "Google Br."
- The patents-in-suit, U.S. Patent Nos. 10,452,854 ("the '854 patent"); 11,068,609 ("the '609 patent"); 11,178,116 ("the '116 patent"); and 9,338,140 ("the '140 patent"); were attached as Exhibits A through D, respectively, of Google's Opening Claim Construction Brief. References to the patents-in-suit are listed by column and line number, or by claim number. The '140 and '116 patents share the same specification, as do the '854 and '609 patents. Further, the four patents share the same first 35 figures and corresponding 75 columns of text. (The different material begins at Col. 76, line 4 of the '140 patent, and at Col. 77, line 27 of the '854 patent.)
- All references are to the '140 patent unless otherwise stated. Such references also encompass the corresponding language in the '116 patent and– when within the first 75 columns of text– the corresponding language in the '854 and '609 patents. For example, "11:18-30" refers to Column 11, lines 18-30 of the '140 patent; as well as Column 11, lines 42-54 of the '116 patent; Column 11, lines 5-17 of the '854 patent; and Column 11, lines 5-17 of the '609 patent.
- References to claims in the patents-in-suit are cited by the shortened patent number followed by "cl." and the claim number. For example, "'140 cl. 1" refers to claim 1 of the '140 patent.
- References to December 29, 2023 declaration of Aviel Rubin that SFI will presumably file with its brief are cited as "Rubin," followed by the paragraph number.
- Emphasis in brief added unless otherwise noted.


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## I. SFI'S LEGALLY FLAWED APPROACH TO CLAIM CONSTRUCTION

Google's proposed constructions accord with the approach set forth in the seminal *Phillips v. AWH Corp*. case: "claims must be read *in view of the specification*, of which they are a part." 415 F.3d 1303, 1315 (Fed. Cir. 2005). On the other hand, as Google previewed in its Opening Brief (Google Br. 13), SFI's approach to claim construction is fundamentally flawed. SFI relies on broad, usually non-technical, extrinsic dictionary definitions in the first instance, and then only refers to the specification to check to see if there was some disclaimer or lexicography. SFI Br. 8-9, 13, 15, 18, 21, 24, 28-29.

As Google detailed in its Opening Brief and as explained in *Phillips*, this is the approach that ***had*** been espoused in *Texas Digital v. Telegenix*, 308 F.3d 1193 (Fed. Cir. 2002), but ***was rejected and overruled*** by the *en banc* Federal Circuit in *Phillips*:

> ***[T]he Texas Digital approach limits the role of the specification in claim construction to serving as a check on the dictionary meaning of a claim term*** if the specification requires the court to conclude that fewer than all the dictionary definitions apply, or if the specification contains a sufficiently specific alternative definition or disavowal. [] ***That approach, in our view, improperly restricts the role of the specification in claim construction***. …
>
> The main problem with elevating the dictionary to such prominence is that it focuses the inquiry on the abstract meaning of words rather than on the meaning of claim terms within the context of the patent. Properly viewed, ***the "ordinary meaning" of a claim term is its meaning to the ordinary artisan after reading the entire patent***. Yet heavy reliance on the dictionary divorced from the intrinsic evidence risks transforming the meaning of the claim term to the artisan into the meaning of the term in the abstract, out of its particular context, which is the specification. The patent system is based on the proposition that ***claims cover only the invented subject matter***.

*Id*. at 1320-21. Accordingly, "[w]e cannot look at the ordinary meaning of the term ... in a vacuum. Rather, we must look at the ordinary meaning in the context of the written description and the prosecution history." *Id*. at 1313 (internal quotation omitted). "[T]he specification is ***always*** highly relevant to the claim construction analysis. Usually, it is dispositive; it is the single best guide to


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the meaning of a disputed term." *Id*. at 1315 (internal quotation omitted).

Yet, again and again, SFI makes legal arguments directly contrary to *Phillips*. For example, SFI asserts that "[i]f the claim language is clear, claim construction is restricted to determining if a deviation from the clear language of the claims is specified." SFI Br. 1. SFI cites to *Interactive Gift Express, Inc. v. CompuServe, Inc.*, 256 F.3d 1323, 1331 (Fed. Cir. 2001)—a pre-*Phillips* case—for this point. This overreliance on supposedly "clear and unambiguous" dictionary meanings pervades SFI's brief. *See* SFI Br. 2, 8-9, 13, 15, 18, 21, 24, 28-29.

SFI compounds its legal error by repeatedly arguing that the specification can only alter the "ordinary meaning" of a claim term via explicit disclaimer or lexicography. SFI Br. 1, 2-3, 8, 13, 15-16. While Google's constructions are true to the ordinary meaning of the claim terms in light of the intrinsic record, as the Federal Circuit has explained, "[o]ur case law does not require explicit redefinition or disavowal." *Trustees of Columbia Univ. in City of New York v. Symantec Corp*., 811 F.3d 1359, 1363 (Fed. Cir. 2016). Rather, "a claim term may be clearly redefined without an explicit statement of redefinition, and even when guidance is not provided in explicit definitional format, the specification may define claim terms by implication such that the meaning may be found in or ascertained by a reading of the patent documents."[1] *Id*. at 1364 (*quoting Phillips*, 415 F.3d at 1320-21) (internal quotation omitted).

[1] *Poly-Am., L.P. v. API Indus., Inc*., 839 F.3d 1131, 1136 (Fed. Cir. 2016) (SFI Br. 1), does not show otherwise. As *Poly-Am* itself stated, "Ultimately, the only meaning that matters in claim construction is the meaning in the context of the patent." *Id*. at 1137; *see also id*. ("Every embodiment described in the specification has inwardly extended short seals and every section of the specification indicates the importance of inwardly extended short seals. These two facts provide together a proper reason to limit the claims in this way.") Nor do SFI's cited district court cases. *Cypress Lake Software, Inc. v. ZTE (USA) Inc*. (cited at SFI Br. 13) merely rejected defendants' proposed construction based on a full *Phillips* analysis (2018 WL 4035968, at *23 (E.D. Tex. Aug. 23, 2018)), and *Alltech Assocs., Inc.* v. *Teledyne Instruments, Inc.* (also cited at SFI Br. 13) ***replaced*** "the inventor's words" in the claims with statements made while prosecuting the patent. 2014 WL 4214953, at *5 (D. Del. Aug. 25, 2014).


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SFI also asserts its claim construction approach is needed to avoid the so-called "cardinal sin" of importing limitations from the specification into the claims. SFI Br. 2, 3, 25-26. Initially, that was precisely the goal of the overruled *Texas Digital* standard. *Phillips*, 415 3d. at 1319-20. *Phillips* takes a more nuanced approach focusing on the specification in context:

> To avoid importing limitations from the specification into the claims, it is important to keep in mind that the purposes of the specification are to teach and enable those of skill in the art to make and use the invention and to provide a best mode for doing so. One of the best ways to teach a person of ordinary skill in the art how to make and use the invention is to provide an example of how to practice the invention in a particular case. ***Much of the time, upon reading the specification in that context, it will become clear whether the patentee is setting out specific examples of the invention to accomplish those goals, or whether the patentee instead intends for the claims and the embodiments in the specification to be strictly coextensive***. The manner in which the patentee uses a term within the specification and claims usually will make the distinction apparent.

*Id*. at 1323-24 (internal citations omitted). Thus "[a]lthough claims need not be limited to the preferred embodiment when the invention is more broadly described, neither do the claims enlarge what is patented beyond what the inventor has described as the invention." *Inpro II Licensing, S.A.R.L. v. T-Mobile USA, Inc*., 450 F.3d 1350, 1355 (Fed. Cir. 2006) (internal quotation omitted). That is because "the purpose of claim construction is to capture the scope of the actual invention, and whether the embodiments define the outer limits of the claim term, or are merely exemplary in nature, is a question that must be determined in the context of the particular patent." *Tippmann Eng'g, LLC v. Innovative Refrigeration Sys., Inc.*, No. 2022-1318, 2023 WL 18559, at *3 (Fed. Cir. Jan. 3, 2023) (cleaned up). Numerous cases have thus limited claims to the sole embodiment in the specification, when it was clear that the inventors had not contemplated other embodiments. Google Br. 8 (collecting cases).

In sum, SFI cannot avoid the teachings in the specification merely by citing to dictionary-based constructions, then asserting that Google's constructions are incorrect because they "exclude" supposed scope that is found in the dictionary and not contemplated by the


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specification. Yet as discussed below, that is precisely what SFI does throughout its brief.[2]

## II. DISTRIBUTING / GENERATING DATA CHUNKS OR SHARES (*ALL CLAIMS*)

The parties dispute whether the claims should be interpreted in light of the specification to cover systems that split data sets into data chunks or shares (Google), or whether the claims should encompass other, unexplained means of distributing or generating data chunks or shares such as "converting." SFI Br. 12. As Google demonstrated, the specification exclusively and consistently states that data chunks may only be created by ***splitting*** the data in the data set. Google Br. at 7. The Court previously recognized this fact, finding that "[a]t a high level, the claims are directed to a method for securing data that involves splitting data, encrypting the data with encryption keys, and storing the data and the encryption keys in one or more places." Dkt. 125 at 2. Even ***SFI*** agrees with Google and the Court on the patents' scope, both in previous disclosures (Google Br. at 5-6, 8-9) and in its opening claim construction brief: "The Asserted Patents clearly express the underlying concepts, such as splitting the data into smaller chunks . . . ." SFI Br. at 1; *see also id.* at 5 (quoting and agreeing with the Court's finding at Dkt. 125 at 2), 27 ("the specification describes the generation and use of a session key to 'split' data into shares."). Despite agreeing to this scope, SFI asserts that the "generating" and "distributing" limitation need not be construed because the terms are supposedly "clear and unambiguous." SFI Br. 13. But as discussed above, that simply is not the state of the current law.

When SFI actually addresses the language of the patents' specifications, it asserts that its constructions are "consistent with the specifications' uses of the words 'generating' and 'distributing.'" SFI Br. 13-14. But tellingly, SFI does not include any quotes from its citations

[2] While irrelevant to claim construction, SFI's allegations that it is "the predecessor of SFC" and that "SFC's long-time Chairman, Leo Guthart, saved SFC's patents out of bankruptcy" (SFI Br. 4-5) are incorrect, as Google has explained in other submissions. *See* Dkt. 281, 5.


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demonstrating this supposed consistency. This is likely because each of SFI's citations explicitly discusses "splitting" data into chunks or shares, in accordance with Google's construction. *See, e.g.*, '609 patent at 6:57-61 ("Another aspect of the invention includes using any suitable parsing and ***splitting*** algorithm to generate shares of data."); *see also* 21:9-37, 54:17-37, 74:47-50.

SFI complains that "generating" and "distributing" cannot both mean "splitting" given the doctrine of claim differentiation. SFI Br. 14. "Although claim differentiation is a useful analytic tool, it cannot enlarge the meaning of a claim beyond that which is supported by the patent documents[.]" *Fenner Invs., Ltd. v. Cellco P'ship*, 778 F.3d 1320, 1327 (Fed. Cir. 2015). Here, these claims use "generating" and/or "distributing" to refer to the same process of splitting data sets into chunks or shards. That the applicants chose—perhaps strategically—to use different words to refer to the same concept does not entitle them to a broader scope than what they described in the specification. *See Inpro II Licensing,* 450 F.3d at 1355.

Moreover, SFI concedes that the "generating" of the specification "includes 'distributing' as merely one of the steps" in arguing that they should be construed differently. SFI Br. at 14. If anything, however, this means that generating would be ***narrower*** than distributing because it must "include distributing" along with additional steps. Yet, SFI contends that "generating" should be ***broader than*** distributing/splitting. In any event, Google is not contending that a narrower construction of "generating" is needed to resolve the dispute between the parties, so SFI's argument is not relevant to the dispute actually before the Court. Google did not propose construing "generating" in the '854 and '140 Patents, for the same reason. *Cf.* SFI Br. 14 n. 7.

SFI also points to portions of the specification it contends would be "nonsensical if 'distributing' means splitting." *Id*. This is a red herring. Google seeks a construction that, *e.g.*, "generating a plurality of data chunks based on a data set" ***in the claims*** means "splitting the data


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set into a plurality of data chunks." It is not seeking to replace the word "distributing" with the word "splitting" throughout the entire ***specification***. That is not the point of claim construction.

## III. DATA INDICATIVE OF . . . KEY(S) ('140 CL. 1; '854 CL. 1; '609 CL. 1, 2, 3)

While some of the asserted claims recite storing encryption keys with data chunks, other claims instead recite storing "data indicative of" encryption keys with data chunks. *Compare* '116 cl. 1 ("separately storing each data chunk of the plurality of data chunks together with one of the plurality of obfuscated different encryption keys") *with* '854 cl. 1 ("storing with the plurality of data chunks data indicative of at least one of the distinct encryption keys"). The parties dispute whether "data indicative of a key" is metadata about the key and whether the key itself can be "data indicative of a key," as SFI contends. Google Br. 10.

### A. "DATA INDICATIVE OF A KEY" IS METADATA ABOUT THE KEY

As Google showed, data indicative of a key is simply metadata about that key. Google Br. 9-11. This construction accords with the words of the claims, the intrinsic evidence, and the common-sense understanding of what "indicate" means. *Id.* Indeed, SFI itself states "[a] core concept of the patented inventions is storing ***information about*** the encryption key with the data chunk that key encrypts." SFI Br. 16. That is what metadata is. So while SFI posits, relying again on its flawed legal standard, that "there is nothing in the intrinsic record that could constitute a clear and unequivocal disavowal of claim scope" (SFI Br. 15), Google's construction does not rely on or require any such "disavowal." This is simply what the phrase means.

SFI incorrectly asserts that Google's construction replaces "data" with "metadata." SFI Br. 15-16. Not so. The relevant phrase is "data ***indicative*** of a key." Google's construction is not, as SFI posits, "metadata indicative of a key." Rather, Google proposes that the "data indicative of" a key is "metadata about a key." In other words, "metadata" addresses what it means for "data" to "indicate" something about a "key" according to the patents. Google Br. 10-11.


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For its part (SFI Br. 15), SFI addresses none of the problems Google identified with SFI's proposed alternative construction, cobbled together from disparate dictionary definitions divorced from the specification. Google Br. 13.

### B. "DATA INDICATIVE OF A KEY" CANNOT BE THE KEY ITSELF

As Google also demonstrated, and as common sense also shows, data *indicative of* a key is not a key itself. Google Br. 11-12. This is not, as SFI contends, "exclud[ing] the very data that indicates the key itself." SFI Br. 17. It is merely providing that a "key" does not indicate itself as a matter of logic, grammar, and common sense.

SFI also complains about Google's construction employing a negative limitation, citing to another pre-*Phillips* case that limited the role of the specification to express disclaimer and lexicography. SFI Br. 16 (citing *Omega Eng'g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1323 (Fed. Cir. 2003)). Again, *Phillips* does not so limit the role of the specification. 415 F.3d at 1313, 1315, 1320. In actuality, as Google noted in its Opening Brief, "[t]here is no *per se* rule against negative constructions, which in some cases can be enough to resolve the relevant dispute." *Intel Corp. v. Qualcomm Inc.*, 21 F.4th 801, 811 (Fed. Cir. 2021) (internal citation omitted); *see also* Google Br. 11. Here, Google's negative construction appropriately resolves the parties' dispute as to whether "data indicative of a key" can be the key itself (thereby reading out the term "data indicative of" from the claim). Google Br. 11.

SFI also asserts that "data indicative of a key" should be construed to include a key to avoid excluding embodiments of the patents. SFI Br. 16-17. Initially, SFI ignores that the patents contain multiple embodiments and other claims cover those embodiments, making SFI's concern far less persuasive. *See* Google Br. 11-12; *Alcon Rsch., Ltd. v. Barr Lab'ys Inc.*, No. 09-CV-0318-LDD, 2011 WL 3901878, at *7 (D. Del. Sept. 6, 2011). Indeed, by SFI's logic, claims that explicitly recite storing the key with the data chunks should also be construed to store metadata about the


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key with the data chunks. In any event, the "clear evidence to the contrary" purportedly required to exclude embodiments is the language of the "data indicative" in the claims themselves. These claims require storing "data indicative of a key," not storing a "key."

SFI further points to the prosecution history of the '140 patent, which Google disclosed as intrinsic evidence, as supposed evidence that "data indicative of a key" can be the key. SFI Br. 17. There, the applicants amended the claims to recite "include with each of the plurality of shares data indicative of the at least one session key used to secure the dataset." SFI Br. Ex. K at 7. They then distinguished prior art references that purportedly do not "teach or suggest storing any additional information with each of the data shares, much less information used to secure a dataset." *Id*. This merely shows that the metadata stored with the chunks can be used to locate the key used to secure those chunks, as the patents themselves explain. 90:35-36 ("Keyid data structure 4906 may include information for identifying a key, such as id and idLen."); *see also* Fig. 49, Panel B. It does not support SFI's position that data "indicates" itself.

Finally, SFI argues that no construction is necessary because the claim language is "clear and unambiguous" and uses "commonly understood English Words." SFI Br. 15. But a construction ***is*** necessary because SFI reads this term the ***opposite*** of what clear English requires.

## IV. DATASET / DATA SET (*ALL CLAIMS*)

This term requires construction to resolve whether a "data set" must be related information treated as a unit, e.g., a file or a set of files (Google), or simply any data (SFI). SFI makes this dispute crystal clear in its opening brief, equating a "data set" to "***any data*** for storage on 'storage devices.'"[3] SFI Br. 9. As Google demonstrated, the claims, specification, extrinsic evidence, and

[3] That the "data set" must be "stored" is required by other claim language and is thus redundant. Google Br. 15. To narrow the dispute, however, Google does not object to the Court adding "for storage" to Google's proposed construction.


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simple grammar show that a "data ***set***" is not synonymous with "data," but rather a collection of related data such as a file, set of files, or a database table. Google Br. 14-15.

As SFI itself notes earlier in the brief, "data set" is a "technical" term. SFI Br. 3. While SFI accuses Google of "cherry-picking" a dictionary definition (*id*., 10), SFI relies on the same technical definition from the *Microsoft Computer Dictionary*.[4] Google Br. 15. But, SFI's alternative construction truncates the relevant definition without any evidentiary support, turning "a collection of ~~related~~ information ~~made up of separate elements that can be treated as a unit in data handling~~" into "a collection of information for storage" (the language SFI removed from the definition is in red, and the language SFI added is in blue). And despite agreeing "data set" is a technical term, SFI oddly argues that "data set" should carry its "colloquial English" meaning, despite not providing any evidence of such a "colloquial" meaning. SFI Br. 9.

Further, rather than address Google's actual position explained in the parties' meet and confer and in Google's interrogatory responses and elsewhere (*e.g.*, Google's Sep. 8, 2023 Supp. Rog. Resp. (Ex. A) at 10, 12, 14, 16, 19; Google's Aug. 24, 2023 Letter (SFI Br. Ex. D) at 3, 4, 5, 6), SFI raises a strawman argument that Google seeks to restrict the "size, form or type of the data" within the data set. SFI Br. 10. This is incorrect. Google's construction does not exclude any file by size, form or filetype. Indeed, the intrinsic evidence cited by Google acknowledges the claimed

[4] SFI's complaint that the definition Google provided from the *American Heritage Dictionary* definition does not use the same verbiage as the *Microsoft Computer Dictionary* (SFI Br. 10) is misplaced. Like the *Microsoft* definition, it too requires that the "collection" be of "related data records." And while there may be different definitions of "data set" in the extrinsic evidence, (*see, e.g.*, SFI Ex. G at 237 (reciting definitions of "data set" using "AT&T jargon" and "IBM jargon")), the parties apparently agree that the Microsoft definition is appropriate. There is thus no need to "resolve the tension" between the definitions as SFI asserts. SFI Br. 10. Indeed, on this point, SFI cites *Brookhill-Wilk 1, LLC* v. *Intuitive Surgical, Inc.*, 334 F.3d 1294, 1300 (Fed. Cir. 2003), another pre-*Phillips* case that "consult[ed] dictionary definitions [as] a first step in the claim construction analysis" in line with the overruled *Texas Digital* standard.


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invention "operates on any type of data set, and on any and all file types, or in a database on any row, column or cell of data in that database." 53:3-5 (*cited at* Google Br. 14); *see also* 62:45-67, 63:13-15 (*cited at id.*). Data ***within*** a data set can be "text, audio, video," or other types of "data." 20:18-23, 87:48-49. But nowhere do the specifications of the Asserted Patents, including in SFI's collected citations (SFI Br. 9), suggest that a "data set" could be "any data," *i.e.* any sequence of 1s and 0s. Nor do the claims, as that would read out the word "set" from this term, rendering it just "data." While SFI asserts '609 cl. 1 uses "data" and "data set" interchangeably (SFI Br. 8), this too is incorrect—claim 1 of the '609 patent actually makes clear they are different, by referring to the "data ***of*** the data set." '609 cl. 1, Google Br. 14.

SFI also points to Google's August 24, 2023 letter as purportedly "drawing an apparent distinction between 'a photo album' and 'a single photo'" as a basis to reject Google's construction. *Id.* What Google actually said is that "SFI's chart identifies no such 'data set'" at all. Thus, SFI should "identify what the data set is that SFI is pointing to . . . In reference to Photos for example, would it be a photo album, a single photo, etc. . . ." SFI Br. Ex. D at 3, 4, 5, 6. Google thus asked what SFI was alleging met the "data set" limitation—*e.g.*, a "photo album" or a "single photo"[5]—a detail SFI refuses to disclose for every product it has purported to accuse in this case. Dkt. 132 at 2-6; Dkt. 166 at 2-3.

## V. "A DATA SET" / "THE DATA SET"

SFI argues that the Court need not adopt Google's construction because "there is no dispute between the parties with respect to antecedent basis." SFI Br. 11. But as Google showed in its opening brief, there is a dispute to resolve because SFI points to different "data sets" at different

[5] If SFI was arguing that a photo album is the *same* "collection of information for storage" as a single photo, that absurdity further shows why its construction should be rejected and why a construction of the antecedent basis terms data set/the data set discussed below is necessary.


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points in its infringement charts. Google Br. 16-17. Whether by oversight or design, SFI never actually states it agrees with Google's construction that "a data set" and "the data set" must be the same data set, and its infringement charts demonstrate that it actually disagrees. *Id.* A construction is thus required. *O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1362 (Fed. Cir. 2008); *see also* SFI Br. 1-2 (agreeing the court should construe a term when "there is an actual, legitimate dispute as to the proper scope of the claims").

For example, SFI says it agrees that "a" provides the antecedent basis for "the." And it quotes *SFA Sys., LLC* v. *1-800-Flowers.com, Inc.* for the proposition that "the first mention of a noun is preceded by *a* or *an* and subsequent references to the same noun are preceded by *the* or *said.*" SFI Br. 11. But SFI avoids agreeing to the impact of that rule in the following sentence of the opinion: that "the second mention of 'sales process' ('the sales process') refers back to the first mention ('a sales process') and both relate to the same 'process of selling goods or services, including two or more phases such as lead generation, time with customer, order management, and customer retention' (the construction for 'sales process.')." *Id.* (*quoting* 940 F. Supp. 2d 433, 447 (E.D. Tex. 2013)). This is why this dispute requires resolution.

SFI also oddly argues Google's construction would result in juror confusion as to "why is the Court uniquely emphasizing these terms?" as opposed to the other antecedent basis terms. SFI Br. 11. This is not credible. As Google noted, Google proposed similar constructions for the other antecedent basis terms in the claims too. Google Br. 16 n. 9. ***SFI*** refused to provide constructions for any of these terms, in violation of the Scheduling Order's requirement that it do so. *Id.* If SFI's opposition were really based on juror confusion, it could have simply agreed with Google's antecedent basis proposals, thereby saving the parties the burden of briefing the issue and the Court the burden of resolving it. But it will not, because SFI is attempting to avoid an adverse ruling on


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an issue where it has no viable position. This simply shows a construction is necessary.

None of SFI's cases support its position to the contrary. For example, in *Personalized User Model LLP* v. *Google Inc.*, the Court "[f]or the most part, [] agrees with Google" though seeing "no need to inject further language and potential confusion into the claims," but did so for two antecedent basis terms where there was a dispute as to claim scope, as there is here. 2012 WL 295048, at *25-27 (D. Del. Jan. 25, 2012). *I/P Engine, Inc.* v. *AOL, Inc.* is simply irrelevant, as Google withdrew antecedent basis terms (SFI Br. 11) in response to the Court's post-briefing suggestion that the parties further limit the number of disputes. 874 F. Supp. 2d 510, 513 n.1 (E.D. Va. 2012). And as previously noted (Google Br. 17 n. 10), the courts in *Cybergym Rsch. LLC* v. *Icon Health & Fitness, Inc.* and *SFA Sys., LLC* v. *1-800-Flowers.com, Inc.* both ***agreed*** that defendants' proposals as to antecedent basis were consistent with blackletter law, but found no need to enter formal constructions. 2007 WL 5688735, at *22 (E.D. Tex. Jan. 25, 2007); 940 F. Supp. 2d 433, 447 (E.D. Tex. 2013). Here, there is such a need for claim construction in light of SFI's inconsistent infringement allegations. Google Br. 16-17. Even if the Court were inclined to avoid a formal construction, it should still issue a ruling confirming that "a data set" and "the data set" refer to the same data set, in the manner of *SFA Sys*. 940 F. Supp. 2d at 447.

## VI. VIRTUAL DISK [] COMPRISING A DIRECTORY MAPPED TO THE PLURALITY OF PHYSICAL STORAGE DEVICES (*'140 CL. 1*)

Claim 1 of the '140 patent recites a "virtual disk comprising a directory mapped to the plurality of physical storage devices such that physical locations of the shares are hidden from the client device." As noted in Google's Opening brief, "virtual disk" is a term of art, and SFI agrees it is a "technical claim term." Google Br. 18; SFI Br. 3. As Google demonstrated the meaning of this term of art is a "RAM disk"—referring to a seemingly persistent hard drive that is actually implemented in transient Random Access Memory. Google Br. 18 (collecting definitions). While


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SFI asserts these definitions support its own construction, SFI only does so by misleadingly editing them to omit that virtual disks are implemented on "RAM." SFI Br. 28.

In any event, there does not appear to be any dispute that the patents do not use this term to refer to RAM disks. As SFI seemingly acknowledges, while never mentioning a "virtual disk," the specification discloses only ***one*** mechanism for performing the functionality the claim assigns to the "virtual disk." SFI Br. 29-30; Google Br. 18-19 (both citing 87:16-34). As explained above, when the specification is so limited and the term at issue is not a term of art or used as a term of art, the claim is accordingly limited to the teaching in the specification. *GPNE Corp.*, 830 F.3d at 1370–71; *see also* Google Br. 8 (collecting cases). If the "virtual disk" of the claims does not refer to the sole implementation in the specification, then the term would be indefinite, as a person of skill in the art would not know what else the "virtual disk" could be, given the term of art "RAM disk" definition is indisputably nonsensical in light of the claims.

SFI complains that Google's construction rewords claim language. SFI Br. 29-30. But this is an irrelevant truism; any claim construction of a term does not simply copy it. SFI also argues that Google's construction "gives no attention to the word 'virtual.'" *Id*. at 29. Not so: as SFI admits in the next paragraph of its brief, Google's construction is drawn from the only description of the "virtual disk" functionality in the specification. While SFI asserts that "[w]hen the patentee intended to refer to 'a distributed file system' and 'file assets,' it knew those phrases and used them" (*id.*), this argument is self-defeating. As SFI acknowledges, the applicants used those same words in describing the only implementation of the claimed virtual disk technology, and Google's construction appropriately uses those very words. *GPNE Corp.*, 830 F.3d at 1370–71.

Despite the acknowledged sole disclosure of virtual disk in the specification discussed above, SFI seeks to broadly sweep in as a "virtual disk" ***any*** "system that simulates or emulates a


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physical storage device." As purported support, SFI cites to a single sentence at 69:41-43 regarding an unclaimed "group key" embodiment not even related to the acknowledged sole discussion of what could be a "virtual disk" in the specification. SFI's citation to *Oasis Rsch., LLC v. AT&T Corp.*, 2012 WL 602199, at *9 (E.D. Tex. Feb. 23, 2012) (SFI Br. 29) is also not relevant. That case relied on different intrinsic evidence, including explicit lexicography the Court adopted. Google Br. 19-20. The court did not purport to adopt any "ordinary" meaning of "virtual disk" as SFI suggests. *Oasis*, 2012 WL 602199, at *9. In any event, SFI itself does not even use the complete construction in *Oasis*. So its complaint that Google is somehow improperly "deviating" from the supposed "ordinary" meaning from *Oasis* makes no sense.

Finally, SFI inexplicably shortened its exchanged construction of "a system that simulates or emulates a physical storage device, comprising a directory mapped to a plurality of physical storage devices such that physical locations of the shares are hidden from the client device" (Google Br. Ex. K at 8) to remove everything after the comma. Instead, SFI only accounts for the term "virtual disk" in the full phrase for construction. Thus, SFI's construction is now further infirm by failing to give any meaning to "comprising a directory mapped to the plurality of physical storage devices." *Bicon, Inc. v. Straumann Co.*, 441 F.3d 945, 950 (Fed. Cir. 2006) ("claims are interpreted with an eye toward giving effect to all terms in the claim").

## VII. EXTERNAL KEY (*'854 CL. 1*)

As Google demonstrated in its Opening Brief, the parties dispute whether the "external key" of '854 cl. 1 must be generated outside of the storage system implementing the claim, *i.e.*, by a third party (Google), or whether it may be merely stored "separately," whatever that means, from the data chunks (SFI). The claim language makes clear that the method "***receiv[es]*** an external key from an ***external*** storage system." The key thus cannot have been stored on the storage system executing the claimed "method for securely storing a data set." The claim further specifies that


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this received key is an ***external*** key. Like the "external storage system" that sends it, the "external key" therefore must also originate outside the claimed storage system. The specification explains why this may be preferable, *e.g.*, because the third party storing data on the secured system wants to maintain control of that data. Google Br. 20-21.

Nevertheless, SFI complains that Google's construction is purportedly inconsistent with one of Google's dictionary definitions of "external" as "situated or lying outside." SFI Br. 20. Not so: Google's construction addresses what the "external key" is "situated or lying outside" of: the entity executing claim 1's system "for securely storing a data set." SFI also argues that Google's construction does not make sense because "[w]hat third party, who are the first two parties, and how does this third party provide the key to the system?" SFI Br. 20. It is doubtful this confusion is genuine. As a matter of common English, a third party is a party other than the first party running the "method for securely storing a data set" of the claim, as Google explained in briefing (Google Br. 20-21) and at the parties' meet and confer. As a matter of basic grammar and common sense, there is no other "second" party as SFI posits.

In contrast, while SFI acknowledges that the "external key" must be stored outside "the system that generates and stores the data chunks" (SFI Br. 20), SFI's construction fails to address what the "external key" is external to. As discussed at Google Br. 21-22, this seems to be intentional, so that SFI can argue that a key that originated and is somehow received "from" ***within*** the entity executing the claimed method is somehow an "external key." Indeed, SFI contends its construction is met if that system *itself* stores the external key, as long as the two are stored in "different locations." SFI Br. 20. But it is unclear what SFI means even by "different locations"—different portions of the same hard drive, different hard drives on the same computer, different computers on the same desk, different desks in the same room, different rooms on the same floor,


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etc. And while SFI asserts that an "external" key need only be "stored separately" from the chunks (SFI Br. 19), this makes no sense in the context of the claims either. Indeed, '854 cl. 1 does not even require that the received "external key" be "stored" at all.[6]

SFI points to '854 patent at 78:66-79:3, 79:15-19 as supposedly supporting its construction. SFI Br. 20. But those passages actually support Google's construction. The first one notes: "When pre-encryption of the shares is selected, ***an external key*** may be passed to the secure data parser. This key may be ***generated and stored externally*** in a key store (or other location) and may be used to optionally encrypt data prior to data splitting." '854 patent at 78:66-79:3. The second similarly describes the post encryption key, including that it "may be generated and stored externally in a key store (or other location)." *Id.* at 79:15-19. Thus, the specification explains that an external key is one that is generated (and stored) externally. The specification also further explains that the "key [] provided from an external key store" was originally "provided by a user or an external system," *i.e.* a third party. *Id*. at 77:59-63. Contrary to SFI's assertions (SFI Br. 20), none of these passages characterize the external key as being stored "separately," or even use the word "separate" (or similar language) at all.

SFI's arguments about a "parser master key" (*id*.) are irrelevant, as the specification never indicates that it is an external key. Rather, the specification explicitly states that it is "installed on the server on which the secure data parser has been deployed" and is thus not external at all. '854 patent at 62:40-47. SFI's citation to 79:66-80:4 (SFI Br. 20) is similarly of no moment, as it relates to storing an unclaimed "workgroup key" separately from shares and external keys, not to storing

[6] To the extent SFI's construction is intended to refer to the location of the "external key" prior to its use by the claimed method, that location is already specified by the claim's requirement that the key be "receiv[ed] [] from an external storage system." That the claim further specifies the key itself be "external" imposes an *additional* requirement. *Bicon*, 441 F.3d at 950.


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shares and external keys separately from each other as SFI suggests.

Finally, SFI claims that Google "has not provided any explanation of why the term is indefinite." SFI Br. 21. Not so. At the party's meet and confer, in a follow up email, and in an interrogatory response, Google explained that a person of skill in the art would not understand the metes and bounds of the "external key" limitation unless it referred to a key that was generated by a third party and that SFI's alternative "stored separately" construction was indefinite. Ex. B at 54-55, 76-79. SFI should not be permitted to later address the indefiniteness issue for the first time in its January 8 response brief (or tardy expert declaration, § XI).

## VIII. MINIMUM NUMBER OF THE PLURALITY OF [DATA] CHUNKS (*'854 CL. 1; '609 CL. 1*)

Claim 1 of the '854 patent recites "generating a plurality of data chunks based on the data set, such that the data set can be reconstructed using at least a minimum number of the plurality of data chunks…." Claim 1 of the '609 patent recites similar language. The parties primarily dispute whether this "minimum" number must be known or "predefined" prior to the creation of the data chunks given the intrinsic evidence (Google), or whether this phrase is effectively meaningless such that whatever number of chunks are ultimately used to reconstruct the data set will meet the "minimum number" limitation (SFI). Google Br. 22-24.

SFI points to many of the same sections of the specification as Google. But SFI omits ***how and why*** the specification uses the minimum number of portions needed to reconstruct the data set. SFI Br. 18; *compare* Google Br. 23-24. As the patents explain:

> The operation of the splitting technique and assignment of split data and split keys to shares may also be dependent on the M of N fault tolerance employed by fault tolerance process 4116 in a particular embodiment. ***A N of N embodiment may provide for a higher level of data security***, since all shares must be received to recover the underlying keys and data. ***A M of N embodiment may provide redundancy***.

81:25-32. This minimum number of shares is thus explicitly predefined and preconfigured,


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consistent with Google's construction, as a trade-off between the data ***security*** of requiring all shares (the "N of N embodiment") and the protection by ***redundancy*** against data loss of requiring less than all shares (the "M of N embodiment"). *See also* 66:50-54.

SFI complains that Google's construction restricts the claims to embodiments wherein the minimum number of chunks *n* is always less than the total number of chunks *m*. SFI Br. 19. Not so. In accordance with the specification, "[a]ny suitable value for *n* or *m* may be used." 69:9-23. And under Google's construction, *n* and *m* could each be predefined to be the same number. While this "minimum number" may vary (SFI Br. 18), at any given time that number is carefully calibrated as a tradeoff between data security and data redundancy, as detailed above. It is not randomly determined by the number of chunks/shares that the data set happen to be split into.

That SFI contends the "minimum number" "is simply the threshold number of chunks, out of the total number of chunks generated, that must be available to reconstruct the data set" makes Google's point as to why SFI's construction should be rejected. SFI Br. 18. According to SFI, the limitation is met by whatever number of chunks were "available" to be used to reconstruct the data set. So under SFI's position, there is thus no difference in scope between a claim that includes the underlined (above) portion of this phrase and a claim that does not, improperly rendering that language meaningless. *Bicon,* 441 F.3d at 950.

## IX. TRANSFORMING AND OBFUSCATING TERMS

The asserted claims of the '116 patent recite either an "obfuscating" (cl. 1) or "transforming" (cl. 9) step that occurs after the dividing and encrypting steps. As Google demonstrated, these steps refer to specific, and separate, obfuscation and transformation steps described in the specification and should be construed accordingly. Google Br. 25-30. In contrast, SFI contends that these terms should be interpreted to be coextensive with each other and the "encrypting" recited earlier in the claims. SFI's position that the encrypting, obfuscating, and


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transforming steps are coextensive also [redacted]

### A. TRANSFORMING / PERFORMING A TRANSFORM (*'116 CL. 2, 9*)

The specification's sole disclosure of how to "transform" in a cryptographically secure manner is the All-or-Nothing Transform and the claims are appropriately construed according to this disclosure. Google Br. 28-29. Again, SFI's assertions that the supposedly "clear" language render a construction unnecessary and its alternate dictionary definition proposal divorced from the specification (SFI Br. 21) are wrong as a matter of law. Section I , *supra*.

SFI's arguments regarding the defining "All-Or-Nothing Encryption and the Package Transform" paper are also unavailing. SFI does not even address that the paper was cited by the patents, or dispute that the paper explains what the All-or-Nothing Transform of the patents entails. Google Br. at 28-29. SFI instead argues that a paper that expressly ***excludes*** encrypting from the relevant transform somehow shows that transforming is ***broader*** than encrypting. SFI Br. 23-24. SFI provides no intrinsic support for this counterintuitive proposition. Nor could it because the patents treat transforming and encrypting as separate, non-overlapping steps. Google Br. 28-29; *see also infra*. Google's construction also does not contain a "negative limitation." SFI Br. 22. Rather, excluding encryption is part of what it means to "transform" in the patents.

While SFI posits that its broad, non-technical dictionary definition is consistent with the specification's description of a "package transform" (SFI Br. 21-22), SFI's quotation edits out the reference to the All or Nothing Transform:

> The session key 4604 may optionally be transformed into transform key 4612 such as through a AoNT or a package transform. In the example of a package transform, the session key 4604 may be XORed with the n encrypted 30 blocks 4608, resulting in a transform key 4612 that cannot be recovered without also recovering all of then [*sic*] encrypted blocks.


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’116 patent at 87:27-33 (SFI’s omissions underlined). That the “transform key [] cannot be recovered without also recovering all of the[] encrypted blocks” is a defining feature of an All or Nothing Transform (Google Br. 28) and thus precisely what SFI’s citation actually recites.

SFI further complains that Google’s construction excludes encryption, which it asserts is synonymous with transformation. SFI Br. 22. Initially, this contradicts SFI’s assertion that transforming is broader than encrypting. *Id*. 23-24. Further, the sole quotation SFI provides is at best ambiguous as to whether encrypting is synonymous with, “or” is an alternative to, transforming: “Cryptography, in general, refers to protecting data by ***transforming, or encrypting***, it into an unreadable format.” *Id.* (*quoting* ’116 patent at 1:42-44). SFI’s remaining cites that it does not quote show that transforming and encrypting are different steps. 82:40 refers to an “encrypt/transform process 4110,” which 82:65-83:11 makes clear both separately encrypts and transforms: “Encryption/transform 4110 process may perform key generation, data encryption, ***and*** key transform steps as described herein . . . . For example, ***AES encryption may be used*** with a cryptographically secure pseudo-random number generator to create a 128, 192, or 256-bit key . . . . ***The key may then be transformed*** for splitting and storage such as with a package transform or AoNT as described herein.” 85:26-29 refers to Fig. 46 which depicts the same “encrypt/transform process 4110.” So does Fig. 41.

SFI’s complaint that Google’s construction is not consistent with cited broad dictionary definitions (SFI Br. 23) also misses the mark. Google cited these dictionary definitions to show that SFI’s supposed “plain meaning” interpretation of “transforming” is not even the colloquial meaning, which requires a ***substantial*** change from those definitions as Google explained on the parties’ meet and confer. Google Br. 29. Nor does SFI’s dictionary definition of “transform” from the *Microsoft Dictionary* support its alternative construction or argument that “transform” as used


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in the '116 patent includes encryption. The cited definition is "To change the appearance or format of data ***without altering its content***; that is, to ***encode*** information according to predefined rules." SFI Br. 23. That is not SFI's alternative construction at all. Moreover, SFI's tardy expert declaration from Dr. Rubin (discussed below §XI), attaches a *Internet Security Glossary* that says encode "should ***not*** be used as a synonym for 'encrypt' because encoding is not usually intended to conceal meaning." Ex. E , Ex. F, 68. In any event, none of this extrinsic evidence should be needed given the clear intrinsic evidence supporting Google's proper construction.

### B. SEPARATELY STORING EACH DATA CHUNK … WITH ONE OF THE PLURALITY OF OBFUSCATED DIFFERENT ENCRYPTION KEYS (*'116 CL. 1*)

As Google demonstrated, "obfuscating" is not a term of art. And the specification only describes one means of performing "obfuscation," by storing the encrypted data chunk with a different key than the one that encrypted it. There is nothing in the specification that even suggests other processes. Google Br. 25-26. While SFI asserts that construing "obfuscating" according to the disclosed embodiment is legally incorrect because claims cannot be be limited to disclosed embodiments (SFI Br. 25-26), as discussed in Section I, *supra*, that legally incorrect as as claims are routinely limited to disclosed embodiments when there is no indication the inventors contemplated anything else. *See also* Google Br. 8 (collecting cases).

SFI's cited cases do not compel a different result. SFI Br. 25-26. In *Suffolk Techs. LLC v. AOL Inc.*, the court found that because the specification explicitly described files that were not identifiable by location, the construction of "file" could not be limited to files identifiable by location. 942 F. Supp. 2d 600, 607 (E.D. Va. 2013), *aff'd*, 752 F.3d 1358 (Fed. Cir. 2014). Significantly, the same court also found that the "file" of the claims must be "stored on, or created by, a server," in light of files' exclusive use in the intrinsic evidence. *Id*. at 606-607. And in *Morpho Detection, Inc. v. Smiths Detection Inc.*, the court ruled that the term "dryer" was not


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limited to dryers using desiccating materials because the specification "lacks any indication" that *all* the various dryers disclosed in *all* the different embodiments must do so. 2012 WL 5194076, at *11-12 (E.D. Va. Oct. 19, 2012). In contrast, Google's construction captures the *only* set of embodiments for "obfuscating" keys. Google Br. 25-26.

SFI also asserts that Google's construction would somehow exclude embodiments of obfuscating in the specification. SFI Br. 26. But none of its cited embodiments are designated as "obfuscating." SFI cites '116 patent at 77:13-16, which discusses the "All-or-Nothing Transform," without mentioning "obfuscation." 24:54-61 refers to "cryptographic keys" being "split into independently undecipherable randomized numbers," with no indication that is "obfuscating." And 77:43-46 details the unclaimed use of a "workgroup key" to encrypt other keys, without mentioning "obfuscating" either.

While SFI contends the dictionary meaning of "obfuscating" as "hidden" is apt here (SFI Br. 24), as Google demonstrated and explained on the parties' meet and confer, the supposedly colloquial meaning would render the claim indefinite for failing to inform a person of skill in the art as to what steps render the keys sufficiently "hidden" to meet the claim language. Google Br. 26-27. SFI does not address this. Rather, SFI simply concludes that other functions ***not*** described as "obfuscating" in the specification somehow fit within its cited dictionary definitions with no explanation. SFI Br. 24-25. Again, this is the *Texas Digital* approach *Phillips* overruled.

SFI also asserts that because dependent claims recite that the obfuscation step comprises "performing a transform" or "applying Shamir's Secret Sharing algorithm," the "obfuscating" step should be construed to encompass those steps. SFI Br. 24-25. But the dependent claims ***add*** those limitations to the disclosed "obfuscating" step; they do not replace it. While unstated, SFI's arguments appear to be based on the claim differentiation suggestion that independent claims


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should be interpreted as being broader than their corresponding dependent claims. "Although claim differentiation is a useful analytic tool, it cannot enlarge the meaning of a claim beyond that which is supported by the patent documents." *Fenner*, 778 F.3d at 1327.

## X. SESSION KEY (*'140 CL. 1, 8*)

While SFI alone proposed "session key" for construction, it still does not explain why the term needs to be construed at all, just as it refused to do on the parties' meet and confer. As an initial matter, SFI should not be permitted to hide the ball as to the import of this term.

Further, SFI ignores the temporal aspect that makes a "session" a "session," appropriately captured in Google's construction (a "key generated each time a data set is secured"), including as supported by ***SFI's*** own cited evidence. Google Br. 30; Charles C. Mann, *A Primer on Public-Key Encryption*, THE ATLANTIC (Sept. 2002) (Ex. D) at 6 ("When Alice wants to begin a new round of messages, she creates another session key.") (*cited at* SFI Br. 27). Instead, SFI argues against Google's construction by raising for the first time an ambiguity from a purported hypothetical nowhere in the intrinsic evidence where a session key is used to encrypt then decrypt a data set, then used again to encrypt and decrypt the same data set. SFI Br. 28. There is no ambiguity. Google's construction simply provides that a session key is a key generated for that session to secure the data of that session (*see, e.g.*, 32:44-59), without precluding subsequent steps that may be taken with that session key. SFI also argues that Google's construction should be rejected because a session key must be used "to secure a *particular* data set." SFI Br. 27 (emph. orig.). This is a peculiar argument. As discussed above (*supra*,§ V), Google proposes that the "at least one session key used to secure a dataset" is the same "dataset" as used in the later limitation of "at least one session key used to secure the dataset." It is ***SFI*** that opposes this construction.

Moreover, while SFI spends the rest of its brief urging the Court to construe terms according to the overruled *Texas Digital* standard, SFI reverses course for "session key." SFI says


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it "is not a common English phrase" and thus should be limited to how the session key is purportedly used in the '140 patent. SFI Br. 26. To be sure, the '140 patent does include embodiments where the "session key" is "symmetric," such that the same key is used to both encrypt and decrypt data as SFI's construction provides. SFI Br. 26-27. This is in contrast to asymmetric keys, such as public and private keys, which use different keys to encrypt and decrypt. *Id.*; *see also* 1:44-49. But the specification also states a "skilled artisan will recognize from the disclosure herein that the cryptographic keys may advantageously include ***some or all of*** symmetric keys, public keys, and private keys." 11:40-45. So unlike Google's proposed constructions that track the ***only*** teachings of the specification that SFI uniformly opposes, here, SFI's proposal precludes types of keys the specification specifically says may be used.

## XI. SFI'S TARDY AND IRRELEVANT EXPERT DECLARATION SHOULD BE IGNORED

The Scheduling Order states that on November 10, 2023, "[e]ach party shall also identify all references from the specification or prosecution history that support its proposed constructions and ***any extrinsic evidence*** known to the party on which it intends to rely either to support its proposed claim constructions or ***to oppose any other party's proposed claim constructions***, including, but not limited to, as permitted by law, dictionary definitions, citations to learned treatises and prior art, and ***testimony of fact and expert witnesses***." Dkt. 54, 7. SFI provided no expert testimony by this date. Nevertheless, on Friday, December 29, right before a holiday weekend, SFI served Google with an expert declaration from Dr. Avi Rubin to be filed with its January 8 Responsive Claim Construction brief, despite it being tardy by seven weeks. Ex. F. SFI refused to withdraw the declaration, will not make Dr. Rubin available for deposition until January 23, and has thus far refused Google's reasonable compromises to address the prejudice to Google from the declaration. *Id.* As Google will detail in a motion to strike, this tardy declaration should be stricken. Should SFI be permitted to present this tardy extrinsic evidence, Google will seek


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alternative relief to submit any deposition testimony from Dr. Rubin, a responsive declaration from its own expert, and/or a supplemental brief.

In any event, Dr. Rubin's declaration is legally irrelevant. He addresses three terms: "external key," the "transform[]" phrases, and the "obfuscating" phrases. Yet for each, Dr. Rubin does no more than parrot SFI's arguments. *Compare*, respectively, SFI Br. 19-21, to Rubin, ¶¶ 26-31; SFI Br. 21-24, to Rubin, ¶¶ 33-39; SFI Br. 24-26, to Rubin, ¶¶ 41-47. It is apparent Dr. Rubin brings nothing to the table, technical experience or otherwise (other than citing further previously undisclosed extrinsic evidence), beyond his say-so that SFI's arguments are correct. His "opinions" fail for the same reasons already discussed in Google's brief regarding these same terms. *Supra*,§§ VII, IX. *Phillips*, 415 F.3d at 1318 (a court should discount any expert testimony at odds with the intrinsic evidence). And as a legal matter, Dr. Rubin's extrinsic evidence expert testimony is simply irrelevant. *Bushnell Hawthorne, LLC v. Cisco Sys., Inc.*, No. 1:18-CV-760, 2019 WL 2745735, at *5 n. 5 (E.D. Va. July 1, 2019), aff'd, 813 F. App'x 522 (Fed. Cir. 2020) (J. Ellis) ("[P]laintiff's expert does not provide any technical background that would aid a reader who is unskilled in the art in interpreting the '951 Patent. To the contrary, plaintiff's expert declaration in large part simply repeats arguments that plaintiff makes in its brief, which do not require the aid of an expert to consider and resolve here. Accordingly, plaintiff's expert declaration is not entitled to any significant weight in determining whether the various claim terms of the '951 Patent discussed herein render the Patent's claims indefinite."); *Genuine Enabling Tech. LLC v. Nintendo Co.,* 29 F.4th 1365, 1373 (Fed. Cir. 2022) (considering expert testimony over the intrinsic record would be "unfair to competitors who must be able to rely on the patent documents themselves, without consideration of expert opinion that then does not even exist, in ascertaining the scope of a patentee's right to exclude.").


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Dated: January 8, 2024

Respectfully submitted,

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