IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROKU, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 21-1035 (MN)
	)	CONSOLIDATED
ALMONDNET, INC. and	)	
INTENT IQ, LLC,	)	
	)	
Defendants.	)	

JOINT CLAIM CONSTRUCTION CHART

Pursuant to Paragraph 11 of the Scheduling Order (D.I. 41, as amended), Plaintiff Roku, Inc. ("Roku") and Defendants AlmondNet, Inc. and Intent IQ, LLC (collectively, "AlmondNet") submit the attached Joint Claim Construction Chart (Exhibits 1 and 2), which identifies the claim terms in dispute and each party's proposed construction with citations only to the intrinsic evidence in support of their proposed constructions. As further set forth in Paragraph 11 of the Scheduling Order, the parties will include a joint appendix with the joint claim construction brief that contains a copy of the patents-at-issue, the portions of all relevant intrinsic evidence cited in the Joint Claim Construction Chart, and any further evidence cited in the parties' joint brief.

As instructed by the Court on March 28, 2023, the parties will set forth their respective positions regarding narrowing the claims at issue and invalidity references in concurrently filed letters.

As of April 10, 2023, AlmondNet has identified the following 50 asserted claims from eight patents that it currently asserts infringement of by Roku:

- USP 8,677,398 ("'398 patent"): claims 13, 15, 17-18, 22
- USP 10,715,878 ("'878 patent"): claims 1, 6

- USP 8,566,164 ("'164 patent"): claims 1-2, 5-7, 11-12
- USP 10,321,198 ("'198 patent"): claims 1-2, 4-6, 9, 17
- USP 8,595,069 ("'069 patent"): claims 4-5, 9, 17
- USP 8,671,139 ("'139 patent"): claims 1, 37, 41-43, 45, 48-49
- USP 8,959,146 ("'146 patent"): claims 1, 5-9, 21
- USP 8,244,582 ("'582 patent"): claims 1, 3-5, 9-11, 13-15

The disputed claim terms and proposed constructions for the 10 terms of these asserted claims are found in Exhibit 1 hereto.

Further, in this consolidated case, Roku seeks a declaratory judgment of non-infringement for the following additional claims for which AlmondNet has not provided infringement contentions or has recently withdrawn as claims alleged to be infringed by Roku:[1]

- USP 8,677,398 ("'398 Patent"): claims 14, 16, 19-21, 23-26
- USP 10,715,878 ("'878 Patent"): claims 2-5, 7-9, 10-12
- USP 7,822,639 ("'639 Patent"): claims 1-8, 10, 13, 14, 24, 27-29, 31, 32, 36, 37, 39, 43-45, 47
- USP 8,244,586 ("'586 Patent"): claims 1-4, 11-13, 16-17, 20-22
- USP 10,026,100 ("'100 Patent"): claims 1-3, 5, 7, 9-11, 13-17, 19, 21, 23-25, 27-31, 33, 35, 37-39, 41, 42
- USP 10,628,857 ("'857 Patent"): claims 1-3, 5, 7-9, 11
- USP 8,566,164 ("'164 Patent"): claims 3, 8-10, 13, 14

[1] As further explained in Roku's concurrently filed letter, Roku believes these claims should be adjudged or dismissed with prejudice to AlmondNet later asserting them in this action or another action. AlmondNet disagrees with Roku's position as set forth in its letter. AlmondNet believes that the DJ-only claims should be dismissed for lack of jurisdiction and that the dropped claims are dismissed without prejudice.

- USP 8,595,069 ("'069 Patent"): claims 1, 3, 8, 10-16
- USP 10,321,198 ("'198 Patent"): claims 3, 8, 10-16

The disputed claim terms and proposed constructions for these 12 DJ-only and dropped claim terms are found in Exhibit 2 hereto.

The parties have agreed to the following construction(s):

Claim Term	Joint Proposed Construction[2]
preambles ('878 Patent, claim 1; '198 Patent, claim 1; '139 Patent, claims 1, 37; '146 Patent, claims 1, 21)	The identified preambles are limiting.
"third-party server computer" ('139 Patent, claims 1, 37; '146 Patent, claims 1, 21)	"server controlled by an entity that is distinct from the entit(ies) controlling the [computer system] / [system comprising one or more computers] performing the claimed method"
"off-site advertisement" / "off-site" ('639 Patent, claim 1; '586 Patent, claim 1; '100 Patent, claims 1, 15, 29; '857 Patent, claim 1)	"off-site advertisement": advertisement that is derived from outside of the immediate local context of a present site "off-site": outside of the immediate local context of a present site

[2] AlmondNet's agreements are for purposes of this case only and to streamline the parties' disputes and narrow the number of terms to be briefed and argued in *Markman* proceedings for this case. It is not (and should not be interpreted as) an agreement that the constructions are appropriate for other cases that may involve different postures, facts, and disputes.

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EXHIBIT 1

Exhibit 1 – Claims Asserted by AlmondNet and Intent IQ ("AlmondNet")

(* denotes Roku DJ only claim(s) in which claim term appears[1]; ** denotes AlmondNet withdrawn claim[2])

No.	Claim Term	AlmondNet's Proposed Construction	AlmondNet's Intrinsic Evidence	Roku's Proposed Construction	Roku's Intrinsic Evidence
1.	Preambles for '582 Patent, claims 1, 11	Not limiting; Roku has not shown any preamble should be construed as limiting.	'582 patent, claims 1, 11	The identified preambles are limiting. *Catalina Mktg. Int'l v. Coolsavings.com*, 289 F.3d 801, 808 (Fed. Cir. 2002) (holding that claim preambles limit inventions when they recite essential structure or steps, or if it is necessary to breathe life into the claims).	'878 Patent, claim 1; '198 Patent, claim 1; '582 Patent, claims 1, 11; '139 Patent, claims 1, 37; '146 Patent, claims 1, 21 .
2.	"electronic indicia"/ "indicia" ('398 Patent, claims 14*, 18, 23–24*, 26*;	Not indefinite	'398 patent, at Abstract, 7:6-8:33, 8:38-9:40, 10:23-12:9, and associated Figures, claims 1, 4, 9-10, 12-14, 23-27,	Indefinite. This term lacks certainty as to its scope and cannot be construed in light of the specification because the specification does not sufficiently disclose	'398 Patent: claims 1, 4, 9, 10, 12, 14, 18, 23–24, 26–27, 30, 32, 35–36, 39, 41, 44, Abstract, 7:66–8:8, 8:61–9:4, 10:53–11:3, 11:25–33,

[1] Roku: A "Roku DJ only claim" is one which was identified in Roku DJ's complaint (D.I. 1) but which AlmondNet has in this case either not alleged infringement of or withdrawn as a claim asserted to be infringed. Disputed claim terms which only appear in Roku DJ only claims are listed in Exhibit 2 to the JCCS.

[2] Roku: Roku maintains that any previously asserted but now withdrawn claims must be withdrawn with prejudice, which AlmondNet does not agree to.

No.	Claim Term	AlmondNet's Proposed Construction	AlmondNet's Intrinsic Evidence	Roku's Proposed Construction	Roku's Intrinsic Evidence
	'198 Patent[3], claim 2; '069 Patent, claim 2**)		30-32, 35-36, 39-41, 44. [4] '198 patent, at 8:30-9:29, 9:54-56, 11:32-12:7, 15:32-16:31, 17:12-19:23, and associated Figures, claims 2, 17, 27. '069 patent, claims 2, 19, 26.	or describe "indicia." "Indicia" could be arguably any form of electronic data.	11:53–66, 12:4–9 '398 Prosecution History, Aug. 8, 2013 Notice of Allowability at 2–3; March 8, 2013 Response to Office Action at 3, 7, 9, 12–13, 15–18 '198 Patent: claims 2, 19, 27, 15:3–7, 15:61–16:17 '069 Patent: claims 2, 19, 26, 14:51–56, 15:41–57 IPR2022-00773, Patent Owner Response at 9–11

[3] Roku: The '164 Patent, '198 Patent, and '069 Patents share a common specification. Roku reserves the right to rely on the corresponding portions of the specification of the '164 Patent to those cited from the '198 and '069 Patents for any disputed term relating to this patent family.

[4] AlmondNet: the following patent families share identical or substantially identical specifications: (1) the '164, '069, and '198 patents; (2) the '398 and '878 patents; and (3) the '639, '586, '100, and '857 patents, and (4) the '139 and '146 patents. AlmondNet reserves the right to rely on the portions of one patent's specification where the corresponding portions of another patent in the same family have been cited. AlmondNet also reserves the right to amend or supplement these disclosures, for example after Roku articulates the basis of its indefiniteness arguments and its arguments regarding preambles as limiting.

No.	Claim Term	AlmondNet's Proposed Construction	AlmondNet's Intrinsic Evidence	Roku's Proposed Construction	Roku's Intrinsic Evidence
3.	"at least in part on at least a portion" ('398 Patent, claim 22; '878 Patent, claims 6, 11*, 17*, 20*, 23*)	Not indefinite	'398 patent, at Abstract, 4:42-50, 7:66-9:41, 10:24-12:32, 14:22-14:56, 17:21-19:34, and associated Figures, claims 8, 22, 43. '878 patent, claims 6, 11, 17, 20, 23.	Indefinite due to the inability to determine the metes and bounds of "at least in part on at least a portion." There are compounding subjective terms of degree in this phrase – "at least," "in part," "at least," and "portion" without any reasonable guide in the specifications as to the boundaries regarding these subjective terms. *IBSA Institut Biochimique, S.A. v. Teva Pharms. USA*, 966 F.3d 1374, 1380 (Fed. Cir. 2020); *see also Vaxcel International Co., Ltd. v. Heathco LLC*, C.A. No. 20-224-LPS (D. Del. Nov. 22, 2021).	'398 Patent: claims 8, 22, 43 '878 Patent: claims 6, 11, 17, 20, 23
4.	"unaffiliated third parties"/ "unaffiliated third party"	Not indefinite	'582 patent, at Abstract, 3:30-4:44, 8:19-9:28, 11:4-12:36, and associated	Indefinite for the reasons set forth in *AlmondNet, Inc. v. Roku, Inc.*, Case	'582 Patent: claims 1, 2, 5, 11, 12, 15

No.	Claim Term	AlmondNet's Proposed Construction	AlmondNet's Intrinsic Evidence	Roku's Proposed Construction	Roku's Intrinsic Evidence
	('582 Patent, claims 1, 5, 11, 15)		Figures, claims 1, 2, 5, 11, 12, 15.	No.6:21-cv-00876-ADA (W.D. Tex.), Dkts. 35, 38.	'582 Patent Prosecution History, CBM2017-00052, Decision Denying Institution at 7–11, 15–16; June 6, 2011 Supplemental Preliminary Amendment at 3–6, 8
5.	"partial profile" ('582 Patent, claims 1, 3, 4, 6**, 11, 13, 14, 16**)	Not indefinite	'582 patent, at 2:57-63, 3:30-4:44, 5:4-7:19, 7:24-53, 11:4-16:34 Abstract, and associated Figures, claims 1, 2, 5, 11, 12, 15.	Indefinite for the reasons set forth in *AlmondNet, Inc. v. Roku, Inc.*, Case No.6:21-cv-00876-ADA (W.D. Tex.), Dkts. 35, 38.	'582 Patent: claims 1–4, 6, 11–14, 16, Abstract, 2:36–62, 3:30–52, 4:2–6, 5:4–35, 5:60–7:20, 7:24–29, 7:43–53, 7:58–65, 11:4–23, 12:37–67, 13:7–39, 14:5–15, 14:33–39, 14:46–56, 15:4–25, 15:54–16:28, 16:42–59
6.	"available" ('582 Patent, claims 1, 11)	Plain and ordinary meaning, which is "available"	'582 Patent at Abstract, 2:36-57; 2:63-3:6; 3:30-52; 4:2-6; 5:4-36; 5:57-7:19; 7:24-29;7:50-53; 8:19-28; 8:37-9:6; 9:29-54; 10:36-38; 10:54-63; 11:4-23; 12:9-67; 13:7-39; 14:5-15; 15:49-16:13; 16:35-40; Figs 2-5; Claims 1, 11	Electronically accessible	'582 Patent: claims 1, 11, 17:54–55 '582 Patent Prosecution History, Supplemental Preliminary Amendment at 3, 5, 8

No.	Claim Term	AlmondNet's Proposed Construction	AlmondNet's Intrinsic Evidence	Roku's Proposed Construction	Roku's Intrinsic Evidence
7.	"automatically with the computer system"/ "automatically"/ "automatic" ('582 Patent, claims 1, 4–6**, 9–11, 14–16**, 19**–20**; '139 Patent[5], claims 1, 37; '146 Patent, claims 1, 21 '586 Patent[6], claims 1*, 8–9**, 11*, 20*, 21*; '164 Patent[7], claims 1, 3*; '398 Patent, claim 14*, 22; '100 Patent, claims 1*, 8**, 9*, 15*, 23*, 29*, 37*; '857 Patent, claims 1*, 6**, 7*; '069 Patent, claims 1*, 3*, 4–5; '198 Patent, claim 1, 3*, 4–5)	Plain and ordinary meaning, wherein "automatically" / "automatic" does not mean "manually" / "manual"	'582 Patent at 2:36-57; 2:63-3:6; 3:62-4:38; 5:4-36; 5:57-7:19; 8:29-9:41; 11:4-12:67; 13:17-39; 14:5-45; 15:49-57; 15:64-16:9; 16:35-40; Figs. 2-5; Claims 1, 2, 4–6, 9–11, 12, 14–16, 19–20. '139 Patent at Abstract, 6:13–18, 6:50–62; 7:40-8:8; 8:37-9:3; 12:24-31; Figs. 2-3; Claims 1, 19, 37. '398 patent, at Abstract, 2:61-4:50, 7:66-9:41, 10:24-14:66, 15:1-20:31, 21:4-40, and	Not manually	'582 Patent: claims 1, 2, 4–6, 9–11, 12, 14–16, 19–20; '139 Patent, claims 1, 19, 37, Abstract, 6:13–18, 6:50–62 '139 Patent Prosecution History, October 9, 2013 Examiner-Initiated Interview Summary; Notice of Allowability at 2–4, 7–8, 13–14, 17, 24–27; September 24, 2013 Examiner-Initiated Interview Summary; September 23, 2013 Advisory Action Before the Filing of an Appeal

[5] Roku: The '139 Patent and the '146 Patent share a common specification. Roku reserves the right to rely on the corresponding portions of the specifications of the '146 Patent to those cited from the '139 Patent for any disputed term relating to this patent family.

[6] Roku: The '639, '586, '100, and '857 Patents share the same specification. Roku reserves the right to rely on the corresponding portions of the specifications of the respective patents to those portions cited from any patent in this patent family for any disputed term relating to this patent family (or alternatively, to rely on corresponding citations for any of the four family members).

[7] Roku: The '164 Patent, '198 Patent, and '069 Patents share a common specification. Roku reserves the right to rely on the corresponding portions of the specifications of the '198, and '069 Patents to those cited from the '164 Patent for any disputed term relating to this patent family.

No.	Claim Term	AlmondNet's Proposed Construction	AlmondNet's Intrinsic Evidence	Roku's Proposed Construction	Roku's Intrinsic Evidence
			associated Figures, claims 1-5, 13-19, 22, 27-33, 36-37, 40-42. '164 patent, at Abstract, 3:34-5:14, 9:59-10:10, 13:6-21:18, 21:19-23:6, 23:18-24:5, and associated Figures, claims 1-3, 10, 13, 16-18, 23-25 '586 patent, at Abstract, 6:55-8:6, 9:50-12:53, 13:48-14:4, and associated Figures, and corresponding disclosure in the '639, '100, and '857 patents.		Brief; September 16, 2013 Response to Final Office Action at 4; January 29, 2013 Response to Office Action at 15 '146 Patent, claims 1, 17, 21 '146 Patent Prosecution History, October 2, 2014 Applicant Initiated Interview Summary '639 Prosecution History, 11/13/2008 Response to Final Office Action at 17–18 IPR2022-00773, Patent Owner Response at 40–43 IPR2022-01420,, Patent Owner's Preliminary Response at 13–19;

No.	Claim Term	AlmondNet's Proposed Construction	AlmondNet's Intrinsic Evidence	Roku's Proposed Construction	Roku's Intrinsic Evidence
					22–23
8.	"URL redirection" ('582 Patent, claims 1, 10, 11, 20**)	"obtaining certain information for at least a portion of an accessed page / site from a different location"	'582 Patent at 3:62-4:16; 11:62-12:8; Claims 1, 10, 11, 20.	Obtaining a requested webpage from a different location	'582 Patent: claims 1, 10, 11, 20, 4:2–13, 12:2–4 U.S. Patent No. 7,979,307 Prosecution History, 4/27/2011 Supplemental Amendment and Interview Report at 6–7
9.	"indicia of instructions"/ "indicia of a condition"/ "indicia" ('582 Patent, claims 11, 15, 16**, 19**, 20**; '139 Patent, claims 1, 37; '146 Patent, claims 1, 5, 6, 8, 10**–11**, 21, 23**–24**)	Not indefinite	'582 Patent at 5:57-7:19; 8:53-9:28; 9:42-10:14; 11:4-12:18; 12:52-59; 16:35–40; Claims 11, 12, 15, 16, 17, 19, 20. '139 Patent at 7:40-8:8; 8:37-9:3; 9:27-44; 12:24-42; Figs. 2-3; Claims 1, 2, 15, 16, 18, 19, 20, 33, 34, 36, 37, 38, 51, 52, 54.	Indefinite for the reasons set forth in *AlmondNet, Inc. v. Roku, Inc.*, Case No.6:21-cv-00876-ADA (W.D. Tex.), Dkts. 35, 38.	'582 Patent: claims 11, 12, 15, 16, 17, 19, 20, 6:33–57, 11:34, 16:35–40 '139 Patent: claims 1, 2, 15, 16, 18, 19, 20, 33, 34, 36, 37, 38, 51, 52, 54 '139 Patent Prosecution History, CBM2017-00058 Decision Denying Institution at 7–12; October 9, 2013

No.	Claim Term	AlmondNet's Proposed Construction	AlmondNet's Intrinsic Evidence	Roku's Proposed Construction	Roku's Intrinsic Evidence
					Examiner-Initiated Interview Summary; Notice of Allowability at 3–4, 7, 13, 27; September 25, 2013 Interview Report at 2 '146 Patent, claims 1, 5, 6, 8, 10–12, 14, 17, 19–21, 23–24 '146 Patent Prosecution History, CBM2017-00056, Decision Denying Institution at 7–12; October 2, 2014 Applicant Initiated Interview Summary
10.	"possibly applicable" ('139 Patent, claims 1, 37; '146 Patent, claims 1, 21)	Not indefinite	'139 Patent at 6:12-18; 6:50-55; 7:40-8:36; 10:22-29; 12:1-41; Figs. 2-3; Claims 1, 19, 37	Indefinite for the reasons set forth in *AlmondNet, Inc. v. Roku, Inc.*, Case No.6:21-cv-00876-ADA (W.D. Tex.), Dkts. 35, 38.	'139 Patent: claims 1, 19, 37 '139 Patent Prosecution History, Advisory Action Before the Filing of an Appeal Brief

No.	Claim Term	AlmondNet's Proposed Construction	AlmondNet's Intrinsic Evidence	Roku's Proposed Construction	Roku's Intrinsic Evidence
					'146 Patent: claims 1, 17, 21

EXHIBIT 2

Exhibit 2 – Claims-at-Issue In Roku's Declaratory Judgment (And Not Asserted by AlmondNet)

(denotes AlmondNet withdrawn claim[1])**

No.	Claim Term	AlmondNet's Proposed Construction	AlmondNet's Intrinsic Evidence	Roku's Proposed Construction	Roku's Intrinsic Evidence
1.	preambles ('878 Patent, claims 13, 22; '100 Patent, claims 1, 15, 29; '857 Patent, claim 1)	Not limiting; Roku has not shown any preamble should be construed as limiting.	'878 patent, claims 13, 22; '100 patent, claims 1, 15, 29; '857 patent, claim 1.	The identified preambles are limiting. *Catalina Mktg. Int'l v. Coolsavings.com*, 289 F.3d 801, 808 (Fed. Cir. 2002) (holding that claim preambles limit inventions when they recite essential structure or steps, or if it is necessary to breathe life into the claims).	'878 Patent, claims 13, 22; '100 Patent, claims 1, 15, 29; '857 Patent, claim 1.
2.	"computer-charging" ('639 Patent, claim 45)	Not indefinite	*See* '586 patent, at Abstract, 6:55-8:6, 9:50-12:53, 13:48-14:4, and associated Figures, and corresponding disclosure in the '639 patent.	Indefinite. This term lacks certainty as to its scope and cannot be construed in light of the specification because the specification does not sufficiently disclose or describe "computer-charging."	'639 Patent: claims 21, 45

[1] Roku: Roku maintains that any previously asserted but now withdrawn claims must be withdrawn with prejudice, which AlmondNet does not agree to.

3.	"without any expression of the visitor's consent to divulge information" ('639 Patent, claims 2–3; '586 Patent, claim 2)	Not indefinite	'639 patent, at Abstract, 5:23-32, 5:36-54, 6:44-58, 10:32-11:7, 18:32-51, and associated Figures, Figure 4, and corresponding discussion.	Indefinite. This term lacks certainty as to its scope and cannot be construed in light of the specification because the specification does not sufficiently disclose or describe "without any expression of the visitor's consent to divulge information."	'639 Patent: claims 2–3, 19, 23 '586 Patent: claim 2
4.	"premium price" ('586 Patent, claims 8**–9**)	Not indefinite	*See* '586 patent, at Abstract, 12:64-13:9, and associated Figures, and corresponding disclosure in the '639 patent.	Indefinite. This term lacks certainty as to its scope and cannot be construed in light of the specification because the specification does not sufficiently disclose or describe "premium price." What constitutes a "premium price" vs. other prices? This is a subjective term without any boundaries.	'639 Patent: claim 18, 20–21, 13:2–9 '586 Patent: claims 8–10, 13:2–9
5.	"usual price" / "usual second-site advertising price" ('586 Patent, claims 8**–9**)	Not indefinite	*See* '586 patent, at Abstract, 3:15-3:48, 12:54-13:47, and associated Figures, and corresponding disclosure in the '639 patent.	Indefinite. This term lacks certainty as to its scope and cannot be construed in light of the specification because the specification does not	'639 Patent: claim 18, 20 '586 Patent: claims 8–9

				sufficiently disclose or describe "usual price." Same issues as "premium price."	
6.	"conducted some specific action" ('639 Patent, claims 6, 31)	Not indefinite	*See* '639 patent, at Abstract, 5:23-5:32, 19:36-19:61, and corresponding Figures.	Indefinite due to the inability to determine the metes and bounds of "conducted some specific action." What constitutes a "specific action?" Inaction?	'639 Patent: claims 6, 31, 5:23–32
7.	"relates to content" ('639 Patent, claim 37; '586 Patent, claims 17, 22; '100 Patent, claims 14, 28, 42; '857 Patent, claim 11)	Not indefinite	'639 Patent at Abstract; 2:1-4; 2:14-37; 2:63-66; 3:18-47; 4:46-5:3; 5:23-27; 6:41-7:26; 7:49-54; 7:62-8:6; 8:20-39; 9:14-18; 9:40-43; 10:36-44; 11:26-12:8, 12:25-30; 12:38-50; 12:54-13:47; 12:54–13:23, 13:51–54, 16:5–11, 17:1–11, 17:16–19, 20:28–31, 22:15–17, 23:36–41, 23:56–63, and corresponding Figures; claims 1, 4, 5, 6, 8–18, 20, 22–25, 27, 30–31, 34, 36–48.	Indefinite. This term lacks certainty as to its scope and cannot be construed in light of the specification because the specification does not sufficiently disclose or describe "relates to content." "Relates" is also a subjective term without any boundaries.	'639 Patent: claims 37, 48 '586 Patent: claims 17, 22 '100 Patent: claims 14, 28, 42 '857 Patent: claims 11, 22, 33
8.	"third party" / "third parties" ('639 Patent, claims 1, 24, 45;	Plain and ordinary meaning, which is "third party" /"third parties"	'639 patent, at Abstract, 4:15-26, 5:36-54, 6:58-8:9, 11:26-12:14, 12:9-53,	party not having any common ownership with any other party	'639 Patent: claims 1, 11, 18, 21, 24, 25, 35, 45

	’586 Patent, claims 1, 8**–9**, 11, 20; ’100 Patent, claims 1, 15, 29; ’857 Patent, claim 1)	Alternatively, the plain and ordinary meaning is “distinct entity” / “distinct entities”	26:13-29:35, Figures 2, 3, 4, 5, 6, 7, and corresponding discussion, and corresponding disclosure in the 586, ’100, and ’857 patents.	[or the computer/ computer system]	’639 Prosecution History, September 3, 2010 Notice of Allowability at 3–4; July 8, 2010 Response to Office Action at 2, 4, 6, 9, 11–14; December , 2009 Response to Office Action at 2, 4; June 25, 2009 Amendment Accompanying RCE at 2, 4, 6, 8–9, 13–14, 16–18 ’586 Patent: claims 1, 6, 8–11, 15, 20 ’100 Patent: claims 1, 15, 29 ’100 Patent Prosecution History, June 8, 2018 Notice of Allowability at 3–4; December 22, 2017 Amendment Accompanying RCE at 13–14, 17, 20; Agenda for 11/2/2017 Examiner Interview at 1–2; June 23, 2017 Office

					Action at 24; PCT/IL99/00237 at 2–3 ’857 Patent: claims 1, 12, 23
9.	“Internet site(s)” (’639 Patent, claims 1, 4-6, 8, 10, 13–14, 24, 27, 30**–31, 36–37, 39, 40**, 43–45, 47; ’586 Patent, claims 1, 4–5**, 7**–9**, 11–12, 16–17, 20–22; ’100 Patent, claims 1–3, 4**–5, 13–14, 15–17, 19, 27–31, 33, 41–42; ’857 Patent, claims 1–3, 4**–5, 11)	Plain and ordinary meaning, which is “location(s) on the Internet”	’639 Patent at Abstract; 2:1-4; 2:14-37; 2:63-66; 3:18-47; 4:46-58; 5:23-27; 6:34-43; 7:49-54; 7:62-8:6; 8:20-39; 9:14-18; 9:40-43; 10:36-44; 12:25-30; 12:38-50; 12:54-13:47; 14:60-15:4; 15:45-47; 15:54-67; 16:5-11; 17:1-11; 17:16-22; 17:30-36; 17:40-42; 17:65-67; 18:26-31; 19:53-61; 20:28-31; 21:1-15; 22:15-17; 23:36-41; 23:56-63; Claims 1, 4, 5, 6, 8–18, 20, 22–25, 27, 30–31, 34, 36–48.	a collection of HTML Web pages that can be accessed by users with Web browsers	’639 Patent: claims 1, 4, 5, 6, 8–18, 20, 22–25, 27, 30–31, 34, 36–48, Abstract, 2:1–4, 2:14–21, 2:63–66, 5:23–27, 9:14–18, 12:54–13:23, 13:51–54, 16:5–11, 17:1–11, 17:16–19, 20:28–31, 22:15–17, 23:36–41, 23:56–63 ’639 Prosecution History, September 3, 2010 Notice of Allowability at 3–5; July 8, 2010 Response to Office Action at 2–13; Response to Office Action at 3–6; Amendment Accompanying RCE at 5, 7–8, 10, 16–17; May 15, 2009 Response to Final Office Action at 7–8, 12–13, 15–18, 20; October 19, 2006

					Second Supplemental Preliminary Amendment at 14 ’586 Patent: claims 1, 4–12, 14, 16–22 ’100 Patent: claims 1–5, 13–19, 27–33, 41–42 ’100 Patent Prosecution History, June 8, 2018 Notice of Allowability at 3–4; April 5, 2018 Notice of Allowability at 6–7 ’857 Patent: claims 1–5, 11–16, 22–27, 33 ’857 Patent Prosecution History, February 25, 2020 Notice of Allowability at 2–3 IPR2022-00928, Patent Owner Response at 1, 7

					IPR2022-00928, Decision Denying Institution (’639 Patent), at 14–18 IPR2022-00929, Patent Owner Response at 1–3, 8, 12 IPR2022-00929, Decision Denying Institution (’586 Patent) at 9, 15–19 IPR2022-01453, Patent Owner’s Preliminary Response at 13
10.	“second Internet site” / “second, different Internet site” (’639 Patent, claims 1, 10, 14, 24, 37, 39, 40**, 43, 45, 47; ’586 Patent, claims 1, 5**, 7**–9**, 11, 17, 20, 22; ’100 Patent, claims 1, 13–15, 27–29, 41–42; ’857 Patent, claims 1, 11)	Internet site operated for the benefit of a different (and not commonly owned) entity from an entity for which the first Internet site is operated for the benefit of	’639 Patent at Abstract; 2:1-4; 2:14-37; 2:63-66; 3:18-47; 4:46-58; 5:23-27; 6:41-43; 7:49-54; 7:62-8:6; 8:20-39; 9:14-18; 9:40-43; 10:36-44; 12:25-30; 12:38-50; 12:54- 12:54–13:23, 13:51–54, 16:5–11, 17:1–11, 17:16–19, 20:28–31, 22:15–17, 23:36–41, 23:56–63, and corresponding Figures; Claims 1, 4,	Internet site owned by and operated for the benefit of proprietor(s) that are different from (not commonly owned by) proprietors of the first Internet site Alternatively, Internet site operated for the benefit of proprietor(s) that are different from (not commonly owned by)	’639 Patent: claims 1, 9–12, 14, 18, 20, 23, 24, 34, 37–41, 43, 45, 47–48, 7:45–54, 8:1–39, 12:21–30, 12:38–53, 19:52–55 ’639 Prosecution History, September 3, 2010 Notice of Allowability at 3–5; July 8, 2010 Response to Office Action at 2–13; Response to Office Action at 3–6;

			5, 6, 8–18, 20, 22–25, 27, 30–31, 34, 36–48.	proprietors of the first Internet site	Amendment Accompanying RCE at 5, 7–8, 10, 16–17; May 15, 2009 Response to Final Office Action at 7–8, 12–13, 15–18, 20; October 19, 2006 Second Supplemental Preliminary Amendment at 14 ’586 Patent: claims 5–9, 11, 14, 17–20, 22 ’100 Patent: claims 1, 13–15, 27–29, 40–42 ’100 Patent Prosecution History, June 8, 2018 Notice of Allowability at 3–4; April 5, 2018 Notice of Allowability at 6–7 ’857 Patent: claims 1, 11–12, 22–23, 33 ’857 Patent Prosecution History, February 25, 2020 Notice of Allowability at 2–3

11.	"in conjunction with" ('639 Patent, claim 40**; '586 Patent, claims 4–5**, 12; '100 Patent, claims 1, 15, 29; '857 Patent, claim 1)	Not indefinite	'639 patent, at 4:27-38, 5:36-6:57, 6:58-8:9, 9:51-10:14, 10:45-63, 11:24-12:36, 21:1-24:58, 25:42-29:35, and corresponding Figures, claims 40, 41.	Indefinite due to the inability to determine the metes and bounds of "in conjunction with." "Conjunction," like "relates" is an ambiguous and potentially subjective term. What level of connection/relation gives rise to "in conjunction with?"	'639 Patent: claims 40–41, 4:27–38, 5:36–54, 6:44–64, 7:27–34, 7:55–61, 9:53–10:4, 10:32–56, 11:26–67, 12:1–8, 12:31–37, 21:1–55, 22:3–14, 22:24–23:35, 25:43–63, 26:4–24, 26:56–62, 27:39–64, 28:4–22, 28:50–57, 29:27–33 '586 Patent: claims 4–5, 12, 18–19 '100 Patent: claims 1, 15, 29 '100 Patent Prosecution History, June 8, 2018 Notice of Allowability at 3–4; April 5, 2018 Office Action at 7; January 25, 2018 Supplemental Amendment at 11–12 '857 Patent, claim 1
12.	"depends on differences" ('164 Patent, claim 3)	Not indefinite	'164 patent, at 7:16-9:11, 9:14-10:10, 11:35-67, 21:45-23:4, and corresponding	Indefinite. This term lacks certainty as to its scope and cannot be construed in light	'164 Patent: claims 3, 18, 25

			Figures, claims 3, 18, 25.	of the specification because the specification does not sufficiently disclose or describe "depends on differences." These are subjective terms to trigger specific determinations so there needs to be clarity regarding the bounds.	

13:12:40 IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

ROKU, INC.,	)	
	)	ROUGH DRAFT
Plaintiff,	)	
	)	C.A. No. 21-1035(MN)
v.	)	
	)	
ALMONDNET, INC., and	)	
INTENT IQ, LLC,	)	
	)	
Defendants.	)	

Friday, July 7, 2023
10:00 a.m.
Markman Hearing

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE MARYELLEN NOREIKA
United States District Court Judge

APPEARANCES:

MORRIS NICHOLS ARSHT & TUNNELL LLP
BY: MICHAEL J. FLYNN, ESQ.

-and-

JACKSON WALKER LLP
BY: BLAKE T. DIETRICH, ESQ.
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BY: PHILIP X. WANG, ESQ.
6 BY: JAMES A. MILKEY, ESQ.

7 Counsel for the Defendants

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9 _ _ _ _ _ _ _ _ _ _ _

10

09:38:51 11

09:38:51 12 THE COURT: Good morning, everyone. Please be

09:59:28 13 seated. All right. Let's start with some introductions.

09:59:33 14 MR. FLYNN: Good morning, Your Honor. Michael

09:59:37 15 Flynn from Morris Nichols. And with me today is Wusif

09:59:41 16 Qureshi, Blake Dietrick, Victoria Emery and Lisa Peschel.

09:59:45 17 MR. QURESHI: Good morning, Your Honor.

09:59:45 18 THE COURT: Stand up when you address the Court.

09:59:47 19 All right.

09:59:48 20 MR. FLYNN: Apologies. For plaintiff, for Roku.

09:59:52 21 THE COURT: All right.

09:59:53 22 MR. FARNAN: Good morning, Your Honor. Brian

09:59:57 23 Farnan on behalf of the defendants. With me is Philip Wang

10:00:01 24 and James Milkey, both from Russ August & Kabat.

10:00:06 25 THE COURT: Welcome as well.

10:00:07 1 So we have read the briefing and your letter on
10:00:17 2 the way you want to go through the terms, the order of going
10:00:22 3 through the terms, and that I think works for us and makes
10:00:26 4 sense. So we can start with that.
10:00:39 5 MR. DIETRICH: Your Honor, would you like to
10:00:41 6 take up presentations in the order of the briefing or would
10:00:43 7 you prefer --
10:00:44 8 THE COURT: I thought I just said I would like
10:00:47 9 to do it in the order that you proposed in the your letter.
10:00:51 10 MR. DIETRICH: I'm sorry, Your Honor, I meant
10:00:53 11 which party first.
10:00:54 12 THE COURT: I don't care. Did you guys talk
10:00:56 13 about that?
10:00:57 14 MR. DIETRICH: Our preference would be to leave
10:00:59 15 it to the Court.
10:01:00 16 THE COURT: The defendant can go first on the
10:01:03 17 ones where there is a proposed construction and you can go
10:01:06 18 first on the ones where you're asserting indefiniteness.
10:01:11 19 MR. DIETRICH: Yes, Your Honor.
10:01:18 20 MR. QURESHI: A little bit of confusion because
10:01:20 21 where --
10:01:20 22 THE COURT: I know, that's why -- I know that.
10:01:28 23 MR. WANG: Thank you, Your Honor. And good
10:01:30 24 morning. I will -- I represent defendants, AlmondNet and
10:01:37 25 Intent IQ and based on the Court's instruction, I will start

10:01:40 1 --

10:01:40 2 THE COURT: Let me ask about the preambles

10:01:43 3 first. With respect to the term "automated" as it appears

10:01:45 4 in claim 1, I'm not being asked to define that term, right?

10:01:49 5 MR. WANG: I don't believe so, Your Honor.

10:01:50 6 THE COURT: And you agree, I'm not being asked

10:01:53 7 to define automated?

10:01:55 8 MR. DIETRICH: That's correct, Your Honor.

10:01:56 9 THE COURT: All right.

10:01:57 10 MR. WANG: So the dispute for the preamble is

10:02:00 11 whether or not it's limiting and I want to just begin with

10:02:05 12 slide 4. And Your Honor's question is on point because I

10:02:11 13 think that there was an allegation in the briefing that the

10:02:14 14 term automated was added in prosecution. That's just not

10:02:18 15 true. The original claim just recited an automated method

10:02:24 16 and as we explained in the briefing --

10:02:27 17 THE COURT: Show me that because they said --

10:02:30 18 you say it's not true, let me see who is right so we can get

10:02:34 19 some credibility going here. Where am I looking?

10:02:37 20 MR. WANG: They didn't attach the prosecution

10:02:39 21 history.

10:02:40 22 THE COURT: Well, then, how am I supposed to

10:02:42 23 know who is telling me the truth? Did you respond and say

10:02:45 24 it was always in there?

10:02:47 25 MR. WANG: I don't even think they clearly

10:02:50 1 allege that it was added in prosecution --

10:02:52 2 THE COURT: So before you call them liars, how

10:02:54 3 about we be accurate with what you're saying. You don't

10:02:58 4 know what they said. Did you say that automated was added

10:03:00 5 in prosecution?

10:03:01 6 MR. DIETRICH: No, Your Honor.

10:03:02 7 THE COURT: All right. So if you don't know and

10:03:04 8 you're just telling me that they said something that's wrong

10:03:06 9 and you don't know that that's true, don't say it, because

10:03:09 10 that affects your credibility with me. You got it?

10:03:13 11 MR. WANG: I understand, Your Honor. Let me

10:03:15 12 restart. The term automated was not added in prosecution

10:03:19 13 and that would not be a basis to find that the preamble is

10:03:23 14 limiting.

10:03:23 15 THE COURT: Why don't you stick with the

10:03:25 16 arguments that they're actually making and don't argue

10:03:28 17 against things that they're not making.

10:03:30 18 MR. WANG: Sure, Your Honor.

10:03:31 19 So we know that the test for whether a preamble

10:03:36 20 is limiting can come down to if there is an antecedent

10:03:40 21 basis. There is no antecedent basis required for any

10:03:45 22 language in the claim body. There is no structure in the

10:03:48 23 claim preamble. And I think that the only argument that

10:03:52 24 they make is to say that it would be limiting is this

10:03:57 25 automated concept which is already in the body, there are

10:04:00 1 several automatically limitations, so that's not required,
10:04:05 2 nor does it take antecedent basis from it as Your Honor's
10:04:11 3 question pointed out. And then they also argue that the
10:04:16 4 term "internet using entities," that that is necessary to
10:04:20 5 understand the body. But as we explained in the briefing --
10:04:25 6 THE COURT: Yeah, I didn't really -- I got to
10:04:27 7 tell you, I didn't really understand that. I don't know
10:04:30 8 what an internet using entity is versus a global computer
10:04:34 9 network. What is the difference? Is there a difference?
10:04:37 10 Why are we using multiple terms? Are they synonymous? I
10:04:41 11 have no idea.
10:04:42 12 MR. WANG: Right. And I think as we explained,
10:04:46 13 if you just --
10:04:47 14 THE COURT: Don't tell me what you explained.
10:04:49 15 Okay? Because if I'm asking the question, I don't
10:04:52 16 understand what you explained, so just answer my question.
10:04:55 17 MR. WANG: Yes. They are the same.
10:04:58 18 THE COURT: And how do we know that?
10:05:00 19 MR. WANG: Because the language it says an
10:05:02 20 entity that uses and then it has the words "a global
10:05:06 21 computer network."
10:05:07 22 THE COURT: So is there no global computer
10:05:09 23 network other than the internet?
10:05:11 24 MR. WANG: Not that I'm aware of. That seems to
10:05:13 25 be a clear reference to internet. And we can also see that

10:05:18 1 based on the other language, right, an entity that uses, and
10:05:22 2 then the preamble is internet using entities, so it's more
10:05:27 3 than a coincidence, so that term is not necessary to --
10:05:32 4 THE COURT: Was internet using entities added
10:05:35 5 during prosecution?
10:05:37 6 MR. WANG: No, not that I am aware of. What I
10:05:41 7 was trying to say earlier was that the original claim that
10:05:44 8 became claim 1 stated that the preamble as written, there
10:05:49 9 was no amendment during prosecution to overcome like some
10:05:53 10 examiner amendment, so there is no reason to believe that
10:05:57 11 these terms are limiting or provide disclaimer.
10:06:02 12 And so for claim 1, the body recites the
10:06:09 13 structurally complete invention, and it really falls
10:06:13 14 squarely into many cases that say where a preamble states an
10:06:18 15 intended purpose of use, that in general is not limiting.
10:06:24 16 And the two arguments that Roku raises for why it should be
10:06:34 17 really are based on the automated method and the internet
10:06:37 18 using entities, but those are not either referred back to in
10:06:40 19 the body or --
10:06:41 20 THE COURT: Tell me why this matters. You guys
10:06:47 21 have done contentions, so what is this relevant to, the sort
10:06:53 22 of the arguments that are being made here?
10:06:56 23 MR. WANG: Sure. So we don't think it matters a
10:07:03 24 great deal. We reached agreement on many preambles --
10:07:07 25 THE COURT: I know that, but just tell me -- I

10:07:09 1 don't construe claims just because you all want me to, I
10:07:13 2 construe them because there is actually a dispute that it is
10:07:16 3 relevant to. So just tell me, what is the dispute that this
10:07:20 4 is relevant to?
10:07:22 5 MR. WANG: Sure. So this was a construction
10:07:26 6 that Roku proposed and we tried to narrow it, and this was
10:07:30 7 just something that the parties disagreed on, I don't --
10:07:33 8 THE COURT: Can you tell me what is the dispute
10:07:34 9 that this is relevant to?
10:07:36 10 MR. DIETRICH: Yes, Your Honor, I believe the
10:07:37 11 main dispute is predicated on whether this is an automated
10:07:40 12 method, so it has multiple automated --
10:07:43 13 THE COURT: So you didn't ask me to construe
10:07:47 14 automated, presumably you want automated to mean every
10:07:52 15 single step has to be done automatically, they say no, yet
10:07:56 16 if I say that it is a limitation, that question is still out
10:08:01 17 there, right?
10:08:02 18 MR. DIETRICH: I can't believe at that point
10:08:04 19 there would be a dispute, because what they're doing is
10:08:07 20 suggesting that automatic leaves open the possibility for
10:08:11 21 other manual intervention steps.
10:08:13 22 THE COURT: Right. And I might agree with that.
10:08:15 23 So what I'm saying, if I were to say that's limiting, you're
10:08:19 24 going to come in and say well, there is some human use in
10:08:23 25 here, and they're going to say so what, it is still

10:08:27 1 automated, and then is that an issue of fact for the jury to
10:08:32 2 decide whether something is automatic or automated enough?
10:08:36 3 MR. DIETRICH: We have not asked for Your Honor
10:08:38 4 to specifically --
10:08:39 5 THE COURT: And I'm not going to because you
10:08:41 6 know that was an option. So if you're telling me by me
10:08:44 7 saying that the preamble is limiting, suddenly we're now
10:08:47 8 going to have a second claim construction round with
10:08:50 9 automated, I don't think that's the way this works. So tell
10:08:53 10 me what happens if I agree with you that that is limiting,
10:08:57 11 where do we go?
10:08:58 12 MR. DIETRICH: I don't believe that there would
10:09:00 13 be an issue of fact, I believe at that point the claim would
10:09:02 14 definitively show there could not be manual intervention at
10:09:07 15 that stage.
10:09:09 16 THE COURT: And I assume you disagree?
10:09:12 17 MR. WANG: Yes, we disagree. And that provides
10:09:13 18 an additional reason why it should not be found limiting if
10:09:17 19 they're going to further interpret it.
10:09:19 20 Let me just make two reasons why that
10:09:21 21 understanding cannot be correct. One, this is a comprising
10:09:25 22 claim so obviously this would preclude other manual
10:09:29 23 unrecited --
10:09:29 24 THE COURT: Well, it can't be all manual such
10:09:33 25 that it's no longer an automated method, right?

10:09:36 1 MR. WANG: Sure, but in general a comprising
10:09:38 2 claim is open ended. And also even here we have limitations
10:09:44 3 A, B, and E, they don't include the term automatically. But
10:09:49 4 I think my friend also conceded that their proposal for the
10:09:53 5 word automatic does not even apply to the word automated or
10:09:58 6 this portion of the claim, so for many reasons we're a
10:10:02 7 couple of levels removed from what is proper.
10:10:05 8 But the answer from my friend is helpful for
10:10:08 9 answering Your Honor's question about why this could matter
10:10:12 10 if they intend to further interpret the preamble in a way
10:10:16 11 that we think is inappropriate, that would be another reason
10:10:19 12 to find that it is not limiting.
10:10:21 13 Unless Your Honor has more questions about claim
10:10:25 14 1, I can move on to claim 11.
10:10:31 15 THE COURT: Okay.
10:10:32 16 MR. WANG: So claim 11 I have on slide 8. And I
10:10:35 17 can be brief on this term. So this is essentially the same
10:10:40 18 claim as claim 1, except it's written in what's known as a
10:10:46 19 Beauregard format. And that just describes the claim to
10:10:55 20 computer readable medium containing programing instructions
10:11:00 21 for a computer, the language of a tangible nontransfer data
10:11:04 22 storage medium. So we agree this is a Beauregard claim
10:11:09 23 that's readable, computer readable medium claim. But the
10:11:14 24 rest of it is just kind of a repeat of claim 1.
10:11:19 25 THE COURT: So how is it -- so if I say these

10:11:22 1 preambles are not limiting, how is this any different than
10:11:25 2 claim 1?
10:11:26 3 MR. WANG: It would be a system claim. We would
10:11:28 4 need to point to a nontransfer data storage medium, but then
10:11:33 5 --
10:11:33 6 THE COURT: So part of the preamble is limiting?
10:11:37 7 MR. WANG: I mean, we're not going to say --
10:11:39 8 THE COURT: I mean, if not, I mean, that's a
10:11:41 9 method, it says the method, so I don't know what you're
10:11:45 10 telling me. If the preamble is not limiting, so we don't
10:11:49 11 look at the preamble, how is this different? I don't see
10:11:54 12 how it's a system.
10:11:56 13 MR. WANG: So I think it would be different from
10:11:58 14 claim -- it would be very similar, maybe overlapping the
10:12:03 15 subject matter, but it would be a system type claim. It
10:12:06 16 would be a system claim.
10:12:08 17 THE COURT: Why? If the preamble is not
10:12:13 18 limiting, how is that a system claim?
10:12:17 19 MR. WANG: You raised a good question, Your
10:12:19 20 Honor. I think that when we say it's not limiting, we
10:12:22 21 wouldn't be covering it up and treating it as a method
10:12:25 22 claim. It's still, you know, a system claim of tangible
10:12:31 23 data storage medium and maybe the dispute is about the
10:12:34 24 remaining part of the language, but the claim in substance
10:12:41 25 is identical to claim 1, but it's written in this other

10:12:45 1 **Beauregard format.**

10:12:47 2 **THE COURT: Yes, but you're telling me -- I**

10:12:49 3 **mean, I don't understand how written in a Beauregard format**

10:12:53 4 **matters if the preamble doesn't matter. Like what am I**

10:12:57 5 **supposed to do? I say the preamble is not limiting and you**

10:13:01 6 **say oh, but we have to look at the preamble to know that**

10:13:03 7 **it's this Beauregard. Is that okay?**

10:13:06 8 **MR. WANG: Sure. So we --**

10:13:08 9 **THE COURT: What's your best case for that, that**

10:13:11 10 **the only reason we know this is a Beauregard claim is**

10:13:14 11 **because of the preamble, but that does not mean that the**

10:13:17 12 **preamble is limiting, what do I have for that?**

10:13:20 13 **MR. WANG: I mean, there are cases we cite in**

10:13:23 14 **the briefing like the *CyberSource* claim.**

10:13:26 15 **THE COURT: Is that a Beauregard claim?**

10:13:29 16 **MR. WANG: Yes, it talks about Beauregard claim.**

10:13:32 17 **THE COURT: And it's the only place that we know**

10:13:34 18 **this is a storage medium is in the preamble but the preamble**

10:13:37 19 **is not limiting?**

10:13:38 20 **MR. WANG: It doesn't go into whether the**

10:13:40 21 **preamble is limiting, and we have --**

10:13:42 22 **THE COURT: What's your best claim to say that**

10:13:44 23 **the preamble -- all I care about is you supporting your**

10:13:48 24 **argument. Your argument is preamble is not limiting.**

10:13:51 25 **What's your best claim for saying wait, I have to look at**

10:13:54 1 the preamble to know it's this Beauregard claim and it's a
10:13:57 2 system, but that doesn't mean it's limiting, so if they come
10:14:01 3 up with something that's not a system, you know, a computer
10:14:06 4 readable medium, it doesn't matter because -- I don't even
10:14:09 5 understand your argument.
10:14:10 6 MR. WANG: Sure, Your Honor. And I'll try
10:14:15 7 again. I'm not sure I can state it better. I want to
10:14:17 8 assure Your Honor --
10:14:19 9 THE COURT: Here is what I don't understand.
10:14:20 10 MR. WANG: Yes.
10:14:21 11 THE COURT: You're saying preamble is not
10:14:22 12 limiting, but then you're pointing to the preamble to tell
10:14:25 13 me this is not identical to claim 1, and it's not identical
10:14:30 14 to claim 1 because the preambles are different, but yet the
10:14:33 15 preamble is not limiting so we don't care about that.
10:14:36 16 That's what it sounds like you're saying to me and I don't
10:14:39 17 understand that argument.
10:14:40 18 MR. WANG: Right. I guess what I'm saying is
10:14:42 19 when you say a preamble is not limiting, maybe it's a little
10:14:46 20 bit of a semantic thing. I'm not saying we cover up the
10:14:50 21 preamble completely.
10:14:51 22 THE COURT: I understand that, but you're using
10:14:52 23 the preamble, it's not like -- it's not like you're saying a
10:14:59 24 system and we don't cover up the words a system. You're
10:15:02 25 saying it's a tangible nontransitory data storage medium

10:15:08 1 comprising indicia of instructions, whatever. You're saying
10:15:12 2 that's a system, and it's a Beauregard claim. So I don't
10:15:22 3 understand, like it's one thing if you say -- if it just
10:15:25 4 says it's a system, but now it's like a particular type of
10:15:29 5 system and you're relying on it being a particular type of
10:15:32 6 system, so I don't understand then how it's not giving life
10:15:36 7 and meaning to the claim.
10:15:39 8 MR. WANG: Okay, Your Honor. To address an
10:15:41 9 argument that Roku may make and to address Your Honor's
10:15:45 10 concerns, we're not saying that under our reading of the
10:15:49 11 claims, claim 1 and claim 11 are identical.
10:15:52 12 THE COURT: So what's different? Are the steps
10:15:55 13 different?
10:15:56 14 MR. WANG: Sure. So really then for the same
10:15:58 15 reason --
10:15:59 16 THE COURT: Are the steps different?
10:16:00 17 MR. WANG: No, they're the same.
10:16:02 18 THE COURT: The steps, A, B, C, D and E are
10:16:05 19 identical?
10:16:05 20 MR. WANG: Yes.
10:16:06 21 THE COURT: So the only difference comes in the
10:16:08 22 preamble where you say one is a system, one is a method?
10:16:11 23 MR. WANG: The first part of the preamble,
10:16:13 24 right. So for the same reasons that we think it's not
10:16:16 25 limiting, the language in claim 1 in the preamble of claim 1

10:16:19 1 is not limiting, that language is not limiting in claim 11.
10:16:24 2 And so if Your Honor wanted to keep the first portion of it,
10:16:28 3 that makes clear it's a Beauregard claim that we're not
10:16:32 4 running away from.
10:16:33 5 THE COURT: Where is the first portion? That
10:16:35 6 language goes on forever. Where is the first portion?
10:16:39 7 MR. WANG: Sure. I guess to perform a method to
10:16:42 8 collecting profiles of internet usage and the method
10:16:46 9 comprising. If we compare that to claim 1, a method of
10:16:51 10 collecting profiles internet usage and the method
10:16:54 11 comprising.
10:16:56 12 Focusing on that language, the same reasons that
10:16:59 13 we presented for claim 1 about reciting an intended use --
10:17:02 14 THE COURT: Okay. So let's say that I say fine,
10:17:04 15 you're fine with having everything before to perform being
10:17:09 16 included. So then why are all of the things that you have
10:17:13 17 highlighted up there in the first part?
10:17:17 18 MR. WANG: I think that we were trying to show
10:17:20 19 that this slide is that the body is structurally complete,
10:17:26 20 that it already has structural limitations.
10:17:29 21 THE COURT: But you're saying now that you think
10:17:31 22 that you can agree that that all is limiting?
10:17:33 23 MR. WANG: For sure, and that would make it even
10:17:37 24 more structurally complete, so this slide --
10:17:39 25 THE COURT: You agree that the language "A

10:17:45 1 tangible, non-transitory data storage medium comprising
10:17:47 2 indicia of instructions for a processor" is part of the
10:17:52 3 preamble and is limiting?
10:17:55 4 MR. WANG: Yes, we can agree to that, Your
10:17:58 5 Honor, because that's just the format of a Beauregard claim.
10:18:03 6 And as I said at the very beginning, that's the difference
10:18:05 7 between claim 11 and claim 1, claim 1 is a method and claim
10:18:09 8 11 is written in Beauregard format which is this sort of
10:18:13 9 unusual, you know, recitation of a medium and then read by a
10:18:18 10 computer, or comprising instructions for a processor.
10:18:23 11 And so that's all I have for the preamble,
10:18:27 12 unless Your Honor has further questions.
10:18:29 13 THE COURT: All right.
10:18:42 14 MR. DIETRICH: Good morning, Your Honor. Blake
10:18:44 15 Dietrick on behalf of Roku. Jumping directly into this, the
10:18:48 16 question isn't whether some or a part of the preamble is
10:18:51 17 limiting. The question is whether the preamble breaths life
10:18:54 18 into these claims, whether it provides some fundamental
10:18:57 19 characteristics or characterization with what these claims
10:19:00 20 are and how they're performed. So we focus already on two
10:19:05 21 of the components and I don't want to belabor these, but the
10:19:08 22 first portion would be an automated method. We don't think
10:19:11 23 that that needs internal partial construction with respect
10:19:16 24 to what automated means. It either is an automated method
10:19:20 25 or it's not. The second component --

10:19:24 1 THE COURT: I understand your argument on
10:19:26 2 automated. I think the fact that there are limitations that
10:19:30 3 say things have to be done automatically is sufficient to
10:19:34 4 cover that it's an automated method, so I understand your
10:19:37 5 argument, I'm just not going to agree with it. The internet
10:19:41 6 using entities I need some help with.
10:19:44 7 MR. DIETRICH: Certainly, Your Honor. And I
10:19:46 8 would like an opportunity to at least address the automated.
10:19:49 9 THE COURT: You already addressed it. You gave
10:19:51 10 me a brief. You gave me an awfully long brief. I get it,
10:19:55 11 you can take that up with the Federal Circuit and maybe
10:19:59 12 you're right, but we don't have time. You guys have ten
10:20:03 13 terms and we're not going to waste time on that.
10:20:05 14 MR. DIETRICH: Sure.
10:20:06 15 With respect to internet using entities, our
10:20:09 16 position is this claim doesn't really make sense without
10:20:12 17 understanding that is an internet based --
10:20:14 18 THE COURT: Tell me about the global whatever.
10:20:17 19 No one gave me anything about what a POSA thinks. I don't
10:20:21 20 know what a global computer network is other than the
10:20:27 21 internet. What other ones are there?
10:20:28 22 MR. DIETRICH: There are no examples in the
10:20:30 23 specification. The only time that phrase appears is in the
10:20:32 24 claims. And so the question you're raising is a good one,
10:20:35 25 which is, how do we know or what could it be besides the

10:20:40 1 internet? So now they're saying well, using internet --
10:20:44 2 internet using entities is just one possible component.
10:20:49 3 THE COURT: I didn't understand them to say it's
10:20:51 4 just one possible component. He said it's the same as
10:20:54 5 global. Right? You said it's the same.
10:20:57 6 MR. WANG: Yes, Your Honor.
10:20:59 7 THE COURT: So internet using entities is the
10:21:05 8 same thing as global computer using entities.
10:21:08 9 MR. DIETRICH: I don't see that limited in the
10:21:10 10 specification -- or in the claim language here, and frankly
10:21:13 11 to the extent that they are one in the claim, all we're
10:21:16 12 seeing and wanting to do is make sure that that is what is
10:21:20 13 in fact the case. Because currently global computer network
10:21:24 14 could mean something else. It could mean something other
10:21:27 15 than the internet, but that's not determined by the
10:21:30 16 specification and it's not written --
10:21:32 17 THE COURT: Can't you guys stipulate, global
10:21:35 18 computer network, I mean, you guys stipulate to a whole
10:21:39 19 bunch of other terms, what they mean, stipulate that it
10:21:42 20 means internet using.
10:21:44 21 MR. DIETRICH: I think if opposing counsel would
10:21:46 22 be willing to stipulate that a global computer network as
10:21:52 23 dictated by the claim is only the internet and not anything
10:21:55 24 else, we may be able to --
10:22:00 25 MR. WANG: That's something we can -- I'm

10:22:02 1 reluctant --

10:22:04 2 THE COURT: I just asked you if they were the

10:22:06 3 same, and you said yes, and now you're saying oh, maybe not.

10:22:10 4 You're making his point for him. As soon as you say they're

10:22:13 5 not the same thing, suddenly it becomes questionable whether

10:22:17 6 it breaths life and meaning.

10:22:18 7 MR. WANG: Your Honor, I'm hesitant to know

10:22:20 8 exactly what the proposed stipulation is. This is not a

10:22:23 9 term for construction.

10:22:23 10 THE COURT: Go talk about it, right now, figure

10:22:26 11 it out. He's proposing that an internet using entity, or

10:22:31 12 the internet as referred to as the internet using entity is

10:22:36 13 the same thing as a global computer network. You told me

10:22:40 14 that the entity using the global computer network is the

10:22:43 15 entity using the internet, so what's the question?

10:22:49 16 MR. WANG: Right. And we're happy to talk about

10:22:52 17 that, Your Honor.

10:22:52 18 THE COURT: There is no talking because I'm

10:22:54 19 going to rule today, so you guys go talk right now, go talk

10:23:01 20 right now and figure it out.

10:23:02 21 MR. WANG: Sure. And if I could confer with my

10:23:09 22 co-counsel.

10:23:11 23 THE COURT: Of course.

10:23:36 24 (Counsel conferring off the record.)

10:24:08 25 MR. DIETRICH: So, Your Honor, I would represent

10:24:10 1 that the parties I think have reached agreement that global
10:24:14 2 computer network would be construed to mean the internet.
10:24:22 3 THE COURT: Okay. And so global network,
10:24:25 4 computer network is construed to mean the internet, then
10:24:30 5 your argument in terms of the preamble being limited for
10:24:33 6 claim 1 is based on your assertion that automated is
10:24:39 7 required to give meaning, life meaning, whatever to the
10:24:43 8 claim.
10:24:43 9 MR. DIETRICH: Yes. And again, I would
10:24:45 10 appreciate the opportunity --
10:24:47 11 THE COURT: You have thirty seconds, tell me
10:24:49 12 what it is, because if you haven't told me in a 150-page
10:24:55 13 brief --
10:24:56 14 MR. DIETRICH: Yes, I have copies of this but I
10:25:00 15 can show it on the demonstration here. So ultimately what
10:25:03 16 this is predicated on is a CBM challenge to this claim, to
10:25:08 17 this method. Right? And what they talked about in the CBM,
10:25:13 18 in order to overcome a Section 101 challenge was that the
10:25:17 19 automatic nature of the process performed by the
10:25:20 20 pre-programmed computers, and the fact that the claims do
10:25:23 21 not deal with human decision making or activities negates
10:25:28 22 the organizing human activity category.
10:25:30 23 So here they're saying -- and again, at the top
10:25:34 24 here they say the claims here, especially if properly
10:25:38 25 characterized, they are characterizing these claims. And

10:25:41 1 they're saying they negate human activity. And so I'm at a
10:25:48 2 loss as to how we can say well, some of the systems are
10:25:53 3 automated. They said they're removing human decision
10:25:55 4 making, but that's only a preferred -- that's only one
10:25:59 5 preferred way. Right? And that's what they say in their
10:26:02 6 slide presentation today is that it's a preferred use, or
10:26:05 7 it's an intended suggested use. That's not --
10:26:09 8 THE COURT: What exhibit number is this
10:26:11 9 document?
10:26:12 10 MR. DIETRICH: Your Honor, this only became
10:26:14 11 relevant after they sort of manipulated -- I don't want to
10:26:19 12 say manipulated.
10:26:19 13 THE COURT: Yeah, don't say that.
10:26:21 14 MR. DIETRICH: I'm sorry.
10:26:22 15 THE COURT: So where did you give me this and
10:26:24 16 when did this come out?
10:26:26 17 MR. DIETRICH: So this CBM is from 2017, but we
10:26:31 18 have referenced, Your Honor, this CBM proceeding, we have
10:26:34 19 referenced this proceeding, and there are exhibits in our
10:26:36 20 joint appendix.
10:26:38 21 THE COURT: So is this document that you are now
10:26:40 22 relying on anything that you ever told me about?
10:26:43 23 MR. DIETRICH: No, Your Honor.
10:26:43 24 THE COURT: Is it anything you ever discussed
10:26:45 25 with them?

10:26:47 1 MR. DIETRICH: No, Your Honor.

10:26:48 2 THE COURT: Right now we get to have a nice

10:26:50 3 little meet and confer about this, right?

10:26:52 4 MR. DIETRICH: Well, Your Honor, I would suggest

10:26:54 5 -- so the way this came up is because the slides that we

10:26:58 6 received yesterday included now case law that raised

10:27:02 7 arguments that were not addressed in the briefing.

10:27:04 8 THE COURT: Show me the case law.

10:27:06 9 MR. DIETRICH: The one specific case I'm

10:27:08 10 referring to is on slide 8 -- or slide 6, rather, which is

10:27:13 11 the *Acceleration Bay* case. And they're relying on this to

10:27:19 12 show that the preambles are only referring to some preferred

10:27:23 13 or intended use, and not giving rise to the actual

10:27:27 14 characterization of the claims. That case was not cited in

10:27:31 15 their brief. And our position, Your Honor, is that that

10:27:34 16 argument, saying that this is merely an intended use is not

10:27:38 17 what they have said in prior proceedings. If they had said

10:27:41 18 that in their briefing, we would have addressed it. If they

10:27:45 19 had addressed that case, we would have addressed it.

10:27:56 20 THE COURT: All right. No, leave that up there,

10:28:01 21 no one else has it.

10:28:03 22 MR. DIETRICH: I have copies, Your Honor, for

10:28:06 23 counsel. Would Your Honor like a copy?

10:28:12 24 THE COURT: Yes.

10:28:17 25 MR. WANG: Thank you, Your Honor. So this is a

10:28:19 1 new argument that we've never seen.

10:28:21 2 THE COURT: Well, it doesn't matter, you guys

10:28:23 3 made the representation so you better -- how is this -- it

10:28:26 4 looks to me like you're saying the claims do not deal with

10:28:31 5 human decision making or activities. So you now want to say

10:28:36 6 well, maybe there is some human decision making or

10:28:39 7 activities. Why is that not different from what you said in

10:28:42 8 this covered business method patent proceeding.

10:28:46 9 MR. WANG: Your Honor, so I would need to look

10:28:48 10 at the other pages, but just looking at this page which is

10:28:52 11 all I have seen in the last 90 seconds or so, this doesn't

10:28:55 12 appear to be about the preamble, it's not clear what it's

10:28:58 13 talking about. The preamble, the automated term I think

10:29:03 14 they said was not even a term for construction. And there

10:29:07 15 is a debate, there is a dispute for the automatic term as it

10:29:11 16 appears in the body. And we can discuss this then. But

10:29:16 17 what I'm looking at here, it doesn't even say what specific

10:29:21 18 claim or about the preamble. And so, yeah, they certainly

10:29:27 19 had the opportunity, if they were going to argue that the

10:29:29 20 entire claim is a hundred percent automated or automatic

10:29:35 21 based on the preamble, then that should have been raised

10:29:40 22 long ago and clearly, that's nowhere in their --

10:29:44 23 THE COURT: Here is what we're going to do

10:29:46 24 because you guys are just making new stuff up at the last

10:29:49 25 minute. You can each by Monday submit to me two pages and

10:29:53 1 telling me how this supports your argument and you can tell
10:29:56 2 me -- you can refute it. So you do it by Monday, you do it
10:30:00 3 by Tuesday, two pages.
10:30:03 4 MR. WANG: Thank you, Your Honor.
10:30:04 5 THE COURT: All right. But I need to hear from
10:30:06 6 you on claim 11.
10:30:07 7 MR. DIETRICH: Yes, Your Honor.
10:30:10 8 So that then takes us to the preamble of claim
10:30:28 9 11. I do want to point out two things, Your Honor. I have
10:30:31 10 to admit I'm a little confused as to where we are with claim
10:30:35 11 11 --
10:30:35 12 THE COURT: Claim 11 they agreed that we can go
10:30:38 13 all the way up to the perform a method of collecting because
10:30:45 14 that's really what they're saying is just a functional
10:30:48 15 aspect of it.
10:30:50 16 MR. DIETRICH: I don't know that I need to
10:30:52 17 address the fact that there are two comprises in this claim
10:30:55 18 which does make a difference --
10:30:57 19 THE COURT: What if I were to say look, I agree
10:31:00 20 with what they say that up to there, I don't know how you
10:31:03 21 break up a preamble as part limiting or part not, I have
10:31:06 22 never seen that before, so I don't know what that means, but
10:31:09 23 they seem to agree that it's limiting, at least part of it
10:31:13 24 is limiting.
10:31:17 25 MR. DIETRICH: The cleanness break, Your Honor,

10:31:19 1 in my opinion and what makes sense in terms of preamble law,
10:31:22 2 transition phrases, after the first comprising, the first
10:31:26 3 comprising, that typically indicates that what precedes or
10:31:29 4 follows -- I'm sorry, what follows that would be part of the
10:31:34 5 body of the claim. And so breaking it midway through a
10:31:40 6 comprising phrase doesn't make a lot of sense in my opinion.
10:31:46 7 THE COURT: Okay. Let's say I agree with you,
10:31:48 8 what am I supposed to do?
10:31:50 9 MR. DIETRICH: I'm not sure the parties are
10:31:52 10 going to have a big dispute about the first seven words
10:31:56 11 before the first comprising here, so if the Court finds that
10:32:00 12 everything after comprising would be deemed limiting, then I
10:32:04 13 think that would resolve the dispute.
10:32:07 14 THE COURT: Well, clearly because then you win,
10:32:10 15 they say it's not limiting, he said part of it is maybe
10:32:13 16 limiting. What's the relevance of this dispute? I
10:32:17 17 understood the one on claim 1, but what's the relevance of
10:32:19 18 this?
10:32:20 19 MR. DIETRICH: So it again includes the internet
10:32:23 20 using entities which is part of what has now been sort of
10:32:27 21 resolved with our stipulation. But it also includes the
10:32:31 22 phrase indicia of instruction for a processor to perform a
10:32:34 23 method. So that would be another dispute we have later in
10:32:39 24 this proceeding, but that indicia would be a limiting factor
10:32:43 25 in this claim.

10:32:46 1 THE COURT: Is it in other claims?

10:32:49 2 MR. DIETRICH: It is in 15, Your Honor,

10:32:51 3 dependent 15 also recites this, it depends from claim 11 and

10:32:55 4 it says the indicia instructions --

10:32:57 5 THE COURT: Is this an antecedent basis for

10:32:59 6 that?

10:33:00 7 MR. DIETRICH: It's a little bit confusing

10:33:02 8 there, because there they have a second comprising, but they

10:33:06 9 have this body and method claim of constructing a processor

10:33:09 10 to perform in the preamble.

10:33:15 11 THE COURT: Okay.

10:33:19 12 MR. DIETRICH: So I think I sort of laid out --

10:33:22 13 THE COURT: I don't -- I truly don't understand.

10:33:24 14 So tell me -- I don't understand, so you better tell me

10:33:29 15 again.

10:33:29 16 MR. DIETRICH: Yes, Your Honor. I don't know

10:33:31 17 why we would say it would be limiting for some portion of

10:33:37 18 the preamble but not the remainder. Our preference,

10:33:40 19 obviously we've moved on this, is that the entire preamble

10:33:44 20 be found limiting. If there is some way to compromise in

10:33:48 21 suggesting that everything after the first comprising is

10:33:51 22 deemed limiting, then I think we can -- we don't need to

10:33:55 23 address --

10:33:56 24 THE COURT: But they don't agree with that

10:33:58 25 because they want to stop before part -- you're saying --

10:34:01 1 they're saying we start here, there is a beginning, a middle
10:34:07 2 and an end. They're saying beginning and middle we're cool
10:34:10 3 with, you're saying middle and end we're cool with. So no
10:34:13 4 one -- so the middle I guess is all okay, but nobody -- so
10:34:17 5 they're not agreeing to what you're saying, you're just
10:34:20 6 saying I think if we do what I want we're good, but no
10:34:25 7 kidding.
10:34:25 8 MR. DIETRICH: I'm trying to drop at least part
10:34:27 9 of the dispute --
10:34:28 10 THE COURT: I don't know what you're dropping
10:34:30 11 because everything -- what you want -- stop looking at your
10:34:35 12 phone, please. Put it down.
10:34:37 13 MR. WANG: I was looking for a case, Your Honor.
10:34:40 14 THE COURT: Have someone else look for a case.
10:34:48 15 So, go ahead, I don't see how we're narrowing
10:34:51 16 anything because you want middle and end, they want
10:34:54 17 beginning and middle, so I guess then you have to tell me
10:34:58 18 why --
10:35:00 19 MR. DIETRICH: I don't know why we would end
10:35:03 20 somewhere in the middle.
10:35:04 21 THE COURT: They want to -- I don't know,
10:35:08 22 either.
10:35:08 23 MR. DIETRICH: So I don't know how to rebut
10:35:10 24 that. If the middle is everything after the first
10:35:13 25 comprising for the middle portion of that statement is

10:35:16 1 limiting, why would we not go to the second comprising and
10:35:19 2 say that whole comprising phrase is limiting? I don't have
10:35:22 3 a response to that because it doesn't make sense to me,
10:35:25 4 either.
10:35:28 5 THE COURT: Okay.
10:35:35 6 MR. DIETRICH: Unless Your Honor has any other
10:35:37 7 questions, I don't have anything else on this.
10:35:42 8 MR. WANG: May I make one brief comment, Your
10:35:45 9 Honor, on this?
10:35:45 10 THE COURT: Yes.
10:35:46 11 MR. WANG: Fifteen seconds.
10:35:47 12 So when we talked about claim 1, I think we
10:35:51 13 reached a stipulation to global computer network and for
10:35:55 14 those reasons claim 1 is not limiting. Then we get to claim
10:35:58 15 11, it recites a Beauregard format and then the exact same
10:36:02 16 language so what follows should not be limiting for the same
10:36:06 17 reason, we would make the same stipulation for internet in
10:36:10 18 claim 11, and I apologize, Your Honor, but there is case law
10:36:14 19 that it's appropriate to find portions of the preamble
10:36:17 20 limiting --
10:36:18 21 THE COURT: Well, when you send me your two-page
10:36:21 22 paper, send me the case law.
10:36:23 23 MR. WANG: Sure.
10:36:23 24 THE COURT: You say part of it, and I take his
10:36:26 25 point, it's like you want to stop it in the middle, we have

10:36:29 1 two comprisings, and you just want to stop it randomly in
10:36:32 2 the middle of those two comprisings.
10:36:35 3 MR. WANG: Right, I think the first comprising
10:36:37 4 just comes from the kind of boilerplate Beauregard format.
10:36:42 5 Our position is the preamble ends when there is a colon,
10:36:45 6 comprising, colon, the indentation starts with A, B, C, D,
10:36:50 7 E. I do have a case in my e-mail that says that it's
10:36:54 8 appropriate.
10:36:55 9 THE COURT: What is that case?
10:36:57 10 MR. WANG: It's in my e-mail somewhere.
10:37:00 11 THE COURT: Find it. Tell me what it is.
10:37:03 12 MR. WANG: It's in my phone somewhere, but I
10:37:06 13 will find it.
10:37:06 14 THE COURT: Go ahead, you can look at your
10:37:08 15 phone.
10:37:09 16 MR. WANG: If I could come back to that.
10:37:11 17 THE COURT: All right. Let's go to the second
10:37:15 18 term.
10:37:28 19 MR. MILKEY: Yes, Your Honor, this is James
10:37:33 20 Milkey on behalf of AlmondNet, and --
10:37:39 21 THE COURT: So what do you say this term means,
10:37:42 22 because I don't do plain and ordinary meaning, you have to
10:37:44 23 tell me what that meaning is because when I do plain and
10:37:47 24 ordinary meaning, we have disputes later on. So what's the
10:37:50 25 plain and ordinary meaning?

10:37:52 1 MR. MILKEY: Yes, Your Honor. So I understand
10:37:57 2 that you just said you disagree with this, but I would say
10:38:01 3 that automatic does -- you know, people can figure that out,
10:38:05 4 but I would say that in terms of plain and ordinary meaning,
10:38:13 5 I would say perhaps the best way to think about it is in
10:38:16 6 terms of an analogy --
10:38:18 7 THE COURT: No, I need you to tell me what you
10:38:21 8 want me to say it means, because I don't understand. See,
10:38:24 9 what usually happens when I let plain and ordinary meaning
10:38:28 10 go is I say let's say the term is extension cord and I say
10:38:32 11 well, everybody knows what an extension cord is. And then I
10:38:35 12 get an expert report where they say oh, no, an extension
10:38:39 13 cord anybody knows is a six-foot long red cord with three
10:38:44 14 prongs and this cord is not red, so now I have another round
10:38:48 15 of claim construction. So I'm not doing that. I want
10:38:51 16 everyone to know if we say what the plain and ordinary
10:38:53 17 meaning is, what it is. They say it means not manual, you
10:38:57 18 say it means not manual, that's not helpful so I need to
10:39:00 19 know what it is.
10:39:02 20 MR. MILKEY: So, Your Honor, just prefacing it
10:39:06 21 with I believe plain and ordinary meaning should apply in
10:39:08 22 other cases --
10:39:09 23 THE COURT: Every single case where you said
10:39:11 24 plain and ordinary meaning, I want a meaning.
10:39:13 25 MR. MILKEY: I understand. My point is that I

10:39:15 1 think, for example, in the Western District of Texas --

10:39:18 2 THE COURT: I don't care. Look, I love Judge

10:39:21 3 Albright, okay, good friend of mine, he said plain and

10:39:24 4 ordinary meaning. He doesn't care maybe if he gets burned.

10:39:27 5 I do. So all I'm asking you is you think the jury knows

10:39:32 6 what it means, tell me.

10:39:33 7 MR. MILKEY: I will tell you. So for purposes

10:39:36 8 of this case only, Your Honor, I believe that we could

10:39:41 9 propose a construction of automatic as the step that is

10:39:49 10 performed that is not immediately pursuant to that step

10:39:54 11 being performed --

10:39:57 12 THE COURT: That's not the ordinary meaning, if

10:40:00 13 that's what you mean -- the plain and ordinary meaning of

10:40:02 14 automatic is done with little to no human intervention. How

10:40:07 15 is that for a definition for you? Because I'm not -- what

10:40:13 16 you're telling me is not the plain and ordinary meaning.

10:40:16 17 The immediate step preceding it is not done by human

10:40:20 18 intervention. I mean, that's why I ask.

10:40:24 19 MR. MILKEY: Your Honor, I actually believe it

10:40:26 20 is, Your Honor.

10:40:26 21 THE COURT: It's not. Let's look it up. Let's

10:40:31 22 look up what automatic means, because you're not saying it

10:40:34 23 means something special in this field of the art, right?

10:40:37 24 MR. MILKEY: No, Your Honor.

10:40:38 25 THE COURT: It means automatic, what a juror

10:40:41 1 would understand automatic to mean. Right? So Merriam
10:40:46 2 Webster, "done or produced as if my machine." "Mechanical."
10:40:49 3 "Having self-acting or self-regulating mechanism." "Moving
10:40:54 4 independently of humans." "Operating with minimal human
10:41:01 5 intervention." "Independent of external control." Any of
10:41:05 6 these grabbing you? These are all the ordinary meanings.
10:41:10 7 "Done without conscious thought or volition."
10:41:13 8 MR. MILKEY: Your Honor, I think "operating with
10:41:15 9 minimal human intervention" would work.
10:41:17 10 THE COURT: Or none, right?
10:41:21 11 MR. MILKEY: Well, I think as an example, an
10:41:24 12 automatic -- a door that automatically opens, you know,
10:41:28 13 someone walks in front of the door, that's human
10:41:30 14 intervention. But the door senses that and automatically
10:41:34 15 opens. I think everyone would understand that that's within
10:41:36 16 the plain meaning of automatically opening. I think the
10:41:39 17 distinction is that the user didn't specifically tell the
10:41:42 18 door to open, the door figured out that it needs to open,
10:41:47 19 you know, based on the circumstances in that moment. So I
10:41:52 20 think minimal human intervention makes sense. I do think,
10:41:56 21 though --
10:41:57 22 THE COURT: So with little to no human control,
10:42:00 23 are you okay with that?
10:42:04 24 MR. MILKEY: Yes, Your Honor.
10:42:11 25 THE COURT: Okay. Let me hear from the other

10:42:13 1 side and then I'll let you back.

10:42:19 2 MR. DIETRICH: Yes, Your Honor. And so I'm

10:42:21 3 jumping ahead a bit in our presentation just because this

10:42:25 4 proposal that we're discussing right now I think is

10:42:31 5 different than what we've seen in the briefing. And so --

10:42:34 6 and I just want to address that first.

10:42:35 7 What they've said in their briefing is that

10:42:38 8 there can be these preceding steps that are done manually.

10:42:42 9 But what they've done in the prosecution history and say the

10:42:45 10 exact opposite and say that preceding steps that are done

10:42:49 11 manually, for example, someone logging into a system, just

10:42:53 12 clicking a button to log in, that would preclude something

10:42:57 13 being done automatically because the user is doing some

10:43:01 14 involvement. So to say that there could be little or no

10:43:06 15 human involvement I think neglects the fact that they have

10:43:10 16 effectively told --

10:43:12 17 THE COURT: You got to show me where they

10:43:14 18 clearly took that position. I can't read that. I'm sorry,

10:43:18 19 my eyes are just not that good. Can you make it bigger?

10:43:24 20 MR. DIETRICH: Yes, Your Honor, why don't I

10:43:26 21 present it down here and I'll make it bigger. So the top

10:43:34 22 portion, Your Honor, is from their briefing where they say

10:43:38 23 manual involvement preceding the automatic functions does

10:43:43 24 not necessarily negate a finding that the function is

10:43:47 25 automatic. So what they're saying is you can have a

10:43:50 1 computer engineer sitting there typing away, clicking on
10:43:55 2 buttons, prompting the computer to perform a center way and
10:43:58 3 that wouldn't matter because as soon as you press go --
10:44:02 4 THE COURT: I get it, I get it, that's their
10:44:05 5 argument. Tell me what they said in here.
10:44:07 6 MR. DIETRICH: This is in the context -- this is
10:44:10 7 Exhibit 33 in our briefing, Your Honor, this is what they
10:44:12 8 said in the context of an IPR just a few months ago. They
10:44:16 9 said because clicking on a log in button represents a
10:44:20 10 request from the user for the prior art system to perform
10:44:23 11 the allege steps, those steps do not occur automatically.
10:44:27 12 THE COURT: Here is what I need to understand.
10:44:29 13 There are steps that say -- in claim 1, what claim are we
10:44:37 14 talking about here?
10:44:38 15 MR. DIETRICH: Well, this --
10:44:40 16 THE COURT: I need to see the claim so that I
10:44:42 17 can understand this in context. What claim -- can you pull
10:44:46 18 it up so I can see them both.
10:44:49 19 MR. DIETRICH: That specific statement was in
10:44:51 20 regards to the '398 patent.
10:44:52 21 THE COURT: That's one of the ones that we care
10:44:54 22 about here, yes, claim 22.
10:44:56 23 MR. DIETRICH: It is, yes.
10:44:57 24 THE COURT: Where is claim 22.
10:44:59 25 MR. DIETRICH: I'm sorry, Your Honor, but I have

10:45:01 1 not put it into the form of a slide. What I put into the
10:45:04 2 form of a slide is another example --
10:45:06 3 THE COURT: No, I want to see because you're
10:45:08 4 saying they said this, so claim 22 of the '398 patent. I
10:45:19 5 have it here. The method of claim 13 wherein the act
10:45:28 6 automatically causing within the computer system a selected
10:45:31 7 advertisement to be directed to the second device wherein
10:45:34 8 the advertisement is selected based on at least in part on
10:45:38 9 at least a portion of the first electronic profile data ^
10:45:42 10 and then claim 13 is a method implemented using a programmed
10:45:47 11 hardware computer system comprising, two steps.
10:45:58 12 MR. DIETRICH: I believe the relevant portion
10:45:59 13 there, Your Honor, would be in the first limitation, it says
10:46:03 14 automatically causing, again. So this is -- I'm sorry, Your
10:46:09 15 Honor. --
10:46:10 16 THE COURT: No, no, I have the claim, you don't
10:46:11 17 have to put that up, I got that. I see what you're saying.
10:46:15 18 I'm just trying to put it in the context of what is said in
10:46:18 19 that -- what exhibit did you say this is so I can see that
10:46:22 20 in context?
10:46:23 21 MR. DIETRICH: This is Exhibit 33, Your Honor.
10:46:25 22 What they're talking about is --
10:46:27 23 THE COURT: Hold on. Hold on. Page what?
10:46:39 24 MR. DIETRICH: It was page 40, Your Honor. So I
10:47:09 25 believe it begins, Your Honor, on page 40 and continues on

10:47:11 1 to page 41, the discussion of automatically.

10:47:55 2 THE COURT: "So aside from the two faulty

10:47:59 3 explanations of automatically, the petition tries feudally

10:48:04 4 to contend that the '398 patent does not exclude prior user

10:48:08 5 action preceding the claimed step. That statement proves

10:48:13 6 too much. Although some user action could be permissible,

10:48:16 7 clearly the claim language itself excludes any prior user

10:48:22 8 action that negates the recited steps being done

10:48:25 9 automatically. So although some user action could be

10:48:29 10 permissible, clearly the claim language excludes prior user

10:48:33 11 action that negates the recited step."

10:48:39 12 So that seems like they're not saying you can't

10:48:41 13 have any, you just can't have any that negates the automatic

10:48:46 14 aspect of the step.

10:48:48 15 MR. DIETRICH: I'm not sure how to interpret

10:48:50 16 that statement.

10:48:51 17 THE COURT: I'm just reading the words. The

10:48:53 18 statement that it says, "The patent does not exclude prior

10:48:58 19 user action. That statement proves too much. Although some

10:49:00 20 user action could be permissible." "Some user action could

10:49:05 21 be permissible." Clearly the claim language itself excludes

10:49:09 22 prior user action that negates the recited steps. So if the

10:49:13 23 recited step is automatically sending you to a different

10:49:21 24 page and in the thing you're looking, the prior art, a

10:49:29 25 person sent you to the other page, that wouldn't be

10:49:33 1 automatic. But if a person said should we -- as long as
10:49:40 2 it's not negating the automatic step, I think they're okay
10:49:45 3 with it. So I guess what I'm saying is I don't see how
10:49:49 4 you're entirely ruling out any human interaction based on
10:49:55 5 what they said when I don't read that in the context of what
10:49:59 6 they say.
10:50:00 7 MR. DIETRICH: Yes, Your Honor, this is not the
10:50:01 8 only thing that we've cited --
10:50:03 9 THE COURT: All right. This is your shot. Show
10:50:05 10 me your best work because this one was not great.
10:50:08 11 MR. DIETRICH: So again, Your Honor, so here is
10:50:20 12 the statement from the '639 patent prosecution history.
10:50:24 13 THE COURT: Okay. So what do I do if I say
10:50:27 14 okay, '398, I didn't see it. And by the way, Exhibit 40 is
10:50:36 15 not here.
10:50:37 16 MR. DIETRICH: It's a duplicate as Exhibit 9,
10:50:40 17 Your Honor.
10:50:41 18 THE COURT: You guys don't really know how to
10:50:43 19 make things easy on a person, just duplicate it. You're
10:50:47 20 giving me all this and suddenly we're going to skimp.
10:50:55 21 Okay. 45, 46. There is no page 45 and 46.
10:51:20 22 MR. DIETRICH: I'm sorry, Your Honor, that
10:51:22 23 citation at the bottom is where we cited that in our
10:51:25 24 briefing, so that would be the page cite to the brief.
10:51:28 25 The office action itself would be pages 17 and

10:51:31 1 18. So it begins, Your Honor, at the beginning -- at the
10:51:51 2 end of page 17. So I believe the relevant portion here that
10:52:08 3 we've highlighted or underlined in red is that they have
10:52:11 4 said in prosecution of the patents that they have asserted
10:52:15 5 in this case that the claims, the methods are being
10:52:20 6 performed by a computer. And then they go on to say that
10:52:24 7 merely to clarify the claim interpretation already discussed
10:52:28 8 in the specification, they say that the undersigned agreed
10:52:32 9 in order to overcome an office action that the term
10:52:38 10 automatic was used in a sense opposed to manual, and that
10:52:46 11 the examiner should interpret the claim in that fashion.
10:52:50 12 So, in other words, this is to say that this
10:52:55 13 method is done automatically. We see that here. We saw it
10:52:58 14 in the presentation I have, Your Honor, earlier which we'll
10:53:04 15 be addressing on the Monday briefing where they say it
10:53:08 16 negates human activity, it negates human involvement. So I
10:53:15 17 think we do need Your Honor's resolution of the dispute as
10:53:18 18 to whether there can be no manual involvement or minimal.
10:53:23 19 THE COURT: I don't think so. I think sometimes
10:53:25 20 that's a factual issue. If you're saying that there was a
10:53:30 21 clear and unmistakable surrender or that the intrinsic
10:53:35 22 evidence requires it to mean not manual, then I guess that
10:53:40 23 might be a legal issue. If I disagree and say it should --
10:53:44 24 that these are not clear to me, that they're somehow
10:53:47 25 redefining it from its plain and ordinary meaning, then I

10:53:52 1 think it is a factual issue.

10:53:54 2 Is there such manual -- is there such human

10:53:58 3 intervention that it is no longer an automated process?

10:54:03 4 It's kind of like what you were saying, if you step on the

10:54:07 5 tread for the door, it's an automatic door, I think that's

10:54:11 6 an issue of fact.

10:54:12 7 MR. DIETRICH: Your Honor, I understand that.

10:54:14 8 My only issue is I would -- we have attempted to be

10:54:19 9 cognizant of the fact that we don't want a later dispute as

10:54:23 10 to what the scope of this term means.

10:54:25 11 THE COURT: Well, you can have a later dispute,

10:54:27 12 but that doesn't mean it is a dispute about scope. Right?

10:54:33 13 If I say automatic has its plain and ordinary meaning, maybe

10:54:38 14 it's just that the fact issue is whether something in the

10:54:41 15 accused device or something in the prior art is sufficiently

10:54:46 16 automatic.

10:54:48 17 MR. DIETRICH: Okay. The last thing I would

10:54:54 18 suggest, Your Honor, is just you did read a number of

10:54:58 19 proposed constructions for automatic, and I do think that

10:55:02 20 the majority of the ones that you read did not include some

10:55:05 21 manual carve out, that's the only point I would make on

10:55:10 22 that, Your Honor.

10:55:24 23 THE COURT: Okay.

10:55:38 24 MR. MILKEY: Your Honor, if I may just very

10:55:41 25 briefly --

10:55:42 1 THE COURT: Nope. I want to hear the next term.
10:55:53 2 MR. MILKEY: I do think that there is an
10:55:55 3 actually pretty significant factual issue that was raised.
10:55:58 4 They relied on the '639 patent prosecution history and that
10:56:02 5 is not even a patent that's being construed for
10:56:05 6 automatically. I just want to make that clear.
10:56:09 7 THE COURT: That's not a patent what?
10:56:13 8 MR. MILKEY: That's not a patent in which the
10:56:14 9 term automatically has been proposed for construction, so
10:56:20 10 they haven't even demonstrated why that file history would
10:56:23 11 be relevant to the construction at issue here.
10:56:26 12 THE COURT: Okay.
10:56:28 13 MR. MILKEY: Turning to the next term for
10:56:33 14 construction, available, Your Honor. Again, defendant has
10:56:42 15 actually conceded in their slide --
10:56:46 16 THE COURT: You agree that available in those
10:56:49 17 claims is electronically available, right?
10:56:53 18 MR. MILKEY: Your Honor, actually --
10:56:58 19 THE COURT: I thought you said that in your
10:57:01 20 brief.
10:57:01 21 MR. MILKEY: Yes, Your Honor, I think --
10:57:03 22 THE COURT: It's electronically available, so
10:57:06 23 the real dispute here is accessible versus available, right?
10:57:11 24 MR. MILKEY: Right.
10:57:11 25 THE COURT: What is the plain and ordinary

10:57:13 1 meaning? Like, okay, acceptable versus available, neither
10:57:17 2 one seems more or less helpful. What's the -- I don't get
10:57:22 3 why it matters.
10:57:25 4 MR. MILKEY: That's roughly our position, Your
10:57:26 5 Honor.
10:57:26 6 THE COURT: Why won't you agree to it, that's
10:57:29 7 what I don't understand?
10:57:30 8 MR. MILKEY: We think the plain language itself
10:57:33 9 should govern over --
10:57:35 10 THE COURT: What's the dispute? Where does this
10:57:37 11 come up?
10:57:38 12 MR. MILKEY: I'm frankly not sure --
10:57:40 13 THE COURT: All right. Where does this come up?
10:57:42 14 Let me just ask the plaintiffs, just stay there, tell me
10:57:45 15 where it comes up.
10:57:46 16 MS. PESCHEL: Your Honor, there are some
10:57:48 17 situations in target advertising where a third party might
10:57:51 18 have access to reports that would have like paper reports,
10:57:54 19 like apart from this whole process in the context of the
10:57:57 20 claims.
10:57:57 21 THE COURT: Okay. Electronically, we all agree
10:58:00 22 that it's either electronically available or electronically
10:58:05 23 accessible. Don't tell me about the paper, tell me why I
10:58:08 24 care about available versus accessible.
10:58:11 25 MS. PESCHEL: Right, Your Honor, we want to make

10:58:12 1 sure that third party has access to that profile
10:58:16 2 information, and that's what they described in their
10:58:18 3 clarification in the prosecution history --
10:58:20 4 THE COURT: Is there something that is -- that
10:58:22 5 where the person -- I don't understand how it's available to
10:58:26 6 them if it's not accessible, but okay. Is there some piece
10:58:31 7 of prior art or some accused product where you're saying you
10:58:37 8 say well, gosh, it's available, but it's not accessible?
10:58:42 9 Because that's the only reason I would care to have to
10:58:45 10 construe this.
10:58:47 11 MS. PESCHEL: Right, Your Honor, if for some
10:58:49 12 reason --
10:58:50 13 THE COURT: If, no, right now, all contentions
10:58:53 14 are in, right?
10:58:54 15 MS. PESCHEL: Right, Your Honor.
10:58:55 16 THE COURT: Where does this play in your
10:58:58 17 contentions?
10:58:58 18 MS. PESCHEL: It has --
10:58:59 19 THE COURT: Where is it? Like where do you say
10:59:03 20 gosh, that's not available because it's not accessible? Do
10:59:07 21 you say that?
10:59:08 22 MS. PESCHEL: No, Your Honor.
10:59:09 23 THE COURT: Okay. So if I construe this one way
10:59:13 24 or the other, where is that going to come up, in new
10:59:17 25 contentions, is your expert now going to say something that

10:59:21 1 he did not previously say?

10:59:23 2 MS. PESCHEL: No, Your Honor, as long as it's in

10:59:25 3 the context of the electronic available or electronic

10:59:30 4 accessibility.

10:59:30 5 THE COURT: We all agree on electronic already.

10:59:33 6 If they agree that it's electronic, your fine with using

10:59:37 7 available instead of accessible?

10:59:39 8 MS. PESCHEL: Yes, as long as we're clear that

10:59:41 9 that's what it means.

10:59:42 10 THE COURT: No, available, if I say available

10:59:44 11 has its plain and ordinary meaning, you said we -- and I

10:59:47 12 tell you when you give your contentions, give contentions

10:59:51 13 under their construction and your proposed construction. So

10:59:55 14 you say we have not said that any contention we have given

11:00:01 15 it matters, we haven't said it's not available because it's

11:00:04 16 not accessible, you said that, right?

11:00:07 17 MS. PESCHEL: Yes.

11:00:08 18 THE COURT: Okay. So there is no relevant --

11:00:13 19 there is no issue in this case that the claim scope is

11:00:17 20 meaningful to, right?

11:00:19 21 MS. PESCHEL: As long as we're in the electronic

11:00:22 22 context, you're right, Your Honor.

11:00:23 23 THE COURT: So you agree as long as we're in the

11:00:26 24 electronic context that you're fine with their proposal if

11:00:29 25 it's electronically available and we use the plain words

11:00:33 1 instead of making up a new word, right?

11:00:36 2 MS. PESCHEL: Yes, Your Honor.

11:00:37 3 THE COURT: And you're fine with electronically

11:00:39 4 available?

11:00:40 5 MR. MILKEY: Yes, Your Honor.

11:00:41 6 THE COURT: All right. So we all have an

11:00:43 7 agreement.

11:00:54 8 All right. URL redirection.

11:00:57 9 MR. MILKEY: So Mr. Wang, if could go to

11:01:02 10 AlmondNet slide, the PowerPoint 103, this is Roku's slide

11:01:07 11 28.

11:01:07 12 I actually think it's helpful to start -- sorry,

11:01:12 13 it's Roku's slide 21. Actually I think it's helpful to

11:01:16 14 start with Roku's characterization of the dispute here which

11:01:21 15 is URL redirection -- is URL redirection of a website or

11:01:28 16 just a portion of a website. And if could go back to slide

11:01:33 17 21 now.

11:01:44 18 So turning to slide 30 of AlmondNet's slides,

11:01:52 19 the claim actually makes this very clear that it is -- that

11:01:58 20 URL redirection can be just a portion of a website. It says

11:02:04 21 receiving the partial profile is achieved as a result of

11:02:07 22 automatic electronic URL redirection from a portion of a

11:02:12 23 page of the website.

11:02:13 24 So as I understand it, Your Honor, this entire

11:02:15 25 dispute is solved by the claim language. The claim language

11:02:19 1 says that the redirection can be from a portion of a page of
11:02:23 2 the website. So when Roku is -- as I understand it, they
11:02:30 3 are trying to say that the redirection has to be -- has to
11:02:33 4 involve the entire page, the claim clearly says that that's
11:02:40 5 wrong.
11:02:41 6 And the specification, turning to slide 31, also
11:02:46 7 makes this clear, it refers to a redirect to a portion of
11:02:49 8 the visitor's page, also redirecting a portion of the
11:02:54 9 visitor's page.
11:02:55 10 Turn to slide 32. The specification also talks
11:02:59 11 about redirecting a portion of the visitor page. The
11:03:04 12 extrinsic evidence in another patent by the same inventor
11:03:10 13 explicitly defines URL redirection in saying obtaining
11:03:16 14 certain requested information, e.g., all or part of a web
11:03:19 15 page from a different location.
11:03:21 16 There is another piece of prior art relied upon
11:03:24 17 by Roku that talks about a redirection to access a minimal
11:03:31 18 one pixel graphic image. I can't imagine a smaller portion
11:03:36 19 of a web page than a one pixel graphic image.
11:03:42 20 And as I understand it, the only relate argument
11:03:46 21 that Roku makes is not that they are proposed construction
11:03:52 22 is redirection is consistent with the plain meaning of it,
11:03:55 23 it's consistent with how a person of skill in the art would
11:03:59 24 understand it --
11:04:00 25 THE COURT: Can you go back to Roku's proposed

11:04:03 1 construction. Your slide.

11:04:05 2 MR. MILKEY: Yes.

11:04:18 3 THE COURT: Okay. I take your position on this

11:04:25 4 that there is a whole bunch of stuff that doesn't talk about

11:04:29 5 a whole -- but I don't understand the words that are

11:04:34 6 proposed in the AlmondNet construction. What if it says

11:04:38 7 something like obtaining a requested web page or a portion

11:04:41 8 of a requested web page from a different location? All I

11:04:47 9 have done is I have taken Roku's construction there and

11:04:50 10 added in, "or a portion."

11:05:01 11 MR. MILKEY: So Your Honor --

11:05:02 12 THE COURT: I don't understand certain

11:05:05 13 information, all that, I don't know what those words mean.

11:05:08 14 I don't think they're helpful. I'm just trying to say like

11:05:11 15 you have to redirect, you can redirect to get to a page, you

11:05:15 16 can redirect to a part of a page, whatever, so I'm trying to

11:05:19 17 figure out how to say that.

11:05:21 18 MR. MILKEY: I think we're generally in

11:05:24 19 agreement on that, Your Honor. The reason we proposed

11:05:26 20 certain information is because there is this concept in the

11:05:31 21 prior art and that extrinsic evidence I cited, a single

11:05:34 22 pixel image that is obtained from a different location. So

11:05:37 23 we wanted to make clear that the certain information can

11:05:41 24 just be information that includes a graphic image so it

11:05:45 25 doesn't have to be an entire page that's being --

11:05:47 1 THE COURT: Isn't that a portion of a web page?

11:05:51 2 MR. MILKEY: Yes, Your Honor, as long as that is

11:05:53 3 clear in the record --

11:05:54 4 THE COURT: I'm not going to say that, because

11:05:56 5 that might be a factual issue. If someone gives a pixel, is

11:06:00 6 that sufficient of a portion or not. Someone goes to part

11:06:04 7 of a letter P, is that enough, I don't know, that might be a

11:06:08 8 fact issue for the jury. You can't decide everything with

11:06:11 9 claim construction. But it seems like it's consistent with

11:06:13 10 the intrinsic evidence with saying something like obtaining

11:06:21 11 certain information for at least a portion of a web page or

11:06:22 12 obtaining a portion of a web page from a different location.

11:06:26 13 Is that supported or not supported? You can confer if you

11:06:31 14 want.

11:07:05 15 MR. MILKEY: If I can confer.

11:07:06 16 THE COURT: Sure.

11:07:16 17 (Counsel conferring.)

11:07:35 18 MR. MILKEY: Your Honor, the only concern I have

11:07:37 19 that in that is some elements of a page are not visible, and

11:07:42 20 so I would be hesitant to agree to that in the sense that --

11:07:54 21 in the sense that -- I mean, I think we can agree to that, I

11:08:00 22 just want to be clear on the record that even though some

11:08:03 23 portions of a page are not visible, obtaining those portions

11:08:07 24 would still -- you know, we believe that that would satisfy

11:08:10 25 the limitation, we're not somehow disclaiming that or

11:08:15 1 surrendering that scope.

11:08:17 2 THE COURT: Show me where you think I should

11:08:20 3 read in including invisible parts from the intrinsic

11:08:25 4 evidence that you're citing.

11:08:30 5 MR. MILKEY: So, Your Honor, if I could go back

11:08:33 6 to slide 28, so in the specific intrinsic record of this

11:08:45 7 patent, I don't believe that specifically occurs. However,

11:08:47 8 in the extrinsic evidence there is a minimal one pixel

11:08:55 9 graphic image and a person of ordinary skill in the art

11:08:59 10 would understand that these one pixel graphic images are

11:09:02 11 typically transparent and not visible. So that's my answer

11:09:09 12 to that is based on the understanding of a person of skill

11:09:12 13 in the art, and the extrinsic record. I do think that there

11:09:18 14 is a lot of support for that, but you know, including this

11:09:23 15 Merriman patent, but that specific -- the specific proposal

11:09:30 16 hasn't come up so this issue of whether invisible portions

11:09:35 17 of a page would satisfy this hasn't been briefed.

11:09:42 18 THE COURT: Okay. Let me hear from the other

11:09:44 19 side.

11:09:48 20 MR. DIETRICH: So, Your Honor, I think the

11:09:57 21 dispute obviously pertains to that partial versus full

11:10:01 22 website. First of all, I would acknowledge that I agree

11:10:06 23 that stating obtaining certain information does not even

11:10:10 24 limit this to a URL redirection. If all you're doing is

11:10:14 25 gathering information, that does not necessarily mean that

11:10:16 1 you're redirecting to a URL.

11:10:19 2 What they have cited to in the patent itself

11:10:23 3 states that there is a partial redirection from a portion of

11:10:28 4 the web page, it does not say what is being redirected to or

11:10:33 5 what it is gathering or obtaining.

11:10:36 6 THE COURT: I want to make sure I understand

11:10:39 7 your argument. Can you show me the words. When you just

11:10:43 8 say what they're referring to isn't right, it doesn't help

11:10:46 9 me, I need to see.

11:10:49 10 MR. DIETRICH: Sure. Our proposal again is

11:10:51 11 obtaining a requested web page --

11:10:53 12 THE COURT: Yes. And the problem I'm having

11:10:55 13 with that is all the places they're talking about, I don't

11:10:59 14 even know what it means to get an entire page versus pulling

11:11:02 15 information from part of a page which has its own -- like, I

11:11:06 16 -- like, there is all this stuff that they've cited where

11:11:09 17 they talk about getting just a part of something and you

11:11:12 18 don't need a whole page, so that's why -- that's why your's

11:11:17 19 doesn't make sense to me.

11:11:18 20 MR. DIETRICH: Well, I think they have cited to

11:11:20 21 some portions of the specification in this patent, but after

11:11:24 22 they filed the specification, the claims were rejected.

11:11:26 23 What they had filed said redirection and it was rejected.

11:11:30 24 And this is the language from the office action response.

11:11:33 25 It said assignee submitted several computer dictionaries

11:11:39 1 defining redirection in the sense used in the specification.

11:11:43 2 And then it says, for example, in the attached,

11:11:47 3 and I have a copy of it in Exhibit 41, they submitted a

11:11:51 4 screen shot of the definition of URL redirection from this

11:11:56 5 website, and said, right, this is as it's used in the

11:12:01 6 sentence, and then defined. And so what we have done, Your

11:12:06 7 Honor, is we have followed this language --

11:12:08 8 THE COURT: I get it, but that doesn't seem like

11:12:11 9 it's -- it doesn't seem like lexicography, for example, the

11:12:15 10 patent is very clear saying a page or a portion of a page

11:12:20 11 and this doesn't seem like it's undermining that to me.

11:12:25 12 MR. DIETRICH: So, let me take a look at this

11:12:28 13 next step. Well, understood, understood. I will note --

11:12:31 14 THE COURT: This is not a frivolous point that

11:12:33 15 you're raising. It's just to me looking at all of the

11:12:38 16 intrinsic evidence, you know, if I'm looking at the

11:12:42 17 prosecution history ala *Phillips,* this is one data point and

11:12:46 18 the specification is another. In order to sort of overcome

11:12:49 19 what is in the specification, I think it needs to be strong

11:12:52 20 in the revocation and I don't think you get there.

11:12:59 21 MR. DIETRICH: So the phrase "URL redirection"

11:12:59 22 is not used in the specification of the '518 patent.

11:13:02 23 THE COURT: No, but the concept of redirecting

11:13:04 24 to a portion of something.

11:13:05 25 MR. DIETRICH: But I think here is where they

11:13:08 1 are defining what they mean by redirection. They're saying,
11:13:11 2 Your Honor, that look, there are multiple ways of
11:13:13 3 interpreting redirection. You can mean it in the
11:13:16 4 conventional sense or you can mean it in this sense. Here
11:13:19 5 is the dictionary definition.
11:13:20 6 THE COURT: What do I do with -- for example,
11:13:22 7 what are the other -- can you go back to the previous slide.
11:13:28 8 Okay. It says for example, okay, we submitted several
11:13:34 9 computer dictionaries defining redirection. Do we have the
11:13:39 10 several they submitted?
11:13:40 11 MR. DIETRICH: Those would have been in the
11:13:42 12 context of an interview. This is an supplemental amendment
11:13:45 13 and interview report. What they have done is they have
11:13:48 14 already submitted those to the patent examiner and said
11:13:52 15 look, here is what we meant by redirection, here is a
11:13:56 16 dictionary definition. They came to some agreement during
11:13:58 17 that and said well, if you amend it to mean this, if you
11:14:02 18 give me a dictionary definition, we can bridge that gap.
11:14:08 19 And so not only did they give them a dictionary definition,
11:14:12 20 but along with this same filing they amended the claims to
11:14:16 21 for the very first time refer to URL redirection. Before
11:14:20 22 that URL redirection had never been used anywhere in the
11:14:24 23 patent or the specification. So they are introducing this
11:14:27 24 concept of redirection saying Accium used it in a different
11:14:31 25 way, here is how we mean it, here is how you should apply

11:14:35 1 it, and that's how we should move forward with this. That
11:14:39 2 to me, Your Honor, is a clear-cut case.
11:14:41 3 And to the extent they had provided additional
11:14:45 4 dictionary definitions because apparently they have
11:14:48 5 multiple, maybe that provides some ambiguity, maybe that
11:14:51 6 provides them the ability to say well, some say partial,
11:14:54 7 some say complete, but all this says is you go and obtain a
11:14:59 8 certain requested page from a different location.
11:15:01 9 I do find it interesting, Your Honor, we have
11:15:04 10 spent a lot of time talking about two different other
11:15:07 11 patents, right, a patent filed by the same inventor
11:15:11 12 twelve years after this application was filed, and then a
11:15:14 13 Merriman application which is prior art which they have
11:15:17 14 sought to distinguish in a number of the places we have
11:15:20 15 cited in our briefing. So at one point they're saying it's
11:15:25 16 a critical -- I don't want to misstate the phrase, but I
11:15:29 17 believe they said it was a critical failure to rely on
11:15:34 18 Merriman, because -- let me actually just read this phrase.
11:15:38 19 So this is on page 54 of our briefing, we are a
11:15:42 20 citing from Exhibit 42, and it's criticizing Merriman and
11:15:48 21 says that reliance on Merriman is "a critical failure
11:15:53 22 because the challenged claims use URL redirection in a
11:15:58 23 manner other than its conventional purpose."
11:16:01 24 And so here they have tried something and said
11:16:04 25 here is what we mean, here is how we used it in the

11:16:07 1 specification, use that. And to us, if it's not for its
11:16:10 2 conventional purpose, it wouldn't be given its plain and
11:16:13 3 ordinary meaning.
11:16:19 4 THE COURT: The problem I have is you say URL
11:16:22 5 redirection isn't in the specification, but then when
11:16:24 6 they're defining it they say it's being used in the
11:16:28 7 specification and the specification does talk about not just
11:16:31 8 going to a page.
11:16:33 9 MR. DIETRICH: I think so. As Your Honor is
11:16:36 10 certainly aware, it's very common for a pattern owners to
11:16:40 11 file applications that cover every single possible potential
11:16:44 12 embodiment. But then as you begin actually going through
11:16:47 13 the process of prosecuting those, you have to narrow that
11:16:51 14 scope. So they said well, redirection is too broad, we got
11:16:54 15 rejected based on redirection, so let's add URL redirection,
11:16:59 16 and I'll tell you what that means. And so I think you can
11:17:03 17 use a statement to say well, we used it as the -- in the
11:17:08 18 same fashion as the specification, but at the same time they
11:17:13 19 can't say they weren't amending to overcome a rejection. If
11:17:17 20 you're amending to overcome, it means well, what we had
11:17:21 21 earlier was too broad.
11:17:28 22 THE COURT: Okay.
11:17:32 23 MR. DIETRICH: And again, this just illustrates
11:17:35 24 that our proposal tracks what was presented to the Patent
11:17:38 25 Office.

11:17:49 1 MR. MILKEY: Would Your Honor like to hear
11:17:54 2 further about URL redirection?
11:17:57 3 THE COURT: No, thank you.
11:18:08 4 You know what I didn't ask you, I'm sorry. What
11:18:11 5 about the argument -- you can sit down, thanks.
11:18:18 6 What about the argument about the claim language
11:18:21 7 itself used in context supports that it's a portion?
11:18:24 8 MR. DIETRICH: Yes, Your Honor. So what that
11:18:26 9 talks about is its redirection from a portion of a website
11:18:31 10 or web page. It is not redirecting you to a portion of a
11:18:37 11 website or web page. And so on a web page, we're all
11:18:41 12 familiar with them, right, you might click a link you know
11:18:46 13 and have your redirection to a different website. You're
11:18:49 14 being redirected from a URL prompt, right? You may be
11:18:54 15 clicking on something, but you're not merely going to a
11:18:59 16 portion of a website, you're going to that URL. And so I
11:19:05 17 think that the distinction between from and to does matter.
11:19:11 18 THE COURT: All right. Thank you.
11:19:21 19 MR. WANG: Your Honor, before we move on, may I
11:19:23 20 provide the case citation I alluded to before?
11:19:26 21 THE COURT: Yes.
11:19:27 22 MR. WANG: I didn't want to interrupt. So the
11:19:29 23 case I have is *Biomaterials v. Demora*. And the Westlaw cite
11:19:35 24 is 2023 WL3324684. I'll read that again. 2023 WL3324684
11:19:50 25 and the pin cite is at page 5, *5, and that discusses --

11:19:57 1 THE COURT: Where is that case from?

11:19:59 2 MR. WANG: The Northern District of California.

11:20:01 3 And it issued just in May. Maybe that was the reason it was

11:20:05 4 in our briefing. But it talks about the remainder of the

11:20:08 5 preamble merely provides that it's intended use and it's

11:20:14 6 supported --

11:20:15 7 THE COURT: Yes, but is that saying that part of

11:20:17 8 the preamble is limiting?

11:20:19 9 MR. WANG: I believe so, Your Honor.

11:20:21 10 THE COURT: So you understand that case to say

11:20:25 11 -- they said part of the preamble is limiting, but the rest

11:20:27 12 of it is the suggested intended use is not.

11:20:31 13 MR. WANG: Right. What we're saying is we have

11:20:33 14 a Beauregard claim and then the part after is the intended

11:20:38 15 use, it's not breathing life or meaning for the same reason

11:20:42 16 as claim 1.

11:20:43 17 And I also had a chance to look at the new

11:20:46 18 evidence if Your Honor wanted to hear anything about that.

11:20:51 19 THE COURT: I think I already said you guys can

11:20:53 20 file papers so we're not going to take up the time here to

11:20:56 21 do that.

11:20:58 22 MR. WANG: Sure. Thank you, Your Honor.

11:21:01 23 THE COURT: All right. Next term.

11:21:04 24 All right. So my problem with the issues are we

11:21:08 25 now on definiteness.

11:21:10 1 MS. EMERY: Yes, Your Honor.

11:21:11 2 THE COURT: For the long run. So my problem

11:21:14 3 with definiteness is clear and convincing evidence and I got

11:21:21 4 a lot of attorney argument, and I don't know what to do with

11:21:25 5 that. So I don't know how I can say based on -- like, there

11:21:31 6 are some words and I'm told, look, it's unclear what this

11:21:35 7 includes, but I don't have anything from a person of

11:21:38 8 ordinary skill in the art. I mean, they're ordinary words,

11:21:41 9 and I don't have anything from a person of ordinary skill in

11:21:43 10 the art saying well, this could mean multiple things. We

11:21:47 11 have no idea what this means, that's my problem with you

11:21:49 12 meeting your burden. That's what I need you to focus on,

11:21:52 13 don't just give me your argument, but tell me what evidence

11:21:55 14 do I have that gets to the standard of clear and convincing.

11:22:02 15 MS. EMERY: Yes, Your Honor. And I think as one

11:22:05 16 example, we'll jump ahead, the issue with electronic indicia

11:22:11 17 as used in the terms, AlmondNet's counsel cites to the

11:22:17 18 specification, portions of the specification that counsel

11:22:19 19 cites to deals with associations, and I'll go back so you

11:22:24 20 can see the claim language. But there is a distinction in

11:22:26 21 the claims between electronic indicia and associations. And

11:22:33 22 electronic indicia is not anywhere in the specifications and

11:22:36 23 it's not clear what is required to be an indicia of that

11:22:43 24 association. And AlmondNet's --

11:22:46 25 THE COURT: I get it, that's an argument, right,

11:22:49 1 but in the context of this, the question is, are there
11:22:52 2 reasonable bounds to a person of skill in the art. I don't
11:22:56 3 know. I mean, if someone said give me, you know, some
11:23:01 4 electronic indicia of an association, I could probably come
11:23:05 5 up with something. That's why I'm not -- I'm not saying
11:23:09 6 you're wrong, I'm just saying I don't know what you think is
11:23:13 7 clear and convincing evidence. The fact that it's not in
11:23:16 8 the specification, okay, that's something. But there are
11:23:19 9 lots of words that might not be in the specification, but it
11:23:23 10 still -- it doesn't render the claim indefinite because a
11:23:26 11 person of skill in the art can understand what's being
11:23:30 12 claimed. So I get it, it's not in the specification, but
11:23:34 13 like I -- I don't know what -- I don't know what the
11:23:39 14 evidence is here that I'm supposed to say here, here Federal
11:23:45 15 Circuit, this is the clear and convincing evidence that it
11:23:49 16 must be invalid.
11:23:50 17 MS. EMERY: Yes, Your Honor. And I do want to
11:23:52 18 point to two representations that AlmondNet has previously
11:23:57 19 made. This was in the briefing, but I think it kind of
11:24:01 20 makes the point that their proposal for electronic indicia
11:24:06 21 being electronic data indicative of, that's going to leave
11:24:10 22 open questions and disputes because AlmondNet has previously
11:24:13 23 made pretty clear certain data is not electronic indicia.
11:24:20 24 In Exhibit 32, which is partially reproduced
11:24:24 25 here on the slide, AlmondNet had previously during

11:24:27 1 prosecution of the '398 patent specified that certain
11:24:34 2 paragraphs cited from a prior art reference discuss storing
11:24:39 3 user behavioral information, but they did not disclose what
11:24:44 4 is claimed, a database containing electronic indicia of the
11:24:47 5 electronic association. And the emphasis is directly
11:24:52 6 reproduced, that was in the original argument made by the
11:24:56 7 patent owner during prosecution.
11:25:00 8 And then more recently, Your Honor, in January
11:25:03 9 of this year, in an IPR proceeding instituted by Meta, in
11:25:10 10 its patent owner's response, AlmondNet again argued that
11:25:14 11 certain data does not meet the limitation of electronic
11:25:18 12 indicia. And AlmondNet's patent owner's response --
11:25:22 13 THE COURT: Let's see what it is. AlmondNet
11:25:24 14 argued that electronic indicia was not disclosed. So I
11:25:30 15 guess we're saying that AlmondNet is saying that the list of
11:25:34 16 users generated and stored by the content server is not
11:25:45 17 electronic indicia?
11:25:48 18 MS. EMERY: Yes, Your Honor. So the petitioner,
11:25:49 19 in the petitioner's argument, that's a quote from the
11:25:52 20 petitioner's argument in their petition where they point to
11:25:56 21 Figure 6, which is reproduced here and specifically that
11:25:59 22 highlighted portion and --
11:26:01 23 THE COURT: What exactly did -- see, I want to
11:26:04 24 know what AlmondNet said. I get it, you're saying -- I
11:26:07 25 appreciate you giving me context as to what they're

11:26:10 1 responding to, but I want to see. So the petitioner said
11:26:16 2 list of user generated and stored stuff is electronic
11:26:21 3 indicia of the electronic association. And AlmondNet
11:26:25 4 actually said -- automatically generating and storing
11:26:41 5 electronic indicia of an association between the first
11:26:44 6 device identifier and an electronic identifier of a second
11:26:49 7 device. The petition, however, fails to allege that Baig
11:26:55 8 system generates and stores, fails to allege that Baig's
11:27:01 9 system generates and stores electronic indicia of an
11:27:06 10 association between these two things, the whatever, as would
11:27:15 11 be required under the petitioner's theory.
11:27:18 12 So what I'm not seeing is -- so they're saying
11:27:25 13 that the petition hasn't said that that forms the
11:27:32 14 association between the two things required.
11:27:35 15 MS. EMERY: Correct, Your Honor, yes.
11:27:37 16 THE COURT: And so why -- why would it -- I
11:27:49 17 still don't understand like why is that and why would a
11:27:53 18 person of skill in the art think that actually it does
11:27:57 19 disclose the --
11:27:59 20 MS. EMERY: Well, I think the confusion is that
11:28:02 21 there is not really clear guidance on where they're going to
11:28:06 22 draw the line. They have kind of sliced and diced on what
11:28:11 23 is and is not -- well, they have sliced and diced on what is
11:28:15 24 not electronic indicia of electronic associations of these
11:28:20 25 various claims. And it's not clear as to where they're

11:28:23 1 going to draw the line here because here what they're
11:28:25 2 proposing is just that electronic indicia is just electronic
11:28:29 3 data, but they have specifically carved out certain data,
11:28:33 4 behavioral user information --
11:28:35 5 THE COURT: Okay. So I guess the question would
11:28:41 6 be if the behavioral data information -- what I'm trying to
11:28:47 7 figure out is are they saying no user behavioral information
11:28:51 8 could be that, or just that particular behavioral
11:28:56 9 information in a piece of prior art did not in the way it
11:28:59 10 was implemented illustrate the required electronic
11:29:05 11 association?
11:29:08 12 MS. EMERY: So with respect to the behavioral
11:29:11 13 information -- yeah, I'll put this back in. Let me publish
11:29:39 14 this. This is some more context from the prosecution
11:29:43 15 history which is at Exhibit 32 with the briefing. But this
11:29:50 16 is the fuller excerpt --
11:29:53 17 THE COURT: I'm sorry, this is the response or
11:29:55 18 the petitioner?
11:29:57 19 MS. EMERY: Sorry, this was the prosecution
11:29:59 20 history, this is Exhibit 32, this is the behavioral
11:30:04 21 information example.
11:30:04 22 THE COURT: That's helpful. Let me just pull up
11:30:07 23 Exhibit 32. And what page is this?
11:30:10 24 MS. EMERY: This is page 15 of 19.
11:30:38 25 THE COURT: The prior art does not disclose that

11:30:40 1 the ISP sends to the coordinator or moderator any
11:30:45 2 transmission that is based on any association between
11:30:48 3 different user devices. To the contrary the prior art talks
11:30:53 4 about sending behavioral information to the coordinator or
11:30:59 5 moderator entity without any mention of such transmission
11:31:04 6 being based on any device association. So they're not
11:31:11 7 saying that all behavioral information is not electronic
11:31:15 8 indicia, it's that as I understand this, they're saying
11:31:19 9 well, in whatever the prior art was, they didn't say that it
11:31:24 10 was based on an association. And the prior art discloses no
11:31:32 11 reason why the ISP would send such a transmission based on
11:31:37 12 any device association.
11:31:41 13 So why is that saying oh, well, they said no
11:31:47 14 behavioral information, why would I read it that broadly as
11:31:50 15 opposed to saying well, they said in that piece of prior art
11:31:53 16 there was behavioral information, but nobody said that the
11:31:56 17 behavioral information or the electronic indicia if that's
11:32:01 18 what it was, was based on the required association?
11:32:05 19 MS. EMERY: Yes, Your Honor. And I get that
11:32:09 20 point. But the problem is it's not clear as to what they're
11:32:14 21 going to say here, because what they propose is that it's
11:32:18 22 just electronic data. But --
11:32:21 23 THE COURT: It's electronic data that must have
11:32:24 24 the -- meet the other elements of the claim. Right?
11:32:28 25 MS. EMERY: Right. Yes, Your Honor.

11:32:31 1 THE COURT: Okay.

11:32:38 2 MS. EMERY: Our position is still that the issue

11:32:41 3 remains that it's not clear where they're going to draw the

11:32:44 4 line in terms of electronic data, what it means -- what data

11:32:49 5 --

11:32:49 6 THE COURT: Let me ask you this. It's not clear

11:32:51 7 where they're going to draw the line. All the contentions

11:32:55 8 should be out there. All the contentions using their

11:32:59 9 construction, whether they're infringement,

11:33:02 10 non-infringement, validity, no -- or invalidity, no

11:33:07 11 invalidity, they should be out there. So where is there

11:33:13 12 some dispute over the electronic indicia? I'm not saying I

11:33:21 13 don't have to cite it because you're saying it's indefinite,

11:33:24 14 but you're saying we have no clue what they're going to say.

11:33:28 15 Is there something in reality where this is in dispute,

11:33:31 16 where you say something is electronic indicia and they say

11:33:35 17 it's not, or vice versa?

11:33:42 18 MS. EMERY: Yes, Your Honor. I mean, I don't

11:33:44 19 have all the contentions in front of me, so I'm not entirely

11:33:49 20 sure precisely where that issue may or has come up, but I

11:33:59 21 think part of the problem is the way they have done it in

11:34:01 22 their contentions is it's very broad, it kind of reflects

11:34:04 23 the electronic data portion of their proposal.

11:34:07 24 And with respect to the one thing I wanted to

11:34:12 25 point out because they've injected this indicative of into

11:34:15 1 their proposal for electronic indicia because their proposal
11:34:20 2 is electronic data indicative of. And they rely heavily in
11:34:26 3 their briefing on that Lav Technology case, I wanted to
11:34:30 4 point out some differences in that case. The first being
11:34:34 5 that AlmondNet unilaterally did inject indicative of which
11:34:40 6 indicative was what was being construed in that case, and
11:34:44 7 the dispute here is not what indicative of means, the
11:34:48 8 dispute is the scope of the electronic indicia portion. And
11:34:52 9 the claim language at issue in the specification before the
11:34:55 10 court in Lav, in the claim language and the specification
11:34:59 11 are distinguishable to what we have here. One example of
11:35:02 12 the indicative of claim language in that case from the
11:35:06 13 patents-in-suit was "characteristics indicative of the
11:35:11 14 mobile device." The court noted in that case that the
11:35:15 15 specification provided pretty clear guidance and examples as
11:35:18 16 to the scope of the "mobile device characteristics" in the
11:35:24 17 specification -- sorry, excuse me, yeah, in the
11:35:26 18 specification of the patents-in-suit of that case. The
11:35:30 19 specification provided that those characteristics included
11:35:35 20 by way of example, "name, processor, processor speed, RAM
11:35:40 21 size," and there were others. There is just not that type
11:35:43 22 of clarity in the specification here, so there is -- because
11:35:46 23 electronic indicia doesn't even appear in the '398 and the
11:35:50 24 '198 specifications, so it's really not clear what the scope
11:35:55 25 is of data which is what they're supposing is the definition

11:36:02 1 of electronic indicia.

11:36:07 2 And because of their representations during

11:36:09 3 prosecution and during the IPR proceedings, there is just

11:36:14 4 really no clarity as to the scope. If Your Honor doesn't

11:36:27 5 have any more questions, I'll let opposing counsel go.

11:36:33 6 THE COURT: Okay.

11:36:51 7 MR. WANG: Your Honor, I just have a few brief

11:36:53 8 points on this term. So attorney argument that "it's not

11:36:59 9 clear where they'll draw the line" is not a basis to find

11:37:03 10 indefiniteness by clear and convincing evidence.

11:37:06 11 THE COURT: Do you think there is actually

11:37:08 12 anything in reality where there is a question of where that

11:37:11 13 line is drawn in any of the contentions or anything? I

11:37:14 14 mean, it's not like you guys are all going to suddenly come

11:37:18 15 up with a bunch of new contentions now and say okay, now

11:37:22 16 we're going to have a fight about whether this prior art has

11:37:25 17 electronic indicia. Is there anything where there is a

11:37:29 18 question of where the line is?

11:37:31 19 MR. WANG: I don't think so, Your Honor, because

11:37:32 20 even Roku admits that the word "indicia" itself in isolation

11:37:38 21 is broad. They say it can arguably mean any kind of

11:37:43 22 electronic data. We agree that the word in isolation, just

11:37:48 23 indicia, that's what it would mean to a person of ordinary

11:37:51 24 skill. There is no evidence from a person of ordinary skill

11:37:55 25 that it's ambiguous. There hasn't even been an ambiguity

11:38:00 1 defined that it could mean this, it could mean that, the
11:38:03 2 term in isolation is broad. But importantly the claim
11:38:07 3 language, and I have that in the slide, it's not in
11:38:10 4 isolation, it talks about generating and storing electronic
11:38:13 5 indicia which also the association between the first and
11:38:16 6 second device identifiers. And all of the prior art that
11:38:20 7 was put on the screen, Your Honor, is correct, they were
11:38:23 8 specific to the prior art and factual arguments, but they
11:38:27 9 were all about what comes after, whether or not it was an
11:38:31 10 association between the first and second device identifiers.
11:38:36 11 And for those specific references and the
11:38:39 12 specific arguments made, the argument is that it did not
11:38:42 13 meet that, not that it was in data and not that that data is
11:38:47 14 not an indicia of something, but that it was not the way
11:38:50 15 that those references were implemented or disclosed, it was
11:38:55 16 not the association between the first and second device
11:38:58 17 identifiers.
11:39:02 18 And I won't belabor the point, but the
11:39:05 19 specification does give further illumination talking about
11:39:10 20 databases and how that is stored.
11:39:14 21 So unless Your Honor has any further questions
11:39:18 22 on this term.
11:39:20 23 THE COURT: Okay. Thank you.
11:39:21 24 MR. WANG: Thank you.
11:39:38 25 MS. EMERY: Your Honor, unless you have any more

11:39:40 1 questions on this one, we can move on to the next.

11:39:43 2 THE COURT: Okay. Thank you.

11:39:44 3 MS. EMERY: The next dispute is as to at least

11:39:53 4 in part on at least a portion, which appears in both the

11:39:58 5 '398 and the '878 patents. Claim 22 of the '398 patent and

11:40:07 6 claim 6 of the '878 patent include this compounding terms of

11:40:14 7 agree. Whether taken together or independently, this

11:40:17 8 language does not appear in the specification of the '398 or

11:40:20 9 the '878 patent.

11:40:25 10 In the joint claim construction brief, AlmondNet

11:40:28 11 argues in two separate places that the scope is evidently

11:40:34 12 "anywhere from partially to wholly" and "anything from a

11:40:37 13 portion to the entirety." There is no clear guidance as to

11:40:42 14 what extent the selection of an advertisement must be based

11:40:46 15 on "at least a portion of the profile data" and neither is

11:40:50 16 there any clear guidance as to what amount of electronic

11:40:54 17 profile data is required to be "at least a portion."

11:40:58 18 THE COURT: So again, though, I mean, the words

11:41:01 19 are not -- I mean, it seems to me dumb to say at least a

11:41:09 20 part at least a portion, or redundant, but they're not

11:41:16 21 impossible to understand. If someone said give me at least

11:41:19 22 a part, at least a portion of an apple, I could do it. So

11:41:24 23 what I'm not understanding is why is it that you're saying a

11:41:28 24 POSA wouldn't understand what is being claimed? And again,

11:41:36 25 I need clear and convincing evidence, and all I'm really

11:41:40 1 getting is, well, gosh, we don't know what a portion is. Is
11:41:45 2 it like one little thing? Is it a whole thing? Is it
11:41:50 3 anywhere in between? And why can't I say look, it means any
11:41:53 4 of those things because nobody is telling me that it doesn't
11:42:00 5 make sense or that, you know -- I'm just not understanding
11:42:04 6 why -- what is your evidence that a person of skill in the
11:42:08 7 art would not understand what that meant?
11:42:14 8 MS. EMERY: Your Honor, in our briefing we had
11:42:17 9 briefed the case, the *Zadro Products v. STI Technologies*
11:42:23 10 case and in that case, Judge Bryson found that the phrase
11:42:27 11 "at least in part," even if used to refer to the light
11:42:33 12 emitting region or the light emitting diodes provides no
11:42:37 13 guidance as to what portion or portions of the light
11:42:40 14 emitting regions and diodes must generally or concentrically
11:42:44 15 aligned. The court noted that neither the specification nor
11:42:47 16 the common usage offered significant guidance as to the
11:42:50 17 meaning of the phrase.
11:42:52 18 I think there are similar issues here because
11:42:53 19 the specification doesn't provide any guidance as to what
11:42:57 20 extent or what amount of electronic profile data is required
11:43:00 21 to be, "at least a portion," and it's made worse because of
11:43:04 22 the lack of guidance as to the compound --
11:43:07 23 THE COURT: What was the evidence that Judge
11:43:08 24 Bryson based his decision on?
11:43:12 25 MS. EMERY: Yes, Your Honor. So he had looked

11:43:14 1 at -- I mean, he looked at the specification, and he looked
11:43:17 2 at just the common usage of the term.
11:43:21 3 THE COURT: There was no other evidence that he
11:43:23 4 had? No expert opinions, no discussion of, you know, does
11:43:30 5 it mean like could have two lights versus four lights versus
11:43:36 6 whatever?
11:43:38 7 MS. EMERY: Yes, Your Honor.
11:43:39 8 THE COURT: And give me the citation to that one
11:43:42 9 again, please.
11:43:42 10 MS. EMERY: Yes, Your Honor. It's 2019
11:43:48 11 WL10252726, and the discussion on at least in part to
11:44:02 12 concentrically aligned is at page, looks like it starts at
11:44:06 13 page 2 ^ .
11:44:10 14 THE COURT: So can you tell me from looking at
11:44:12 15 that what he was relying on?
11:44:14 16 MS. EMERY: Yes, Your Honor.
11:44:33 17 Your Honor, it looks like that Judge Bryson just
11:44:36 18 looked at the specifications of the asserted patents.
11:44:42 19 THE COURT: Okay. Thank you.
11:44:49 20 MS. EMERY: And that's all I had on that one, so
11:44:52 21 unless you have any questions, I'll turn it over.
11:44:55 22 THE COURT: All right. Thank you.
11:45:11 23 MR. WANG: Your Honor, again, I'll be brief.
11:45:15 24 Obviously the claim language "at least a portion of" or "at
11:45:19 25 least in part on" appears in thousands of patents.

11:45:23 1 THE COURT: All right. Why don't you -- I have
11:45:25 2 a lot of respect for Judge Bryson. Why don't you
11:45:28 3 distinguish that case.
11:45:30 4 MR. WANG: Sure. Sure. So that case involved
11:45:33 5 two I believe diodes, and the uncertainty created had to do
11:45:41 6 with the claim language that my colleague read being
11:45:46 7 generally concentrically aligned. So I think at least in
11:45:51 8 part of in conjunction with the concept of generally
11:45:57 9 concentrically aligned, we're talking about two diodes based
11:46:01 10 on the specific specification, that was what makes that case
11:46:07 11 distinguishable, and we do distinguish that case in our
11:46:12 12 briefing as well.
11:46:13 13 But I want to try to persuade Your Honor why
11:46:16 14 this dispute or this claim language is very clear. So what
11:46:20 15 I have on the screen is Roku slide 32. And what they've
11:46:24 16 done is they've sort of sliced out like what they're saying
11:46:31 17 requires construction to be at least in part on at least a
11:46:35 18 portion of, we think that's somewhat misleading because what
11:46:39 19 we have is we have modifiers modifying nouns. So if we look
11:46:44 20 at the very last part of the claim, and Strunk & White
11:46:48 21 teaches us that modifiers are placed next to the nouns that
11:46:52 22 need modified. It says "At least a portion of the first
11:46:56 23 electronic profile data." That is perfectly clear, you have
11:47:00 24 profile data and it's part of it. It could be certain
11:47:04 25 demographic information that's part of the first electronic

11:47:13 1 profile data. And then if you look at what's before that
11:47:16 2 it's just saying that the advertisement is selected based at
11:47:20 3 least in part on what follows which is the demographic data.
11:47:25 4 And so it must be based on it at least in part so it could
11:47:30 5 be based entirely on it, or it could be based on that and
11:47:34 6 something else, it can't be only based on something else.
11:47:37 7 So it makes perfect sense, the claim. It's not
11:47:43 8 perfect English, but there is no evidence it would be
11:47:47 9 ambiguous or not understandable by a person of ordinary
11:47:51 10 skill.
11:47:51 11 And I think much of their alleged uncertainty of
11:47:57 12 it has to do with just how they chose to do this word, to
11:48:02 13 remove the nouns and then put these two modifiers together
11:48:08 14 that they have highlighted in yellow.
11:48:12 15 Then I also would mention that Roku to a large
11:48:17 16 extent abandons its argument for this term in the briefing
11:48:21 17 where its sur reply brief is only a few sentences and fails
11:48:26 18 to dispute AlmondNet's evidence and arguments in reply.
11:48:30 19 Unless Your Honor has any other questions.
11:48:32 20 THE COURT: No. Thank you.
11:48:36 21 MS. EMERY: Your Honor, I just wanted to make
11:48:41 22 one very brief point.
11:48:42 23 THE COURT: We're running out of time, so you
11:48:44 24 guys are going to have to pick it up.
11:48:46 25 MS. EMERY: Just to the extent that counsel

11:48:48 1 **tried to distinguish the *Zadro Products* case that trying to**
11:48:54 2 **suggest that Judge Bryson was looking at the generally**
11:49:00 3 **concentrical language, I just want to read a quote from the**
11:49:03 4 **case --**
11:49:03 5 **THE COURT: No, I know, he said the problem**
11:49:06 6 **isn't in the generally concentrically aligned, it's in the**
11:49:09 7 **part, but the problem you have is those things were all**
11:49:13 8 **together and that's the point he was just making which is**
11:49:15 9 **that there are other cases where "at least in part" is used,**
11:49:19 10 **but when you say it's at least in part generally**
11:49:22 11 **concentrically aligned, that's when things start getting**
11:49:25 12 **undefined, so it is a little bit different than what we have**
11:49:27 13 **here.**
11:49:28 14 **MS. EMERY: Yes, Your Honor, we would just still**
11:49:30 15 **argue that the "at least in part on" "at least a portion"**
11:49:33 16 **does not give clarity as to the definitive scope of the**
11:49:38 17 **claim that we have.**
11:49:39 18 **Thank you.**
11:49:41 19 **THE COURT: All right. You have ten minutes and**
11:49:45 20 **a whole bunch of terms, so let's go quickly.**
11:49:55 21 **Now let's assume that I agree that unaffiliated**
11:49:59 22 **third party is a little bit redundant over third party, why**
11:50:02 23 **does that make it indefinite?**
11:50:04 24 **MS. PESCHEL: Your Honor, really the issue is**
11:50:06 25 **with the scope of what unaffiliated means.**

11:50:12 1 THE COURT: Just so I understand, is there an
11:50:15 2 actual issue where somebody is like I have no idea in terms
11:50:18 3 of piece of prior art or piece of -- a piece of like an
11:50:25 4 accused product or system where there is a dispute and you
11:50:31 5 say well, they're unaffiliated and you say no, no, they're
11:50:34 6 affiliated?
11:50:35 7 MS. PESCHEL: Right, Your Honor. So in portions
11:50:37 8 of some of the prior art systems and some of the citations,
11:50:40 9 there are a group of websites that get together and there is
11:50:44 10 another party that's running the system. Right? So the
11:50:46 11 question is when those websites all agree to send their
11:50:49 12 information to that system, are they affiliated or are they
11:50:53 13 unaffiliated with that system?
11:50:54 14 THE COURT: And there is actually a dispute?
11:50:57 15 MS. PESCHEL: Yes.
11:50:57 16 THE COURT: You say they're unaffiliated and
11:51:00 17 they say they are affiliated?
11:51:02 18 MS. PESCHEL: Yes, Your Honor, that would be the
11:51:04 19 contentions. And just understanding that we are in a bit of
11:51:06 20 a time crunch, Your Honor, I wanted to point the Court to
11:51:10 21 Exhibit 30. Unaffiliated is not used in the specifications
11:51:13 22 so we don't have -- unaffiliated or affiliated is not used
11:51:17 23 in the specifications.
11:51:19 24 Exhibit 30 is a dictionary definition for
11:51:21 25 affiliated that was cited in AlmondNet's briefing. If you

11:51:26 1 look at that, affiliate in its common meaning has multiple
11:51:29 2 meanings and they all depend upon context and that's what we
11:51:32 3 don't have in the '582 patent.
11:51:35 4 THE COURT: Again, what does it mean to a person
11:51:45 5 of skill in the art? I don't have a clue if a person of
11:51:48 6 skill in the art would look at that and be like, oh, I know,
11:51:52 7 I know what that means, I know what they're getting at,
11:51:56 8 that's a term that's used in the art. I just have no idea
11:51:59 9 because you haven't given me any evidence of that. I get
11:52:05 10 it, there is a lot of definitions for affiliate. Okay. But
11:52:09 11 thinking of a lot of definitions for affiliated doesn't get
11:52:12 12 me to clear and convincing evidence. I'm not saying you
11:52:16 13 don't have some good argument, not for all these terms, but
11:52:21 14 for some of these terms there are good arguments and I don't
11:52:24 15 know what you're pointing to for clear and convincing
11:52:26 16 evidence.
11:52:27 17 MS. PESCHEL: In construing this claim a person
11:52:29 18 of skill in the art adding meaning to it would look to the
11:52:34 19 intrinsic evidence and there is none for this term.
11:52:40 20 THE COURT: Okay. So what we just heard was
11:52:47 21 look, you got to look intrinsic evidence, and there is none.
11:52:53 22 Do you agree that there is no intrinsic evidence on what an
11:52:56 23 unaffiliated third party is?
11:53:01 24 MR. MILKEY: Your Honor, I don't think that that
11:53:02 25 term is defined --

11:53:04 1 THE COURT: So is there any intrinsic evidence,
11:53:06 2 I'm not saying defined, but let's back up, any intrinsic
11:53:10 3 evidence that tells you what unaffiliated means?
11:53:15 4 MR. MILKEY: I don't believe if it's in the
11:53:18 5 context of this specific specification, but I do know there
11:53:20 6 are portions of the file history that relate to unrelated,
11:53:23 7 the parties being unrelated. I actually believe that
11:53:27 8 applies here.
11:53:28 9 THE COURT: Show me what you're relying on,
11:53:30 10 because we just had an assertion that there is no intrinsic
11:53:34 11 support for unaffiliated. So what intrinsic support do we
11:53:38 12 have?
11:53:39 13 MR. MILKEY: I don't have that.
11:53:40 14 THE COURT: Okay. Come on, we're here, we're --
11:53:43 15 you're supposed to be -- you briefed this, is there no
11:53:48 16 intrinsic support? I mean, you have briefed it, you're
11:53:52 17 prepared for an argument.
11:53:54 18 MR. MILKEY: Actually, Your Honor, I don't
11:53:56 19 recall there being intrinsic evidence on the meaning, the
11:54:02 20 specific meaning of the word unaffiliated.
11:54:04 21 THE COURT: Okay. So there is no evidence on
11:54:07 22 what unaffiliated means. And there is a dispute about
11:54:12 23 whether certain prior art systems or certain accused systems
11:54:18 24 are -- involved unaffiliated folks, and yet we had all kinds
11:54:26 25 of definitions of affiliated. How are they supposed to

11:54:29 1 know? If affiliated means common ownership, maybe they're
11:54:33 2 not affiliated, but if affiliated means we all have a goal,
11:54:38 3 our goal is to work together to do that, they're affiliated.
11:54:41 4 So how am I supposed to -- the Roku privacy policy, come on,
11:54:48 5 that's not telling me -- when was this written? What is the
11:54:51 6 relevance of that to what it means in your patent?
11:54:54 7 MR. MILKEY: Your Honor, I think that the
11:54:55 8 relevance is that people in the advertising industry have
11:55:00 9 maintained this -- there is no evidence that it's changed,
11:55:03 10 this is how people refer to affiliates --
11:55:05 11 THE COURT: I get it, you got the Roku corporate
11:55:08 12 affiliate, in their privacy policy. What else do you have?
11:55:13 13 You have a whole bunch of definitions. Go to your
11:55:17 14 definitions.
11:55:19 15 MR. MILKEY: So the definitions, Your Honor --
11:55:21 16 THE COURT: Can you show me your definitions.
11:55:24 17 Do you have that on a sheet that we can put all those up
11:55:27 18 there?
11:55:28 19 MS. PESCHEL: Yes.
11:55:29 20 MR. MILKEY: So Your Honor, the definitions were
11:55:32 21 presented by Roku in the Texas briefing.
11:55:36 22 THE COURT: All right. Well, then, let's look
11:55:38 23 at them. So what evidence -- let me ask you this. I'll let
11:55:43 24 you put those back up when he's done. Here we go. We got
11:55:48 25 seven definitions. Can you make that a little bigger for

11:55:56 1 me, please? Great. Now just move it over a little bit.
11:56:04 2 Perfect. To bring into includes association. To attach or
11:56:09 3 unite on terms of fellowship. To trace the derivation or
11:56:15 4 origin of. A branch or organization. There are a lot.
11:56:19 5 Some of those might encompass certain relationships and some
11:56:24 6 of them might not. Isn't that like the epitome of
11:56:28 7 definiteness?
11:56:30 8 MR. MILKEY: Your Honor, the only noun, so the
11:56:31 9 nouns start with definition five here and the first noun
11:56:36 10 definition is a branch organization, and the second
11:56:38 11 definition is a business concern owned or controlled in
11:56:42 12 whole or in part by another concern. And then seven refers
11:56:46 13 to an affiliated person --
11:56:48 14 THE COURT: But being in close association,
11:56:50 15 related, how about we just use that, that they're in close
11:56:54 16 -- how about we just use the ordinary meaning of affiliated,
11:56:56 17 say it's not indefinite, the ordinary meaning of affiliated
11:57:00 18 is being in close association or related. How about that?
11:57:04 19 MR. MILKEY: Your Honor, I think that affiliated
11:57:07 20 as a verb is different than affiliate as a noun. To
11:57:10 21 affiliate with someone --
11:57:12 22 THE COURT: Well, I'm looking at affiliated as
11:57:16 23 an adjective. And I believe that unaffiliated is an
11:57:20 24 adjective in your claim.
11:57:23 25 MR. MILKEY: Oh, I see. So I think that I do

11:57:29 1 believe that in a business context people would understand
11:57:31 2 that being in a close association or related in terms of
11:57:34 3 affiliated entities, they would understand that just because
11:57:38 4 someone has a contract with someone else that they are not
11:57:41 5 affiliated entities, and I think that that's the type of
11:57:44 6 ambiguity that Roku is trying to create in its argument.
11:57:52 7 THE COURT: Okay.
11:57:54 8 MR. MILKEY: They're essentially saying --
11:57:56 9 THE COURT: What do you have other than the Roku
11:57:58 10 privacy policy that you're using to support your definition?
11:58:07 11 MR. MILKEY: I would say that the context of the
11:58:11 12 claims requires already that the information is obtained
11:58:17 13 from an unaffiliated third party. So just based on that
11:58:24 14 context, it's clear that there is not some sort of agreement
11:58:28 15 or relationship between the parties, that it clearly
11:58:33 16 contemplates that the parties can have some sort of business
11:58:37 17 transaction --
11:58:44 18 THE COURT: Show me what you're referring to.
11:59:28 19 MR. MILKEY: So the claim language itself says
12:00:00 20 electronically receiving at a programmed computer system
12:00:05 21 coupled to a global computer network, from at least one
12:00:08 22 server controlled by one of a plurality of unaffiliated
12:00:11 23 third parties. There is clearly information being exchanged
12:00:19 24 between the entity practicing the method and the
12:00:25 25 unaffiliated third parties such that there would be some

12:00:29 1 sort of agreement. And the specification of the patent also
12:00:34 2 talks about there being agreements between different
12:00:43 3 entities, it talks about contracts between the different
12:00:46 4 entities.
12:00:48 5 THE COURT: Show me.
12:00:50 6 MR. MILKEY: If you could pull up the '582
12:00:54 7 patent. So I am pulling it up on the projector, but it's on
12:02:37 8 column three of the '582 patent. It's under the summary of
12:02:42 9 the invention, it talks about contracts between parties --
12:02:47 10 THE COURT: Contracts, it defines a contract, an
12:02:50 11 agreement between a user and a system incorporating the
12:02:55 12 method of the present invention wherein ownership of an
12:03:00 13 attribute or a right to represent an attribute is
12:03:03 14 transferred from one party to another for an agreed
12:03:06 15 consideration.
12:03:08 16 So how does that tell me what an unaffiliated
12:03:12 17 party is?
12:03:14 18 MR. MILKEY: So under the summary of the
12:03:16 19 invention starting at line 33 on column 3, the method
12:03:24 20 including the steps of, and this is going down to C, between
12:03:32 21 the user and the data bank, contracting: For the data bank
12:03:36 22 to own or represent a right to a first mutually agreed
12:03:40 23 portion of the first partial profile, and substantially
12:03:44 24 thereafter said data bank incorporating the agreed portion
12:03:47 25 of the first profile into at least one second partial

12:03:51 1 profile. So there is a contract between, at least in the
12:03:56 2 specification it's described here, there is a contract
12:03:59 3 between the party providing the partial profile and the data
12:04:05 4 bank that receives the partial profile and incorporates it
12:04:08 5 into a maintained profile.
12:04:11 6 THE COURT: Okay. How does that have anything
12:04:13 7 to do with unaffiliated, what unaffiliated means?
12:04:16 8 MR. MILKEY: Well, Your Honor, the claim, for
12:04:20 9 instance, claim 11 of the '582 patent, refers to the entity
12:04:26 10 performing the method receiving from one of a plurality of
12:04:30 11 unaffiliated third parties a partial profile, and then
12:04:33 12 adding that to a maintained profile. So this is roughly
12:04:36 13 parallel, Your Honor, to this method description in the '582
12:04:42 14 patent.
12:04:43 15 So in order for unaffiliated to exclude two
12:04:48 16 entities having a contract, that would be reading out this
12:04:54 17 embodiment.
12:05:00 18 THE COURT: Okay.
12:05:03 19 MR. MILKEY: And I would just like to emphasize
12:05:05 20 that regardless of how this term is construed, there is
12:05:09 21 certainly not clear and convincing evidence that the term
12:05:11 22 would not have meaning to a person of skill in the art.
12:05:15 23 THE COURT: All right. Can you just respond to
12:05:18 24 that last part, column 3?
12:05:22 25 MS. PESCHEL: Yes, Your Honor. Your Honor, at

12:05:26 1 column 3 says nothing about unaffiliated third party.

12:05:29 2 THE COURT: I get that, he's saying look, it's

12:05:32 3 talking about the same thing, and calling folks who have a

12:05:37 4 contract unaffiliated. Like, it's following in parallel to

12:05:44 5 what is being talked about in the claim. So if these two

12:05:49 6 folks with the contract between each other --

12:05:56 7 MS. PESCHEL: Your Honor --

12:05:57 8 THE COURT: Look, I'm very sympathic to this

12:05:59 9 argument. I think you may be right. I'm struggling with

12:06:02 10 whether you have given me clear and convincing evidence,

12:06:05 11 that's my real problem.

12:06:07 12 MS. PESCHEL: Yes, Your Honor. You know, in

12:06:10 13 this description there is a contract between the user and

12:06:13 14 the data bank, but it doesn't characterize it as whether or

12:06:16 15 not that is the lack of an affiliation or the unaffiliated

12:06:23 16 nature of the --

12:06:24 17 THE COURT: It could be a third party and they

12:06:28 18 just didn't claim an affiliated third party.

12:06:31 19 MS. PESCHEL: Correct, Your Honor.

12:06:32 20 THE COURT: All right. Let's go to the next

12:06:35 21 one.

12:06:47 22 MS. EMERY: Your Honor, the next term we're

12:07:04 23 taking up is partial profile, and arguing that partial

12:07:09 24 profile is not indefinite. AlmondNet has not provided any

12:07:14 25 articulation of a plain and ordinary meaning for this term.

12:07:18 1 In the '582 patent, partial profile is included in various
12:07:24 2 parts of the claims, but within the claims there are other
12:07:28 3 different types of profiles identified. There is profiles
12:07:32 4 in the preamble. There is partial profiles. There is
12:07:35 5 maintained profiles, and within the specification of the
12:07:40 6 '582 patent, profiles standing alone is defined. But
12:07:46 7 AlmondNet's intrinsic evidence does not clarify what partial
12:07:50 8 adds to the claim.
12:07:52 9 THE COURT: Especially since they say by
12:07:53 10 definition any profile is partial.
12:07:56 11 MS. EMERY: Right, Your Honor. And that's the
12:07:58 12 next point I was going to make is that the specification
12:08:01 13 does equate partial profile with all profiles. And because
12:08:05 14 of this language, AlmondNet actually argues, "the definition
12:08:10 15 leaves no room for concepts like nonpartial profile or
12:08:13 16 complete profile."
12:08:15 17 If that's the case, Your Honor, then the term
12:08:18 18 partial is superfluous and the specification does not offer
12:08:22 19 a way to ascertain the difference --
12:08:24 20 THE COURT: Just because it's superfluous, why
12:08:28 21 does that necessarily make it indefinite?
12:08:33 22 MS. EMERY: Well, Your Honor --
12:08:34 23 THE COURT: There is often superfluous language
12:08:40 24 in claims.
12:08:41 25 MS. EMERY: Right, Your Honor, but I think it's

12:08:43 1 made worse by the fact that partial itself is defined in the
12:08:47 2 specification.
12:08:47 3 THE COURT: Why. What evidence do I have that a
12:08:49 4 person of skill in the art could not figure out what a
12:08:52 5 partial profile is?
12:08:55 6 MS. EMERY: The way that profile is defined --
12:08:58 7 THE COURT: A person of skill in the art, I have
12:09:00 8 no idea, I mean, I read that and I say okay, I know what a
12:09:04 9 profile is, all profiles, nobody can have a complete
12:09:07 10 profiles because there is always some additional information
12:09:10 11 that can be obtained, but all you need is a partial profile,
12:09:13 12 some information about the person and then you add it to
12:09:16 13 other stuff that's been maintained. Like I don't -- I get
12:09:21 14 it, maybe it's a little bit sloppy, but I don't see how that
12:09:25 15 is clear -- the clear and convincing evidence is not an
12:09:29 16 insignificant hurdle, right?
12:09:32 17 MS. EMERY: Yes, Your Honor.
12:09:33 18 THE COURT: So I got a bunch of lawyer argument
12:09:36 19 and a word that doesn't seem all that hard to understand for
12:09:39 20 me. So I'm struggling with clear and convincing evidence.
12:09:44 21 MS. EMERY: Yes, Your Honor. Our position is
12:09:46 22 just that there is really no clarity on, you know, how much
12:09:50 23 data is --
12:09:51 24 THE COURT: Is there a real live dispute where
12:09:54 25 someone is like that's a partial profile, oh, we don't know

12:09:57 1 if that's a partial profile or we don't know if that's a
12:10:00 2 partial profile or you think it is and they think it's not,
12:10:05 3 or vice versa, anything where people can't tell what is
12:10:08 4 being asserted as a partial profile in the prior art or the
12:10:11 5 accused device or anything in this case?
12:10:18 6 MS. EMERY: Well, I think it could be unclear
12:10:20 7 because it's not --
12:10:21 8 THE COURT: Is it? Contentions are done, so is
12:10:25 9 it is my question? I get it, you guys are good lawyers and
12:10:29 10 you can come up with hypotheticals that anything is
12:10:33 11 possible, but we're limited now because we did this claim
12:10:37 12 construction later after all the contentions were in. So is
12:10:42 13 there actually a dispute where people cannot figure out what
12:10:45 14 a partial profile is?
12:10:56 15 MS. EMERY: I'm not sure that there is a
12:11:00 16 particular dispute.
12:11:03 17 THE COURT: And again, that may not be the be
12:11:07 18 all and end all, but when you have no evidence, you just
12:11:10 19 have an argument, and then the only thing that I know is
12:11:14 20 that well, the parties had no real problem figuring out,
12:11:17 21 we're not fighting over whether that's partial profile,
12:11:20 22 that's partial profile. Like, we can't tell if that's a
12:11:24 23 partial profile, that's just -- that just leads me to think
12:11:28 24 that I don't have clear and convincing evidence. At least
12:11:31 25 on the other term there is a dispute and I understood that

12:11:34 1 dispute because you guys are like look, these folks are all
12:11:37 2 doing the same thing, but they say they're not affiliated
12:11:40 3 because there is no corporate structure. I get that. But
12:11:43 4 this one, like it just seems to me that we're saying look,
12:11:47 5 there is no real dispute, we all are able to figure it out,
12:11:52 6 I don't have anything from a person of skill in the art
12:11:54 7 saying I have no clue what that means, so I am not going to
12:11:58 8 find that you met this by clear and convincing evidence.
12:12:01 9 Whether you can come back and find it later, I don't know.
12:12:04 10 All right. Let's go to the ninth term since
12:12:06 11 we're well out of time.
12:12:15 12 MR. DIETRICH: Your Honor, the next term would
12:12:22 13 be indicia of instructions, indicia of condition and
12:12:25 14 indicia. So there is a dispute as these terms. The dispute
12:12:30 15 is whether prior art discloses these limitations. It's
12:12:35 16 identified in their validity contentions.
12:12:37 17 The issue is also, Your Honor, it's not just is
12:12:43 18 this term indefinite, it is s their proposed construction,
12:12:49 19 indeed, for indicia of constructions which is just data
12:12:52 20 indicative of, sufficient to perform what they need -- what
12:12:57 21 that language needs to perform in the context of these
12:13:01 22 claims. So looking at claim 11 of the '582 patent, it
12:13:08 23 refers to indicia of instructions in the initial preamble,
12:13:11 24 we talked about that already. This is claim 15 which we
12:13:15 25 also alluded to which said wherein the indicia of

12:13:19 1 instructions instruct the processor to perform a method. So
12:13:24 2 this indicia of instructions is acting as a driving force
12:13:29 3 for this claim. It is actually causing the processor to
12:13:32 4 perform.
12:13:33 5 The question, then, is how is indicia of
12:13:37 6 instructions --
12:13:39 7 THE COURT: Well, it has to do that in claim 15,
12:13:42 8 it doesn't necessarily have to do that in claim 11, right?
12:13:47 9 MR. DIETRICH: That's fair, Your Honor.
12:13:48 10 So with respect to indicia of condition, this is
12:13:50 11 from the '139 patent, and the question here is they have
12:13:56 12 used indicia of a condition and then directly beneath that
12:14:01 13 have identified condition as its own stand-alone term.
12:14:05 14 So, what is the distinction between indicia of a
12:14:09 15 condition and a condition itself? What they have provided
12:14:14 16 is simply saying well, it could be data. But data doesn't
12:14:19 17 perform method claims, it doesn't instruct computer
12:14:24 18 processors to perform a method, that would be software
12:14:28 19 program code.
12:14:30 20 The question, though, is again, if indicia of
12:14:33 21 instructions are used differently than instructions or the
12:14:37 22 term instructing itself, what's the indicia? That term is
12:14:41 23 not used anywhere in either of these patents so it's just
12:14:45 24 another level of -- I won't even say it's a level
12:14:52 25 superfluousness, it's adding some qualifier to what the

12:14:56 1 indicia is beyond the underlying thing that it's indicating
12:15:00 2 itself.
12:15:01 3 They argue in their briefing that indicia can be
12:15:08 4 software or program code, but that's not what is disclosed,
12:15:14 5 that phrase is never used -- indicia is never defined as
12:15:18 6 software or program code. But even if it was, Your Honor,
12:15:21 7 that presents two critical problems. Software and program
12:15:25 8 code is substantially different than merely saying it's
12:15:28 9 data. And more to the point in the Western District
12:15:33 10 proceedings, with respect to this term, AlmondNet said that
12:15:37 11 an indicia of an instruction need not be actual computer
12:15:41 12 software instruction itself. See if it's not the software
12:15:45 13 instructions, how is it causing a computer processor to
12:15:51 14 perform a computerized method.
12:15:52 15 THE COURT: Well, it only has to do that in
12:15:55 16 claim 15 so it doesn't necessarily have to do that in claim
12:15:58 17 1, right?
12:15:59 18 MR. DIETRICH: That's correct, Your Honor, but
12:16:01 19 --
12:16:01 20 THE COURT: So maybe there is just nothing that
12:16:03 21 falls within claim 15.
12:16:05 22 MR. DIETRICH: It's possible that nothing would
12:16:07 23 fall within claim 15, but I still don't believe that that
12:16:11 24 answers what that phrase means in the context of claim 11.
12:16:14 25 And that phrase is used in claim 11. So if it doesn't have

12:16:19 1 a meaning for one claim in the preamble of claim 15, how can
12:16:24 2 someone a POSA --
12:16:27 3 THE COURT: Again, though, you guys gave me
12:16:31 4 nothing. You gave me no evidence. This is all nice
12:16:34 5 attorney argument, but I truly have no idea if you didn't
12:16:38 6 give me any evidence because you couldn't find a person in
12:16:41 7 the art would be like yeah, I have no idea what that means
12:16:45 8 because they're all like of course we know what that means,
12:16:48 9 we read the patent, we read the prosecution history and
12:16:52 10 everything, we know what that means.
12:16:53 11 That's my problem here, it's your evidence or
12:16:56 12 lack thereof. So I'm not going to find that this one you
12:16:59 13 have meant by clear and convincing evidence. And if you
12:17:02 14 want you can come back during summary judgment and maybe
12:17:05 15 you'll have a little evidence and maybe I can hear someone
12:17:09 16 testify, but I can't do it based on what you have said.
12:17:12 17 MR. DIETRICH: Thank you, Your Honor.
12:17:22 18 MS. PESCHEL: Your Honor, the last term today is
12:17:28 19 possibly applicable. The possibly applicable appears in the
12:17:35 20 family of patents, the '139 patent and the '146 patent.
12:17:39 21 Each of these patents has to do with targeted advertising
12:17:43 22 where information about a user's visit to one media property
12:17:48 23 is used to direct an advertisement to the second one.
12:17:51 24 The critical steps, the possibly applicable is
12:17:58 25 used in step C of each of these patents and wherein the act

12:18:02 1 of authorizing or the act of directing is based on
12:18:07 2 information indicating at least one of a plurality of
12:18:09 3 profile attributes possibly applicable to the electronic
12:18:13 4 visitor.
12:18:13 5 The issue here is that the patentee didn't say
12:18:16 6 it's based on information indicating at least one of those
12:18:19 7 profile attributes is applicable to the electronic visitor,
12:18:24 8 they said possibly applicable and possibly applicable is not
12:18:29 9 used with respect to the attributes in the specification.
12:18:33 10 And again, I think, you know, this is another
12:18:37 11 situation where possibly is a term of degree. How is that
12:18:43 12 act of authorizing triggered? It's based on some
12:18:46 13 information, but that information could or could not --
12:18:49 14 THE COURT: This one, I get it, and I have the
12:18:51 15 same problem. How is it triggered? I don't know, maybe a
12:18:54 16 person of skill in the art would actually know how it's
12:18:58 17 triggered, maybe a person of skill in the art knows what
12:19:00 18 that means, but I don't have clear and convincing evidence.
12:19:04 19 So for terms 8, 9 and 10, I am going to find
12:19:08 20 that the plaintiff has failed to meet its burden by clear
12:19:11 21 and convincing evidence to show that those terms are
12:19:17 22 indefinite, and I am going to adopt the proposals that the
12:19:25 23 plaintiff has given me subject to the defendant, if
12:19:31 24 appropriate, re-raising those issues at summary judgment.
12:19:45 25 And I think that that is also going to be my

12:19:48 1 ruling with respect to electronic indicia. And again, I
12:19:55 2 don't know that some of these, I mean, I don't know if there
12:20:00 3 are reasonable bounds for a person of ordinary skill in the
12:20:03 4 art because I haven't been given any evidence of that, but
12:20:07 5 it seems like for a lot of these terms, the parties had no
12:20:11 6 problem figuring it out when looking at prior art or a
12:20:14 7 proposed infringing product.
12:20:20 8 I don't mean to be construing the terms in light
12:20:23 9 of an accused product for the prior art, I am not doing
12:20:28 10 that, I am just saying in the absence of any real evidence,
12:20:31 11 the fact that the parties were able to figure it out leads
12:20:35 12 me to say I can't grant summary judgment because I don't
12:20:38 13 think I have clear and convincing evidence.
12:20:40 14 What we're going to do now is we're going to
12:20:45 15 take a break and we're going to come back at 2:00 and I will
12:20:58 16 give you my rulings on whatever of the other terms I can at
12:21:05 17 that time. All right? Anything else you want to add before
12:21:10 18 we adjourn for a little bit?
12:21:16 19 MR. QURESHI: No, Your Honor.
12:21:20 20 MR. WANG: No, Your Honor. Thank you.
12:21:22 21 THE COURT: All right.
12:21:23 22 COURT CLERK: All rise.
13:58:16 23 (Court recessed at 12:21 p.m.)
13:58:16 24 THE COURT: All right. Please be seated.
14:06:24 25 Okay. At issue, there are ten disputed claim

14:06:26 1 terms in eight patents. I am prepared to rule on nine of
14:06:31 2 the disputes. I will not be issuing a written opinion, but
14:06:34 3 I will issue an order stating my rulings. I want to
14:06:37 4 emphasize before I announce my decisions that although I am
14:06:40 5 not issuing a written opinion, we have followed a full and
14:06:43 6 thorough process before making the decisions I am about to
14:06:45 7 state. I have reviewed the patents and all the evidence
14:06:48 8 submitted by the parties. There was full briefing on each
14:06:55 9 of the disputed terms and we had argument today. All of
14:06:58 10 that has been carefully considered.
14:06:59 11 As to my rulings, I am not going to read into
14:07:02 12 the record my understanding of claim construction law and
14:07:06 13 indefiniteness. I have a legal standard section that I have
14:07:08 14 included in earlier opinions, including somewhat recently in
14:07:13 15 *REX Computing, Inc. v. Cerebras Systems Inc.,* Civil Action
14:07:17 16 No. 21-525(MN). I incorporate that law and adopt it into my
14:07:22 17 ruling today and will also set it out in the order that I
14:07:24 18 issue.
14:07:24 19 First, the preambles of claims 1 and 11 of the
14:07:28 20 '582 Patent: The parties disagree whether the preambles are
14:07:32 21 limiting. Plaintiff asserts that they are and Defendants
14:07:34 22 argue that they are not. As we have already discussed,
14:07:36 23 there were some new arguments raised today that were not
14:07:39 24 briefed. And I have asked for short additional submissions
14:07:42 25 next week.

14:07:43 1 The second group of terms are the
14:07:44 2 "automatically" terms -- "automatically with the computer
14:07:48 3 system"/ "automatically"/ "automatic" - in multiple claims
14:07:52 4 of the asserted patents. Defendants proposed the Court
14:07:55 5 adopt the plain and ordinary meaning of the term, "wherein
14:07:57 6 'automatically'/ 'automatic' does not mean 'manually'/
14:08:02 7 'manual.'" Plaintiff proposes the construction, "not
14:08:06 8 manually." Today, Defendants agreed that the ordinary
14:08:09 9 meaning of automatically is "done with little to no human
14:08:14 10 control." I will adopt that plain and ordinary meaning.
14:08:16 11 Defendants' main argument about for "not
14:08:20 12 manually" is that in parts of the prosecution history for
14:08:23 13 various patents, applicants commented on a lack of human
14:08:25 14 action. In particular, Plaintiff cites to a statement in
14:08:28 15 the IPR for the '398 Patent distinguishing prior art, noting
14:08:33 16 that "[b]ecause clicking on the login button represents a
14:08:36 17 request from the user ... to perform the alleged
14:08:38 18 'recognizing' and 'generating and storing' steps, these
14:08:41 19 steps do not occur 'automatically' as the claim requires. I
14:08:45 20 cannot, however, read that to mean that no prior human
14:08:47 21 action is permitted, particularly given that the following
14:08:53 22 paragraph allows that "some user action could be
14:08:59 23 permissible," as long as that action is not sufficient to
14:09:01 24 "negate[] the recited steps being done 'automatically.'"
14:09:04 25 Plaintiff also points out that claims of the

14:09:06 1 '139 Patent were amended to include that certain steps were
14:09:11 2 automatically performed. And that is true. I cannot,
14:09:14 3 however, read that to clearly mean that no prior human
14:09:19 4 conduct insufficient to negate the automation claimed is
14:09:22 5 possible.
14:09:23 6 Finally, Plaintiff cites to the prosecution of
14:09:25 7 the '639 Patent, which is not a patent that's asserted
14:09:29 8 claims use this term. There, the applicants noted that
14:09:32 9 during an interview they added automatically in certain
14:09:37 10 claim elements to make clear that the computer was doing the
14:09:39 11 action. This is where the applicant used the phrase "as
14:09:43 12 opposed to manual." I read this as requiring that a
14:09:47 13 computer perform an action, but again, do not believe it
14:09:49 14 clearly and unambiguously precludes prior human conduct that
14:09:52 15 does not negate the action being automatically done.
14:09:55 16 So I will construe the automatically terms to
14:09:59 17 mean "done with little to no human control." And whether
14:10:02 18 there is in too much human controls for something to be
14:10:06 19 considered automatic appears to me to be a fact issue for
14:10:09 20 the jury.
14:10:10 21 The third term is "available" in claims 1 and 11
14:10:13 22 of the '582 Patent. There was a dispute in the briefs about
14:10:16 23 this but today everyone agreed that this means
14:10:20 24 electronically available. I will adopt that construction.
14:10:22 25 The fourth term is "URL redirection" in claims

14:10:25 1 1, 10, and 11 of the '582 Patent. Defendants propose the
14:10:30 2 construction "obtaining certain information for at least a
14:10:33 3 portion of an accessed page / site from a different
14:10:36 4 location." Plaintiff proposes the construction "obtaining a
14:10:40 5 requested webpage from a different location." I will adopt
14:10:43 6 a hybrid of the Plaintiff's proposal: obtaining a requested
14:10:47 7 webpage or a portion of a requested webpage from a different
14:10:49 8 location.
14:10:50 9 I think this is supported by the intrinsic
14:10:52 10 evidence. Element b of claims 1 and 11 of the '582 Patent
14:10:57 11 require that "receiving the partial profile is achieved as a
14:11:03 12 result of automatic electronic URL redirection from a
14:11:07 13 portion of a page of the website accessed by the user
14:11:11 14 computer." Similarly, the specification states that "[t]he
14:11:14 15 website forwards ... (optionally) a redirect to a portion of
14:11:19 16 the visitor's page to a server located in cyberspace ... By
14:11:24 17 redirecting a portion of the visitor's page to the server,
14:11:27 18 the visitor's browser reports to the server a cookie the
14:11:32 19 server put on the visitor's computer in the past, if any."
14:11:35 20 The specification also states that "[t]he enables the server
14:11:47 21 attached to the databank to receive the cookie it installed
14:11:51 22 by redirecting a portion of the visitor page to the
14:11:54 23 databank's server.
14:11:56 24 Plaintiff relies on the '582 Patent's
14:11:58 25 prosecution history, specifically the prosecution of a

14:12:01 1 parent patent (the '307 Patent). Although Plaintiff has
14:12:04 2 identified statements from the patent history that refer to
14:12:07 3 examples of computing dictionary definitions, and one of
14:12:10 4 those is consistent with Plaintiff's proposed construction,
14:12:15 5 I do not find the "example" given to be a clear and
14:12:18 6 unambiguous definition. Nor do I think that they otherwise
14:12:22 7 undermine the statements in the specification I have already
14:12:26 8 noted.
14:12:26 9 The fifth term "electronic indicia" / "indicia"
14:12:31 10 in claim 18 of the '398 Patent and claim 2 of the '198
14:12:35 11 Patent, as well as the eighth term "partial profile" in
14:12:39 12 claims 1, 3, 4, 11, 13, and 14 of the '582 Patent, the ninth
14:12:43 13 terms, "indicia of instruction" / "indicia of a condition" /
14:12:47 14 "indicia" in various claims and the tenth term, "possibly
14:12:51 15 applicable" in claims 1 and 37 of the '139 Patent and claims
14:12:55 16 1 and 21 of the '146 Patent, I have already told you that I
14:12:59 17 do not find Plaintiff has met its burden to prove
14:13:02 18 indefiniteness by clear and convincing evidence and in the
14:13:05 19 absence of any counterproposals will adopt the Defendants'
14:13:08 20 proposals for those terms. Plaintiff may, if appropriate,
14:13:11 21 raise this issue in connection with summary judgment if
14:13:14 22 additional evidence is adduced.
14:13:15 23 I think I am going to say the same thing for the
14:13:18 24 sixth term, "at least in part on at least a portion" in
14:13:22 25 claim 22 of the '398 Patent and claim 6 of the '878 Patent.

14:13:27 1 **Plaintiff has not met its burden. And I do think that this**
14:13:32 2 **case is distinguishable from the *Zadro* case Plaintiff relies**
14:13:33 3 **on. In *Zadro*, Judge Bryson was addressing the claim element**
14:13:37 4 **"at least in part generally concentrically aligned." He did**
14:13:43 5 **note that in that claim language "at least in part" was**
14:13:52 6 **problematic, but I read that really as being problematic in**
14:13:55 7 **the context with the other language. So I cannot say as a**
14:13:58 8 **matter of law that Plaintiff has met its burden for this**
14:14:01 9 **term. And will give those terms their plain and ordinary**
14:14:04 10 **meaning.**
14:14:04 11 **Finally, the seventh term argued is**
14:14:08 12 **"unaffiliated third [party]/[parties]" in claims 1, 5, 11,**
14:14:11 13 **15 of the '582 Patent. Defendants propose the construction**
14:14:16 14 **"a party not having common ownership with the party or**
14:14:20 15 **parties that control said programmed computer system."**
14:14:24 16 **Plaintiff argues that this term is indefinite and lacks**
14:14:27 17 **reasonable certainty as to scope.**
14:14:29 18 **I have struggled with this term. The patent**
14:14:31 19 **really provides no guidance at all as to what unaffiliated**
14:14:34 20 **means. Defendants rely on portions of column 3 of the '582**
14:14:38 21 **Patent and Roku's corporate privacy statement to support**
14:14:42 22 **their reading. I do not find either of those to be helpful.**
14:14:45 23 **The specification does not say anything about the**
14:14:47 24 **affiliation status of the entities mentioned - whether**
14:14:51 25 **affiliated or unaffiliated. And it certainly says nothing**

14:14:54 1 about their corporate or business ownership. So I reject
14:14:58 2 Defendants' proposal.
14:14:59 3 And although I was tempted to find that the term
14:15:01 4 is indefinite, I think the more prudent course is to let
14:15:05 5 discovery play out and see if there is additional
14:15:07 6 information that comes out that would be relevant to
14:15:09 7 Plaintiff's arguments.
14:15:10 8 So I am going to give unaffiliated its plain and
14:15:13 9 ordinary meaning, which according to some of the dictionary
14:15:16 10 definitions that we saw during the hearing, I am going to
14:15:19 11 say is "not closely associated or related."
14:15:25 12 All right. So those are my rulings on the claim
14:15:30 13 construction disputes. Anything else that we need to
14:15:33 14 discuss on those?
14:15:38 15 MR. QURESHI: No, Your Honor.
14:15:39 16 MR. WANG: None from us, Your Honor.
14:15:40 17 THE COURT: All right. So we'll get an order
14:15:43 18 out with those constructions at some point. It will be
14:15:47 19 after we get the additional information on the preambles. I
14:15:53 20 am also going to have an order issued that will require the
14:15:56 21 parties to engage in good faith in-person mediation. Judge
14:16:02 22 Andrews has been incorporating that into his scheduling
14:16:05 23 orders and I think that it is a good idea.
14:16:08 24 Basically what it is is that you have to engage
14:16:11 25 a mediator and engage in mediation prior to the pretrial

14:16:17 1 **conference and provide a joint status statement that will**
14:16:22 2 **have certain information that we require no later than one**
14:16:25 3 **week before the pretrial conference.**
14:16:27 4 **All right. So we will get that out. We will**
14:16:29 5 **get the claim construction order out and I wish everyone**
14:16:33 6 **safe travels.**
14:16:35 7 **COURT CLERK: All rise. Court is adjourned.**
8 **(Court adjourned at 2:16 p.m.)**
9
10 **I hereby certify the foregoing is a true and accurate transcript from my stenographic notes in the proceeding.**
11
12 **/s/ Dale C. Hawkins**
Official Court Reporter
13 **U.S. District Court**
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