IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ACCELERATION BAY LLC, Plaintiff, v. ACTIVISION BLIZZARD, INC., Defendant.	)	C.A. No. 16-453 (RGA) **PUBLIC VERSION**
ACCELERATION BAY LLC, Plaintiff, v. ELECTRONIC ARTS INC., Defendant.	)	C.A. No. 16-454 (RGA)
ACCELERATION BAY LLC, Plaintiff, v. TAKE-TWO INTERACTIVE SOFTWARE, INC., ROCKSTAR GAMES, INC., and 2K SPORTS, INC., Defendants.	)	C.A. No. 16-455 (RGA)

JOINT CLAIM CONSTRUCTION BRIEF

I. INTRODUCTION

A. Acceleration Bay's Opening Introduction

Acceleration Bay's claims are readily understood by those of skill in the art and lay persons, requiring very little construction. For those terms that do require construction, such as m-regular and m-connected, the meanings are readily found in the claims themselves and explicitly provided in the specification. For the means-plus-function claims, the algorithms are spelled out in detail in 30 columns of text and 34 figures. As such, Acceleration Bay's constructions should be adopted.

In contrast, Defendants take a shotgun approach, requesting construction of more than 50 terms. Almost all of these terms — such as "computer," "network," and "connection" — require no construction because they are readily understood by those skilled in the art. Where a claim term is non-technical, is in plain English, and derives no special meaning from the patent and its prosecution history, then the term should be given its "plain and ordinary meaning" and the Court does not need to construe that term. *See Finjan, Inc. v. Secure Computing Corp.*, 626 F.3d 1197, 1206-07 (Fed. Cir. 2010). Defendants' constructions for these simple terms should be rejected because they are unnecessary and unhelpful in view of their plain meaning and, in many instances, include unsupported limitations that are contrary to the intrinsic record.

With regard to the means-plus-function limitations, Acceleration Bay's constructions are unrebutted as Defendants do not provide a construction, arguing only that they are indefinite. However, Defendants provided constructions during *inter partes* review (IPR) and argued (incorrectly) that corresponding structures are in the prior art. This admission that the claims are amenable to construction is dispositive as the case law unequivocally states that the USPTO's standard is the same standard as the District Court's when constructing means-plus-function claims. *See In re Donaldson Co.*, 16 F.3d 1189, 1193 (Fed. Cir. 1994) (*en banc*) (PTAB applies

the same standard as district courts in construing means plus function claims.). For these reasons, and those set forth below, Defendants' construction should be rejected wholesale.

B. Defendants' Responsive Introduction

Although Defendants propose numerous terms for construction, these terms need to be construed because Plaintiff is interpreting the claims in a way that is not faithful to the invention, the claims, the specification, and the prosecution history and contrary to what was previously represented to the Patent Office in related *inter partes* reviews and this Court in motion practice. *See also* Kelly Decl. (KD) ¶ 18-112. Specifically, Plaintiff seeks constructions covering conventional networks disavowed by the patents and the named inventors, which would potentially infringe through coincidental circumstances and not by design. Further, for the first time in its opening brief and 50-page supporting expert declaration, Plaintiff improperly proposes constructions for almost all the terms under the guise of plain and ordinary meaning. Defendants intend to file a motion to strike these late proposed constructions. Also, the means-plus-function terms (Terms 1-8) lack supporting structure and thus are indefinite; the Flooding Terms (Terms 38-40) as properly construed render the claims invalid as indefinite mixed method/apparatus claims; and the computer readable medium terms (Terms 27) as properly construed cover unpatentable subject matter, making them unpatentable under 35 U.S.C. § 101.

C. Acceleration Bay's Reply Introduction

No construction is necessary for the majority of the 56 terms for which Defendants propose constructions because the terms are written in simple words and are used in the claims consistent with their plain and ordinary meaning. Defendants cannot point to any support in the intrinsic record compelling a need to construe these terms, much less their byzantine approach to claim construction, which is based on construing these simple terms by using other terms for which they propose constructions, restating limitations from unrelated terms in other parts of the

claims and manufacturing unsupported limitations. Defendants' cross-referenced, overcomplicated proposed constructions render the claims nonsensical and hopelessly confusing, and will not help the jury understand these claims. *See GPNE Corp. v. Apple Inc.*, 830 F.3d 1365, 1373 (Fed. Cir. 2016) ("such an endeavor could proceed ad infinitum, as every word—whether a claim term itself, or the words a court uses to construe a claim term—is susceptible to further definition, elucidation, and explanation.") (citation omitted).

Given the untenable nature of Defendants' constructions, it is not surprising that their expert studiously avoids commenting on 48 of the 56 disputed claim terms, leaving Defendants without any evidence on the relevant inquiry — how a POSA would understand the claims. This is fatal to Defendants' indefiniteness arguments for six of the means-plus-function limitations because bald attorney argument is insufficient as a matter of law to carry their burden.

D. Defendants' Sur-Reply Introduction

Plaintiff's opening brief and supporting expert declaration show that Plaintiff intends to interpret the claims in a manner that would eviscerate all meaningful limitations defining the claimed inventions under the guise of "plain and ordinary meaning." Plaintiff says under its view of "plain and ordinary meaning," "m" can change at any time, selective network participants can be ignored to determine if the network is "m-regular," "m-regular" can occur coincidentally and ephemerally, and the network need not be both m-regular and incomplete. Plaintiff's expansive views underscore the need for constructions of the disputed terms, and that Plaintiff's purported "plain and ordinary" constructions are simply a ruse to advance broad constructions at a later date to a jury.

II. STATEMENT OF FACTS

A. Acceleration Bay's Opening Statement of Facts

Acceleration Bay is an incubator for next generation businesses, in particular for

companies that focus on delivering information and content in real-time. Acceleration Bay invests in companies that further the dissemination of technological advancement. Acceleration Bay also collaborates with inventors and research institutions to analyze and identify important technological problems, generate new solutions to these problems, and bring those solutions to market through its partnerships with existing companies and startups.

The Asserted Patents are directed to novel computer network technology, developed by Boeing inventors Fred Holt and Virgil Bourassa more than sixteen years ago, that solved critical scalability and reliability problems associated with the real-time sharing of information among multiple-widely distributed computers. Declaration of Nenad Medvidović ("Medvidović Decl."), ¶ 22. This innovative technology enabled large-scale, unlimited online collaborations with numerous participants continually joining and leaving — with applications ranging from aircraft design development to multi-player online games. *Id.*

U.S. Patent Nos. 6,701,344 (the "'344 Patent"), 6,714,966 (the "'966 Patent") and 6,829,634 (the "'634 Patent") are directed to using regular, overlay networks to distribute information between network participants. Medvidović Decl., ¶¶ 23-31. U.S. Patent Nos. 6,910,069 (the "'069 Patent") and 6,732,147 (the "'147 Patent") respectively address adding and removing participants from such networks. *Id.*, ¶¶ 33-34. Finally, U.S. Patent No. 6,920,497 (the "'497 Patent") is directed to contacting a broadcast channel, such as by having a seeking computer use a selected call-in port to request that a portal computer coordinate the connection to a channel. *Id.*, ¶¶ 35-36.

B. Defendants' Responsive Statement of Facts

The Asserted Patents. The six patents relate to a system for "broadcasting" data over a specific and narrowly defined computer network that was itself known in the art. They share a common specification with minor differences. The backbone of the patents is the claimed "m-

regular, incomplete" network topology where each computer (sometimes referred to as a participant) in the network is connected to exactly the same number ("m") of other computers, but no computer is connected to all other computers (i.e., it's "incomplete"). Each computer in the network has a "broadcaster component" that allows it to participate in the network. **A-1**, 15:30-32. The computers create, maintain, and broadcast data to all other computers of the m-regular, incomplete network, where m—the number of neighbors each computer has—is a fixed and unchanging design parameter. KD¶45-49. The network is designed to maintain its m-regularity and incompleteness whenever possible. KD¶18-49. The "Broadcast Patents" ('344, '966, '634 Pats.) claim a technique known as "flooding" to broadcast data through the m-regular, incomplete computer network. The "Add Patent" ('069 Pat.) adds a computer to the network while maintaining the m-regular, incomplete structure. The "Drop Patent" ('147 Pat.) removes a computer from the network in a manner that maintains the network's fundamental m-regular, incomplete structure. The "Portal Patent" ('497 Pat.) claim a specific technique to find a portal computer to connect to the network.

The patents broadcast data over the Internet to a group of interconnected computers. Like a radio broadcast, broadcasting over the Internet is a technique to distribute ***the same data*** to that specified group. KD¶96. Broadcasting data to a group of computers predates the patents. KD¶20-28. The patents distinguish three prior art broadcasting techniques: multicasting, which is a single computer sending data to multiple computers at the same time; client-server networking, which is individual computers communicating only through direct communications with a central server; and full mesh networking, which is each computer directly connected to every other computer in the network. *Id.*

The patents require an "m-regular" and "incomplete" broadcast channel that is neither client server nor full mesh, thus purportedly solving "the central bottleneck problem of client

server networks, as well as the problems of management complexity and limited supported connections of point-to-point networks." **D-5**, pp. 8-9. The patents explain that each broadcast channel has a specific "session identifier" or "channel type and instance" by which it can be identified and located. **A-1**, 17:65-18:5.

The Claimed Network. The "m-regular, incomplete graph" topology is the key feature of the five Topology Patents ('344, '966, '634, '069, '147 Pats.). KD¶18, 29-32. A graph is m-regular only if each node of the graph is connected to the exact same number ("m") of other nodes. A "network topology where no node is connected to every other node is an incomplete graph." **D-5**, p. 10. The Topology Patents require the network to be both m-regular and incomplete, where m is at least three, and that the total number of computers is at least two greater than m—thus resulting in an incomplete graph where each computer has the same m number of connections (the "Topology Limitations" or "Claimed Topology"). KD¶45-49. The minimum number of computers is 5, but the specification describes a network where m is 4 and the minimum number of computers is at least 6.

The number *m* is a fixed design parameter predetermined before the broadcast channel is composed. Each computer that will participate in the network must first allocate *m* internal ports to make its *m* connections to its *m* neighbors. KD¶32, 45, 49, 67 (citing **A-1**, 6:11-19; see also, **B-1** (Sept. 10, 2003 Amend.), pp. 10-11 (affirming the number of "m" neighbors is "predetermined" and a "parameter"). [redacted] There is no disclosure for changing the number of allocated ports after the claimed broadcast channel is established and were never used that way. *Id.*

The Claimed Broadcast Method. In the claimed m-regular, incomplete network (or broadcast channel), no computer has a "connection" to all other computers. **B-1** (Sept. 10, 2003 Amend.), pp. 10-11; **B-1** generally. Thus, no computer can "broadcast" a message directly to all

other computers of the network. The patents therefore rely on a message-forwarding method called "flooding" to broadcast the same message to all of the computers of the m-regular, incomplete network. KD¶1, 33-35, 45. The patents explain this method using the 4-regular, incomplete preferred embodiment (that is, $m = 4$). First, "the computer that originates a message to be broadcast sends that message to each of its [m] neighbors using the internal connections." **A-1**, 7:31-36. Second, "[w]hen a computer receives a broadcast message from a neighbor, it sends the message to its [m-1] other neighbors." *Id.*, 7:37-38. The second step is repeated until the message is received by all of the participants of the network. *Id.*, 7:38-41. Thus, "[e]ach computer sends [m-1] copies of the message, except for the originating computer, which sends [m] copies of the message" and "[e]ach computer on the broadcast channel, except the originating computer, will thus receive a copy of each broadcast message from each of its [m] neighbors." *Id.*, 7:39-49.

This broadcast technique is not used for a client-server or full mesh network. In a client-server network, the server is directly connected to every client and can send a message to every client. In a full mesh network, any computer can send a message directly to every other computer because each computer has a direct connection to every other computer. KD¶27-28. Thus, the claimed flooding technique is neither appropriate nor required in such networks. KD¶35.

The Add Patent. The '069 Patent seeks to maintain the m-regular incomplete network when computers are added to the network. KD¶18, 36-38. Thus, the '069 patent provides a method—called "edge pinning"—to add a computer to the network in a manner that maintains the m-regular, incomplete structure. KD¶36, 49. This is accomplished by breaking existing connections so that all of the computers in the network will still have m neighbors after the new computer is added. Id. Because the network is incomplete, there is a concern about "elongating" the network and increasing its "diameter," which is "distance" between two computers. KD¶37.

Thus, the Add Patent requires "a random selection technique to identify the [m] neighbors" that a new computer will connect to. **A-1**, 7:23-29. "The random selection technique tends to distribute the connections to new seeking computers throughout the computers of the broadcast channel which may result in smaller overall diameters." *Id.* Neither maintaining m-regularity and incompleteness nor minimizing the diameter is a consideration in a client-server or full mesh network. These networks are not m-regular and incomplete and always have a constant diameter regardless of how a computer is added to them KD¶38.

The Drop Patent. The '147 Patent maintains the m-regular incomplete network as computers are removed from the network. KD¶39 (citing **A-1**, 9:2-29). Because the network is incomplete, steps must be taken to restore m-regularity after a computer is removed. Thus, the Drop Patent requires the "neighbors" of the leaving computer form new connections "in order to maintain an m-regular graph." **A-3**, claim 1. The technique of the Drop Patent is not necessary in a client server or full mesh network. KD¶40. In a client server network, the departing client simply disconnects from the server. *Id.* In a full mesh network, when a departing computer disconnects, the resulting network remains a full mesh network. *Id.*

III. TERMS 16, 17 ("M"& "M-Regular Network")

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
16 "M"	No construction necessary: plain and ordinary meaning	'344, '966, '634, '069 "a predetermined design parameter specifying the number of neighbors each participant should maintain" '147 "a predetermined design parameter specifying the number of neighbors each computer should maintain"
17 "M-Regular" & "M-Regular Network"	a network where each participant has m neighbor participants in a steady state	'344, '966, '634: "a state that the network seeks to maintain at all times, where each participant is connected to exactly m neighbor participants" '147: "a state that the network seeks to maintain at all times, where each computer is connected to exactly *m* neighbor computers"

A. Acceleration Bay's Opening Statement (Terms 16, 17)

The proper construction of "m-regular network" is "a network where each participant has *m* neighbor participants in a steady state." This definition is directly from the claims themselves which state that m-regular networks are ones where "m is the exact number of neighbor participants of each participant." *See, e.g.,* Ex. A-1 ('344 Patent) at Claim 1; Medvidović Decl., ¶ 39. The patents further explain that the networks are m-regular in a "steady state." *See, e.g.,* Ex. A-1 at 14:53-15:7 ("When the number of internal connectors is even, then the broadcast channel can be maintained as m-regular … ***(in the steady state)***") (emphasis added); Medvidović Decl., ¶ 39. Thus, Acceleration Bay's construction is directly from the intrinsic record and the proper construction of an m-regular network is "a network where each participant has *m* neighbor participants in a steady state." *Id.*

Defendants' proposed construction, "a state that the network *seeks to maintain at all*

times," improperly adds the unsupported italicized limitations that have nothing to do with the structure of the network and are inconsistent with the understanding of one of skill in the art. Defendants' request to add these intent and at-all-times requirements to the claims should be rejected because it is contradicted by the intrinsic record. Specifically, nowhere in the intrinsic record is there a requirement that a network must *seek to maintain at all times* a state where each computer in the network is connected to the same number of other computers in the network. Medvidović Decl., ¶¶ 39-43. Rather, the intrinsic record makes clear that a network only need be m-regular in steady state. *Id.*, ¶¶ 39-40, 43. Defendants' construction therefore should be rejected because it is made out of whole cloth and not supported in the intrinsic record.

There are multiple embodiments supporting Acceleration Bay's construction rather than Defendants' construction. For example, Figure 1 illustrates a network with nine computers where each computer is connected to four other computers. Ex. A-1 at 4:38-53; 14:53-15:7. The specification explains that, in this "steady state," the network is 4-regular network (i.e., an m-regular network where *m* equals 4) because each computer is connected to 4 other computers. Medvidović Decl., ¶¶ 39-40. This make sense because computers connect and disconnect from the network and, as a result, there will be times when not every computer will be connected to the same number of computers. Ex. A-1 at 14:63-65; Medvidović Decl., ¶¶ 39-40.

The patents also discuss a "small regime," where the number of participants is too low for the network to be m-regular, and scenarios where the number of internal connections and participants are odd. Therefore "one of the computers will have less than that odd number of internal connections [and] the broadcast network is neither m-regular nor m-connected." Ex. A-1 at 14:53-15:7; Medvidović Decl., ¶ 41. In such scenarios "the broadcast channel toggles between being and not being m-regular and m-connected." Ex. A-1 at 15:5-7. The patents also describe scenarios where, if a participant is disconnected and the number of participants is low,

the network will not be m-regular for a period of time. *Id.* at 9:55-10:2.

There are further examples in the specifications which state that, "[w]hen the number of internal connectors is even, then the broadcast channel ***can be*** maintained as m-regular and m-connected (in the steady state)." Ex. A-1 at 14:63-65 (emphasis added); Medvidović Decl., ¶ 40. The specifications' use of the optional language "***can be***" confirms that a network *does not* have to have an *m* number of connections at all times. These examples cut against Defendants' construction. *See, e.g.,* Ex. A-1 at 14:53-15:7; Medvidović Decl., ¶ 39; *Funai Elec. Co. v. Dawwoo Elecs. Corp.*, 616 F.3d 1357, 1371 (Fed. Cir. 2010) ("a claim construction that excludes a preferred embodiment is rarely, if ever, correct") (citation omitted).

Acceleration Bay's construction also comports [redacted]; Medvidović Decl., ¶ 43. In the IPRs, Defendants' proposed construction for m-regular did *not* include any reference to their newly minted constructions. *See, e.g.,* Ex. D-15 at 13 ("each node is connected to exactly *m* other nodes.").

Thus, Acceleration Bay's construction should be adopted because it is consistent with the intrinsic record, and Defendants' construction should be rejected as requesting unsupported limitations. *See Flexuspine, Inc. v. Globus Med., Inc.*, Case No. 6:15-cv-201-JRG-KNM, 2016 WL 4161887, at *6 (E.D. Tex. Aug. 5, 2016) (rejecting construction that would require component to be "intentionally designed to perform the claimed function" because it "improperly confuses the scope of the claims by suggesting that the intent of a designer must be established.")(citation omitted).

Related Term 16, "*m*," requires no additional definition beyond the plain definition in the claims that it is "the exact number of neighbor participants of each participant." Medvidović Decl. ¶ 44; *see also, e.g.,* Ex. A-1 at Claim 1. This construction is well known to the person of

ordinary skill in the art (POSA). Defendants' construction for "*m*" should be rejected because it reiterates their unsupported construction for m-regular and is simply an attempt to confuse the claims and the jury.

B. Accelerations Bay's Opening Statement (Terms 11, 13-15, 29, 30, 32-34, 38-40)

As discussed further below with respect to individual terms, Terms 11, 13-15, 29, 30, 32-34 and 38-40 require no construction because their usage in the Asserted Patents is consistent with their plain and ordinary meaning. Medvidović Decl., ¶¶ 88, 95, 98, 101, 128, 132, 136, 139, 142, 155, 158, 161. Defendants' proposed constructions for these terms are improper because these terms are well known to those of skill in the art and Defendants import the m-regular and/or *m* limitations into these disparate elements. For example, it is impossible to imagine a situation in which one of skill in the art would not know what a "computer" is, especially where there is no explicit disclaimer in the intrinsic record changing the plain meanings of the term. Certainly, Defendants construction of "computer" as a "physical computer that *maintains m connections to its m neighbors* through which it can originate and receive broadcast messages" should be rejected because no one of skill in the art would apply such a far-fetched meaning. Further, the repeated importation of redundant m-regular and/or *m* limitations in twelve additional claim elements would render the claims nonsensical, which is not helpful to the jury. Moreover, such repetition is unnecessary given that each of the claims at issue already recites that the network is m-regular. The repetition of the claim elements does not comport with the understanding of one of skill in the art, and is simply a device to confuse the jury with a long-winded claim definition.

C. Defendants' Responsive Statement

The meaning of "m" and "m-regular" is fundamental. Defendants' construction gives meaning to "m" and "m-regular" and recognizes that the claims have another limitation for the

number of neighbors. In contrast, Plaintiff's recently proposed construction violates the black-letter claim construction principle of giving meaning to every term in the claim. The claims, specification, and prosecution history support that the claimed networks seek at all times to remain both m-regular and incomplete. The proper construction of m-regular is therefore "a state that the network seeks to maintain at all times, where each participant is connected to exactly m neighbor participants" and where m is "a predetermined design parameter specifying the number of neighbors each participant should maintain."

The claim language supports Defendants' construction and rejects Plaintiff's construction. The claims include the term "m-regular" as a term distinct from neighbors. The Broadcast Patents specifically claim a minimum number of neighbors, i.e., "at least three" "neighbor participants" or "other participants." *See, e.g.,* **A-1** claims. A fundamental principle of claim construction is that different terms in the same claim are given different meanings. *Discovery Patent Holdings, LLC v. Amazon.Com, Inc.*, 769 F. Supp. 2d 662, 671 (D. Del. 2011). Plaintiff's construction, however, would give "m" and "m-regular" the exact same meaning as the number of neighbors. This is reason alone to reject Plaintiff's construction.

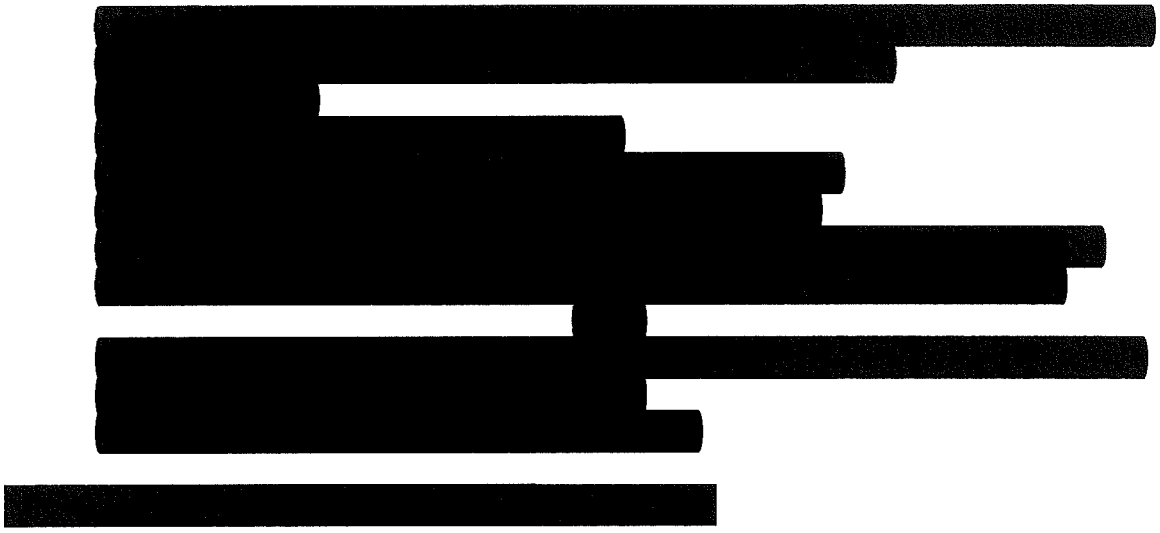
The prosecution history also supports Defendants' construction and rejects Plaintiff's construction. The "m-regular" limitations were all added during prosecution, and applicants explained that "regular" had a different meaning than merely the number of neighbors. B-1 (September 15, 2003 Amendment), B-2 (September 15, 2003 Amendment), B-3 (December 17, 2003 Amendment), B-4 (May 7, 2004 Amendment). The original claims included a limitation of at least three neighbors and were rejected. **B-1** (May 14, 2003 Rejection). To overcome the rejection, Applicants added the "m-regular" limitation and explained that although the prior art permitted neighbors, the prior art did not provide for "regularity." **B-1** (Sept. 10, 2003 Amend.). Further, Applicants argued that *m* must be a predetermined design parameter and specifically

disclaimed networks that obtained m-regularity by chance or in a transient way, explaining the ***requirement*** that "the computer network be *m* regular at substantially all times where there are not new nodes entering or leaving the network" and "that each participant in the network connects to and forms a neighbor bond to exactly an *m* number of neighbors." **B-1** (Sept. 10, 2003 Amend.), pp. 9-11. Applicants emphasized that the claims do not cover networks that "coincidentally" become "regular" but instead are restricted to networks where *m* (the number of neighbors) is "set at a predetermined number" which they characterized as a "parameter." Id, pp. 10-11. Thus, Applicants specifically added "m-regular" as a limitation meaning more than just mere m-neighbors and told the Patent Office that the meaning of "m-regular" was the meaning proposed by Defendants.

Plaintiff previously agreed with these constructions. For instance, Plaintiff represented to this Court that the Broadcast Claims "require a very specific technical structure, of a particular type of network, i.e., an incomplete, m-regular overlay network" where "each participant has ***a set*** number of neighbors." D.I. 28, p. 2 (emphasis added). In the *inter partes* review, Plaintiff distinguished prior art on the basis that the patents "presume" a "dynamic network" using "an incomplete graph and complex 'edge pinning' algorithms to maintain it" which "ensure[] an incomplete graph and that when new network nodes are added a minimum diameter of the network is preserved." **D-2**, 29. In other words, the patents claim a system that strives to maintain being m-regular and incomplete. "[S]tatements made by a patent owner during an IPR proceeding … can be considered for claim construction and relied upon to support a finding of prosecution disclaimer." *Aylus Networks, Inc. v. Apple Inc.,* C.A. 2016-1599, p. 8 (Fed. Cir. 2017) (attached as Defendants' Exhibit ("DEx.") 1).

Now, under the guise of plain and ordinary meaning, Plaintiff argues that "m is simply a number of neighbors" and that "the number m can change as computers connect and disconnect."

Medvidovic Decl. (MD) ¶ 44, 45. Plaintiff's belated claim construction violates fundamental claim construction principles by reading out of the claim term the critical word "regular" and is contradicted by the intrinsic evidence, which confirms that Defendants' constructions are correct. *Lantech, Inc. v. Keip Mach. Co.*, 32 F.3d 542, 547 (Fed. Cir. 1994) (It is improper to "read[] out" a "clearly stated limitation"). Defendants' construction gets to the heart of what the applicants claimed. *See Combined Sys. v. Def. Tech. Corp. of Am.*, 350 F.3d 1207, 1210-11 (Fed. Cir. 2003) (upholding construction that "forming folds" requires "deliberate and systematic creation of folds" and rejecting plaintiffs construction that folds could be incidental); *and Nice Sys., Inc. v. Witness Sys., Inc.*, 528 F. Supp. 2d 470, 476 (D. Del. 2007) (construing "digital audio tape" as a "magnetic tape designed for storage of audio in digital form," where alternative construction lacking "designed" would read the term "audio" out of the claim).



Further, Plaintiff's proposed construction adds "steady state," which is a new technical term that also needs construction. KD¶79. Plaintiff complains that Defendants' construction improperly excludes the situation where a network is not m-regular simply because a computer is joining or leaving the network. Plaintiff is wrong. In that situation, as described in the Statement of Facts, the Add and Drop Patents serve the very purpose of maintaining or restoring the m-regular and incomplete structure to a computer network when a computer is added or dropped.

KD¶36-40. Defendants' construction accepts this temporary departure from the m-regular and incomplete network and emphasizes that Add and Drop Patents provide a method for maintaining or restoring the network to m-regular and incomplete. Consistent with the file history, Defendants' construction ***does*** exclude networks that appear m-regular by chance, just as the patentee did when arguing for allowance of the claims.

Furthermore, and contrary to Plaintiff's contentions, the "small regime" described in the patents is expressly ***not covered*** by the claims. The specification defines the "small regime" as the situation "[w]hen there are fewer than [m+1] computers connected, the broadcast channel cannot be a [m]-regular graph." The "small regime" can never meet the limitations of the claims because in the small regime by its definition cannot be m-regular. Thus, Plaintiff's and its expert's reliance on the "small regime" to support Plaintiff's constructions is not supported and should be disregarded. KD¶78.

D. Acceleration Bay's Reply Statement (Terms 16, 17)

Acceleration Bay's construction for "m-regular" (including its subpart "m") comes straight from the claims' plain language and from the specifications' qualification that the network is "m-regular" only when in a "steady state," but not at all times. *See, e.g.,* A-1, Claim 1, 14:53-15:7 ("the broadcast channel can be maintained as m-regular ... (in the steady state)").

Ignoring that their construction would impermissibly read out every disclosed embodiment, Defendants primarily rely on the incorrect theory that "The claims include the term 'm-regular' as a term distinct from neighbors." But this argument is based on the fundamentally incorrect premise that "m-regular," "m" and "neighbor" are different terms that must be construed to have distinct meanings. To the contrary, "m" is a subpart of "m-regular," and "m-regular" is ***defined*** in the claims by using "neighbor." Specifically, the claims recite that the "network is m-regular, ***where m is*** the exact number of ***neighbor participants***." Thus, Plaintiff is

crediting the actual language of the claims by seeking a proposal that "would give 'm' and 'm-regular' the exact same meaning as the number of neighbors," because that is how the claims define them. Defendants invite error by seeking a contrary construction not supported by the intrinsic evidence. *Discovery Pat. Holdings, LLC v. Amazon.Com, Inc.*, 769 F. Supp. 2d 662, 667 (D. Del. 2011) ("the Court must first look to the words of the claims themselves in order to ascertain their meaning."). Further, there is no "black-letter claim construction principle" that requires every word to be parsed out and individually construed out of the context of the claim. To the contrary, this would improperly render "superfluous" many of the claim terms, especially here where Defendants import the same limitations into terms within terms. *Digital-Vending Servs. Int'l, LLC v. Univ. of Phoenix, Inc.*, 672 F.3d 1270, 1275 (Fed. Cir. 2012).

Defendants' citation to *Discovery Pat.* is inapposite because that case did not deal with the situation here where one word (neighbor) is used in the claim to define another word (m-regular). Instead, the court looked at the construction of different words used in different portions of the claims. 769 F. Supp. 2d at 671. Moreover, Plaintiff has not proposed the same constructions for terms "m-regular" and "m." Specifically, the term "m-regular," should be construed to mean "a network where each participant has m neighbor participants in a steady state" whereas its subpart "m" requires no construction because the claims themselves explain that it is, "the exact number of neighbor participants of each participant."

Plaintiff's construction is fully consistent with applicant's argument during prosecution, and Defendants fail to establish any clear disavowal of claim scope to the contrary. Applicant's arguments regarding the prior art were directed to times "where there are not new nodes entering or leaving the network" i.e., a *steady state*. B-1, (9/10/03 Resp.) at 10; B-2, (9/10/03 Resp.) at 10; A-1, 14:63-65. In contrast, Defendants ignore the repeated references in the intrinsic record to transitional, non-steady states and periodic states where the network will not be m-regular

(such as when m is odd and the network cycles between regular and non-regular). Moreover, there is no support in the prosecution file to import Defendants' intent requirement. The applicant never clearly and unmistakably required that the network seek to maintain at all times an m-regular network. B-1, (9/10/03 Resp.) at 9-11. Thus, Defendants' construction should be rejected because it is wholly unsupported attorney argument. *Avid Tech., Inc. v. Harmonic, Inc.*, 812 F.3d 1040, 1045 (Fed. Cir. 2016) ("When the prosecution history is used solely to support a conclusion of patentee disclaimer, the standard for justifying the conclusion is a high one.").

Defendants further argue that during IPR of the '344 patent, Plaintiff narrowed the scope of the claims. However, nowhere in the cited portion of the IPR does Plaintiff mention "m-regular." D-2, 28-29. Rather, Defendants cite to a discussion of ***incomplete*** graphs rather than *m-regular* networks — two entirely different concepts. Further, during IPR, Plaintiff explained that certain prior art references were limited to fixed networks and were not intended to cover *highly dynamic* networks, but this explanation does not in any way suggest that m-regular networks must have an intent to seek to maintain m-regular status at all times (or even that the network must be complete at all times). Accordingly, the cited portions of the IPR record are not a clear and unmistakable disclaimer limiting the scope of "m-regular."

Plaintiff's constructions are also fully consistent with its arguments to the Court that the network "requires a very specific technical structure, of a particular type of network... where each participant has a set number of neighbors." D.I. 28 at 2. Contrary to Defendants' arguments, Plaintiff never argued that the network must seek to maintain an m-regular network at all times. If any part of the network is m-regular in a steady state, then it satisfies the specific technical structure required by the claims. The network, however, does not have to intend or

seek to maintain an m-regular network *at all times* in order to be m-regular.[1]

That some dependent claims specifically recite that m is an even number (or specifically 4) only proves that the broader claims can cover networks where m is odd and the network will at different times be regular and non-regular (and at times m-connected and non-m-connected) under the doctrine of claim differentiation. *Discovery Pat.*, 769 F. Supp. 2d at 671; Ex. A-1, 15:5-7 ("Thus, with an odd number of internal connections, the broadcast channel toggles between being and not being m-regular and m-connected.").

Defendants dismiss as irrelevant the discussion of the "small regime," but, as Defendants acknowledge, it refers to periods of time that the network is not m-regular, ruling out their "substantially all times" construction. The patents teach that a network can grow from the small regime into a network that is m-regular and can return to the small regime when the number of participants drops below a certain threshold. *See, e.g.,* A-1, 5:10-30, 9:55-10:44, 11:1-16, 19:66-20:44. 22:5-60. This confirms that the claimed networks can be m-regular some of the time, but need not be m-regular all of the time, as Defendants incorrectly contend. Defendants fail to reconcile their construction with this concept (or the scenario where m is odd, causing the network to cycle between regular and non-regular states).

E. Acceleration Bay's Reply Statement (Terms 11, 13-15, 29, 30, 32-34, 38-40)

Defendants fail to address, let alone justify, the need to restate their incorrect m-regular construction in Terms 11, 13-15, 29, 30, 32-34 and 38-40. By reciting the m-regular construction over and over, Defendants render the claims nonsensical, and such repetition is

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[1] Defendants' reference to inventor testimony is a red herring. [redacted] Further, inventor testimony is extrinsic evidence afforded little weight for purposes of claim construction. *See Bell & Howell Document Mgmt. Prods. Co. v. Altek Sys.*, 132 F.3d 701, 706 (Fed. Cir. 1997).

unnecessary because "m-regular" is already recited in the claims. *Digital-Vending*, 672 F.3d at 1275 (declining construction that would render other claim elements unnecessary surplusage).

For Term 33 ("in order to maintain an m-regular graph"), Defendants' construction adds nothing to the plain language of the claim beyond manufacturing a requirement that m cannot change. The claims require only that the network is regular (when in a steady state) in that each participant has the same number of neighbors, but neither the claims nor the specification require that the network cannot be regular at different times with a different number of neighbors. Defendants' citations are silent on this issue and merely confirm that when m is odd, the network will be regular at times and irregular at other times. *See* A-3, 14:52-15:6.

For Terms 38-40, Defendants fail to explain why the jury cannot understand the plain language of the claims. Defendants' constructions unnecessarily reiterate various aspects of the m-regular limitation and reintroduce Defendants' incorrect constructions of that term. *See* Medvidović Decl., ¶¶ 157, 160, 162. Defendants also attempt to read in a "flooding limitation," even though that term does not appear in any of the Asserted Patents. The claim language only requires that messages be sent to other neighbor participants as opposed to the entire network, but not necessarily to all participants in the entire network, and the statements cited by Defendants are not to the contrary. *Id.*, *see, e.g.,* D.I. 28, p. 2, 12 ("Participants pass data to their neighbors in the network, who then forward the message to their neighbors, and so on, rather than being directly connected to all the participants in the network").

F. Defendants' Sur-Reply Statement

Plaintiff's arguments reveal it intends to argue that the claims extend far beyond anything supported by the claim language or intrinsic evidence. For example, Plaintiff argues: "[i]f ***any part*** of the network is m-regular in a steady state, then it satisfies the specific technical structure required by the claims." § III.D. Thus, Plaintiff betrays its view of the claim scope – namely, that

selective parts of the network can be ignored for determining whether the network is m-regular, even though the claims and the intrinsic evidence plainly require that the accused network be m-regular, which means that all participants must have exactly m-connections. Plaintiff's stated intent of picking and choosing limited parts of the network to determine m-regularity under the veil of "plain and ordinary meaning" demonstrates the need for this Court to adopt Defendants' constructions

Applicant expressly disavowed networks that appear m-regular in part or by happenstance. Applicant added the m-regular/incomplete requirements specifically to traverse the rejection based on Alagar (Ex. A) and explained that the amended claims were "precisely the opposite" of Alagar. B-1 (09/10/03 Amend.), 10. Applicant disavowed every aspect of Plaintiff's new claim constructions, stating the claims "require[] that ***each participant in the network*** connects to and forms a neighbor bond to exactly an m number of neighbors." Plaintiff itself confirmed that the number of neighbors is a "set" – or predetermined – number applied to all participants in the network, not just part of the network. D.I. 28, 2 ("***each participant*** has a ***set*** number of neighbors") (emphasis added). Yet Plaintiff now argues that "[i]f ***any part*** of the network is m-regular in a steady state, then it satisfies the specific technical structure required by the claims."

In distinguishing Alagar, Applicant stated that "the Alagar reference is deceiving in that it coincidentally shows a 4-regular network. However, that is not the typical situation...[and] the Alagar reference clearly indicates that there is in fact nonregularity in a computer network formed because the number of neighbors is not set at a predetermined number ....Claim 1 as amended requires that the computer network be m regular at substantially all times where there are not new nodes entering or leaving the network." Yet Plaintiff now argues that "[t]he applicant never clearly and unmistakably required that the network seek to maintain at all times

an m-regular network," that "m" can vary, and that m-regular need only be achieved coincidentally in an undefined and transitory "steady state" without any need for it to be designed to be m-regular.

This evidence confirms Defendants' fair claim interpretations that m must be a "predetermined design parameter specifying the number of neighbors each participant should maintain" and m-regular is "a state that the network seeks to maintain at all times, where each participant is connected to exactly m neighbor participants." Plaintiff criticizes Defendants' proposed construction for (1) imposing an "intent" requirement, and (2) purportedly excluding embodiments by requiring the network to be m-regular at all times. Both arguments lack merit and mischaracterize Defendants' proposed constructions. First, Defendants' proposed construction does not impose an "intent" requirement, it seeks to articulate that the network is m-regular by design ("seeks to maintain") and not by coincidence, which Applicant clearly disavowed. Second, Defendants' proposed construction does not require the network to actually ***be*** m-regular at all times, but rather that it ***seeks to be*** m-regular at all times. This construction allows the network to not be m-regular when participants are joining or leaving, for example. Indeed, Applicant stated to the PTO that the claims "require[] that the computer network ***be m regular at substantially all times*** where there are not new nodes entering or leaving the network."[2]

There can be no ambiguity that maintaining m-regularity of the network at substantially all times is the fundamental characteristic of the claimed system, and both inventors agree that

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[2] Plaintiff's argument that Defendants' proposed construction excludes "small regime" is disingenuous. "Small regime" networks are not covered in the claims. The claims require the number of nodes (participants) to be at least 2 greater than m, which is not "small regime."

"m-regularity" is a specific parameter (i.e., an intrinsic property) of the network that is maintained. *See, e.g.*, [redacted] D-3, ¶¶ 11, 15-17; D-14, 140:6-141:5, 180:5-18, 185:4-16, 229:13-230:7. Defendants' construction rightfully distinguishes the claimed m-regular network from other networks that may appear m-regular in part or by chance.

IV. TERM 19 (NON-COMPLETE GRAPH/INCOMPLETE GRAPH)

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
19 "Thus resulting in a non-complete graph"; and "The network forms an incomplete graph"	No construction necessary: plain and ordinary meaning	"thus resulting . . .": "thus the state of the m-regular graph is always non-complete" "the network . . .": "the state of the m-regular graph is always incomplete"

A. Acceleration Bay's Opening Statement

"The network forms an incomplete graph" and "thus resulting in a non-complete graph," require no construction because their meanings are evident from their plain language and their usage in the claims themselves. Medvidović Decl., ¶ 104. For example, '634 Patent, Claim 1 states, "where m is the number of neighbor participants of each participant, and further wherein the number of participants is at least two greater than m ***thus resulting in a non-complete graph***." Ex., A-4 at Claim 1 (emphasis added). The claim language thus explains that an incomplete graph is one where not all participants are connected because the number of participants is at least 2 great than m. Medvidović Decl., ¶ 105. This reading of these terms is consistent with the specifications. For example, Fig. 2 shows a network with 20 participants, where each is connected to only 4 other participants (i.e., *m* is 4), as opposed to all 19 other participants. Ex. A-4 at Fig. 2; Medvidović Decl., ¶ 106.

Defendants' construction for these terms should be rejected because it repeats their legally erroneous construction, in requiring that "the m-regular graph is always [non-complete/incomplete]." Defendants ignore the fact that, as explained with respect to Term 17, the Asserted Patents contemplate a dynamic network where the network is *not always* incomplete. For example, they describe scenarios where a network is being formed and there is a small enough number of participants that all are directly connected and the graph is, therefore, complete at that time. *See, e.g.*, Ex. A-4 at 5:45-55, 10:13-27; Medvidović Decl., ¶ 107.

B. Defendants' Responsive Statement: Term 19

Plaintiff actually contends that although all the claims include the limitation of a "non-complete" or "incomplete" graph, a complete graph can infringe. § IV.A. No legal authority supports a position that a claim requiring "non-complete" or "incomplete" graph can be infringed by a "complete" graph. Construction permitting "non-complete" or "incomplete" to mean "complete" sometimes should be soundly rejected.[3]

Moreover, Plaintiff argued to the Patent Office that the "always incomplete" nature of the network was a "key attribute" of the claims:

> A ***key attribute*** … claimed … is that the number of network participants N ... is ***always*** greater than the number of connections m to each participant ... In fact, … N must ***always*** be m+2 or greater: $N \geq m+2$. This network topology where no node is connected to every other node is an ***incomplete graph***.

See, e.g., **D-2** (first and second emphasis added, third emphasis retained) at 11; *id.* ("the inventive incomplete graph."); *id.*, p. 12 ("[T]he invention … an m-regular network with (ii) an

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[3] If Plaintiff is arguing that when a computer is added or dropped from an m-regular incomplete network, the network might temporarily be complete and still infringing, that construction should be rejected too. The Add and Drop Patents address this situation and explain that even if there is a temporary complete state, an m-regular and incomplete graph is maintained or restored. See supra. Such a potential temporary complete state does not mean that "non-complete" or "incomplete" can sometimes mean "complete."

incomplete graph topology ..."). These clear statements disavow networks that are not always incomplete. DEx. 1 (Aylus), p. 8. The representation is confirmed by the claim language that Plaintiff cites, which the applicants added to obtain the claims. The network must always be incomplete because the number of participants is required to be at least 2 greater than the number of m neighbors of any one participant. This means that no node is connected to every other node. See, e.g., B-1 (Sept. 10, 2003 Amend.), pp. 10-11 ("It is the combination of having a computer network that is m regular and that is not a complete graph that is patentable..."). Moreover, as explained, the entire point of the system is to maintain its m-regular, incomplete nature—the Add and Drop Patents would be entirely unnecessary in a complete network such as a full mesh network. KD¶36-40.

C. Acceleration Bay's Reply Statement

Defendants fail to show a need to construe Term 19, which is clearly defined in the claims themselves, and their expert does not offer any opinion for this term. In an attempt to support their construction, Defendants mischaracterize Plaintiff's positions as stating that a complete graph is an incomplete graph. Not so. As explained above with respect to "m-regular," the inventions cover networks where computers or nodes are connecting and disconnecting. As such, there is no requirement that the network must *always* seek or maintain at all times to be an incomplete graph as proposed by Defendants. Applicants' statements during prosecution, cited by Defendants, are entirely consistent, and explain that the claimed network is different from the prior art complete networks ***when it is incomplete***. *See* B-1, 9/10/2003 Resp., 10, 11 (distinguishing prior art describing static network from the invention describing dynamic networks, "the claims as amended now require that the computer network so ***formed*** is not a 'complete graph.'"); D-1, 18-19. These statements do not require, let alone clearly disavow, that the network can never be complete. Defendants' construction that the network can never be

complete must be rejected as reading out every embodiment in the patent, which transition from a complete graph to an incomplete graph, and Defendants have no answer to this flaw in their construction. *Funai Elec. Co. v. Daewoo Elecs. Corp.*, 616 F.3d 1357, 1371 (Fed. Cir. 2010).

D. Defendants' Sur-Reply Statement

This term must be construed because Plaintiff's infringement position is that a network can infringe even if it is not ***both*** incomplete and m-regular. But the claims require that the network ***always*** be incomplete because the number of participants is ***required*** to be at least 2 greater than the number of *m* neighbors of any one participant. *See, e.g.*, **B-1** (9/10/03), 10-11. This is confirmed by the file history and Plaintiff's representation to the PTAB that a "key attribute" of the claimed network is that it is "always" incomplete. D-2, 11. Plaintiff does not even address this evidence, which confirms that the claimed network must ***always*** be incomplete. It must be both m-regular and incomplete at the same time.

V. TERM 18 (M-CONNECTED)

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
18 "M-Connected" & "M-Connected Network"	a network that may be divided into disconnected sub-networks by the removal of m participants in a steady state	"a state that the network seeks to maintain at all times, where dividing the network into two or more separate parts would require the removal of at least m participants"

A. Acceleration Bay's Opening Statement

Acceleration Bay's construction for the terms "m-connected" and "m-connected network" is: "a network that may be divided into disconnected sub-networks by the removal of m participants in a steady state." This construction comes straight from the specifications, which explain that, "[t]he graph used by the broadcast technique also has the property that it would take

a failure of [*m*] computers to divide the graph into disjoint sub-graphs, that is two separate broadcast channels." Ex. A-4 ('634 Patent) at 5:1-4; Medvidović Decl., ¶ 47.

Defendants' construction for these terms should be rejected because it reiterates the same legally erroneous and unsupported intent and at-all-times requirements discussed above. Medvidović Decl., ¶ 48 Ex. A-1 at 14:53-15:7 (describing scenarios where the network is at times not m-connected). Additionally, Defendants' usage of "parts" is less precise than "sub-networks," as proposed by Acceleration Bay, and Defendants' proposed "two or more" language is superfluous. *Id.*

B. Defendants' Responsive Statement

As discussed in greater detail in § II.B [Defendants' Statement Of Facts], the "m-connected" network is a state that the network seeks to maintain at all times. Plaintiff only disputes the "maintain at all times" portion of Defendants' proposed construction because "it reiterates the same legally erroneous and unsupported intent and at-all-times requirements discussed above." § V.A (internal citations omitted). However, as discussed previously, this argument is not persuasive because the cited portions only demonstrate that the network does not have to be m-regular or m-connected to operate. With respect to the alleged invention, as previously discussed, the network seeks to maintain an m-regular and m-connected.

C. Acceleration Bay's Reply Statement

Defendants do not and cannot dispute that Plaintiff's construction comes straight from the specifications, and offer no expert opinion in response to Dr. Medvidović's analysis. Instead, Defendants simply repeat their flawed m-regular argument, which fails for the reasons discussed above. Further, Defendants fail to address that their proposed construction is less precise than Plaintiff's construction in using the term "part" of a network rather than "sub-networks." Accordingly, the Court should reject Defendants' construction.

VI. TERMS 1-8 (THE MEANS PLUS FUNCTION)

A. Introductory Statement

1. Acceleration Bay's Opening Statement

Terms 1-8 are definite because a POSA would be able to recognize and identify the structure and algorithm corresponding to the functions from reading the specification of the Patents. *See Typhoon Touch Techs., Inc. v. Dell, Inc.,* 659 F.3d 1376, 1385 (Fed. Cir. 2011) ("[T]he patent need only disclose sufficient structure for a [POSA] to provide an operative software program for the specified function.")(citation omitted); Medvidović Decl., ¶¶ 49, 53, 56, 62, 65, 72, 77. Indeed, while purporting to reserve the right to argue indefiniteness, Defendants provided constructions for all of these terms in the IPRs and argued that the corresponding structure is found in the prior art, confirming that the terms are amenable to construction and can be mapped to software providing the specified functions, thus precluding a finding that they are indefinite. *In re Donaldson Co.,* 16 F.3d at 1193 (PTAB and district courts apply same standard for means plus function claims.)[4]

2. Defendants' Responsive Statement

The PTAB carefully considered the first means-plus-function term and, in each instance, was "unable to construe" the first means-plus-function term from each of claims 13 of the '344 and '966 patents and claim 9 of the '497 patent (Terms 1, 3, 5) because the specifications did not

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[4] Notably, the PTAB denied institution of IPR as to various claims because Defendants did not provide sufficient evidence of a construction. To the extent Defendants argue that the terms are indefinite based on the Board's decisions, the Court should give no weight to these preliminary, non-binding observations by the PTAB, based on only a limited record. *See, e.g.,* Ex. C-19 at 9-10 ("neither party provides much analysis in support of its respective position."); Ex. C-4 at 10 ("we are unable to construe claim 13, and dependent claims 14 and 15, ***for purposes of this decision***.") (emphasis added). Due to the preliminary stage of the proceeding, Acceleration Bay was not permitted an opportunity to provide an expert declaration on the definite meaning of these terms or otherwise fully develop the record or argument. Similarly, Defendants' technical expert in the IPRs did not offer an opinion on this issue.

provide any adequate description of structure for the claimed functions. C-4, pp. 8-10; C-5, pp. 8-10; C-10, pp. 7-9. The PTAB analyzed the same portions of the patents Plaintiff now cites; given the PTAB's expertise in these issues, this is "compelling evidence of indefiniteness." *See Cayenne Med., Inc. v. Medshape, Inc.*, 2016 WL 2606983, at *3 (D. Ariz. 2016). This Court should reach the same conclusion.[5] Plaintiff's contention that the PTAB's decisions are incorrect because its expert is "able to recognize and identify the structure and algorithm corresponding to the functions" misses the mark. "[T]he testimony of one of ordinary skill in the art cannot supplant the total absence of structure from the specification." *Noah Sys., Inc. v. Intuit Inc.*, 675 F.3d 1302, 1312 (Fed. Cir. 2012) ("adequate" corresponding structure to achieve the claimed function must be disclosed).

3. Acceleration Bay's Reply Statement

The specification disclosed with specificity the means-plus-function (MPF) elements such that a POSA can recognize the corresponding structure and algorithm. As an initial matter, Plaintiff's construction of terms 1-6 should govern because Defendants failed to provide an expert opinion regarding indefiniteness and rely exclusively on attorney argument. Thus, they failed to carry their burden to consider the terms under the requisite POSA standard.

> Nor can it be assumed that, without evidence, a general purpose judge could ascertain the position of persons of skill in the art and conclude that there is not a shred of support for any of the eleven interrelated [MPF] claim limitations, as argued by [defendant]...The burden was on [defendant] to prove its case, and ***in the absence of evidence provided by technical experts*** who meet the *Daubert* criteria ***there is a failure of proof. Attorney argument is not evidence.***

Elcommerce.com, Inc. v. SAP AG, 745 F.3d 490, 506 (Fed. Cir. 2014) (emphasis added).

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[5] Contrary to Plaintiff's repeated suggestions, Defendants' positions before this Court are consistent with the positions taken before the PTAB. Defendants identified the corresponding structure for these terms, e.g., for Term 1, Defendants identified "a game website ...." **C-4**, p. 8. Defendants also explained there was no disclosed algorithm for the website function. *Id.*

Defendants provided no evidence that a POSA could not ascertain the scope of the structure of these terms from the cited support in the specification and, thereby, failed to carry their burden to provide clear and convincing evidence of indefiniteness. *TecSec, Inc. v. Int'l Bus. Machs. Corp.*, 731 F.3d 1336, 1347-48 (Fed. Cir. 2013).

Defendants' reliance on the PTAB's decision not to construe the MPF terms for institution purposes is not binding or even relevant to these claim construction proceedings. The PTAB's limited consideration was only for the purposes of its decision if it should institute IPR, and the PTAB did not reach an indefinite analysis, let alone find the necessary clear and convincing evidence. *Microwave Vision, S.A. v. ETS-Lindgren Inc.*, 209 F. Supp. 3d 1322, 1329, 1331 (N.D. Ga. 2016) ("because its authorizing statute limits *inter partes* review to patentability determinations, the PTAB expressly disclaimed any indefiniteness analysis."). Moreover, Defendants cannot reconcile their current positions with their presentation of structure and function for the MPF terms in their IPR petitions, proving the claims are not indefinite. Finally, Acceleration Bay was precluded by statute from providing expert opinion on claim construction regarding MPF terms, which is critical given that the disclosures discussed herein are analyzed from the view of the POSA.

4. Defendants' Sur-Reply Statement

Plaintiff asks the Court to disregard the PTAB's findings and Defendants' arguments because neither is supported by expert testimony. Even though expert testimony is not required under controlling law,[6] Defendants submit additional testimony from Dr. Kelly to alleviate

[6] Plaintiff cites a single vacated case that merely holds that expert testimony is permissible, not required. *Elcommerce.com.*, 745 F.3d at 506, vacated, 564 F. App'x 599 (Fed. Cir. 2014); *see also Mobile Telecomm. Techs., LLC v. LG Elecs. Mobilecomm USA, Inc.*, 2015 WL 2250418, at *3 (E.D. Tex. May 13, 2015) (refusing to rely on *Elcommerce.com*). In fact, "expert testimony

Plaintiff's concern. KSRD¶6-43. Nonetheless, the PTAB decisions are "compelling evidence of indefiniteness." *Cayenne*, 2016 WL 2606983, at *3. Even Plaintiff's cited case states that "ignoring the PTAB decision entirely smacks of folly." *Microwave Vision*, 209 F. Supp. 3d. at 1329, 1331. Plaintiff complains that it "was precluded by statute from providing expert opinion" for the *inter partes* reviews, but that is false. Plaintiff did submit an expert declaration but chose not to address the terms. Ex. I.

[cannot be used] to create structure where none otherwise exists" because the specification must "adequately disclose corresponding structure." *Williamson, LLC*, 792 F.3d at 1354.

B. Term 4 ("Means for connecting to the identified broadcast channel")

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
4 "Means for connecting to the identified broadcast channel"	Governed by 35 U.S.C. § 112(6): **Function:** connecting a participant to an identified broadcast channel 966: **Structure:** a processor programmed to perform at least one of the algorithms disclosed in steps 801 to 806 in Figure 8 and described in the '966 Patent at18:3-19:22 or Figures 3A and 3B and described in the '966 Patent at 5:32-52, which involves invoking the connecting routine with the identified broadcast channel's type and instance, connecting to the broadcast channel, connecting to a neighbor, and connecting to a fully connected state. '344: **Structure:** a processor programmed to perform at least one of the algorithms disclosed in steps 801 to 806 in Figure 8 and described in the '966 Patent at 17:67-18:47 or Figures 3A and 3B and described in the '966 Patent at 5:33-55, which involves invoking the connecting routine with the identified broadcast channel's type and instance, connecting to the broadcast channel, connecting to a neighbor, and connecting to a fully connected state.	This term is indefinite. Function: connecting to the identified broadcast channel Structure: Indefinite because no/insufficient algorithm disclosed

1. Acceleration Bay's Opening Statement

The parties essentially agree on the function for Term 4, "connecting a [participant] to an identified broadcast channel." This term is definite because the specifications sets forth an algorithm for performing the function. Medvidović Decl., ¶¶ 57-61. Figure 8 (reproduced below) "is a flow diagram illustrating the processing of the connect routine in one embodiment."

Ex. A-2 ('966 Patent) at 3:7-8. The '966 Patent further describes Fig. 8 at 17:55-18:44, including the specific steps that are performed. *Id.* at 17:55-18:44; Fig. 8; Medvidović Decl., ¶ 57. Similarly, the '966 Patent includes Figs. 3A and 3B, which "illustrate the process of connecting a new computer Z to the broadcast channel" and the steps of this algorithm are further detailed in the specification at 5:22-34. *See* Ex. A-2 at 5:22-34; Figs. 3A and 3B; Medvidović Decl., ¶ 58. A POSA would understand that these figures and the related portions of the specification disclose the algorithms for performing the function of "connecting a participant to an identified broadcast channel." Medvidović Decl., ¶ 59; *TecSec, Inc. v. Int'l Bus. Machs. Corp.*, 731 F.3d 1336, 1348-49 (Fed. Cir. 2013) (holding an algorithm may be expressed in prose, flow charts, and diagrams).[7]

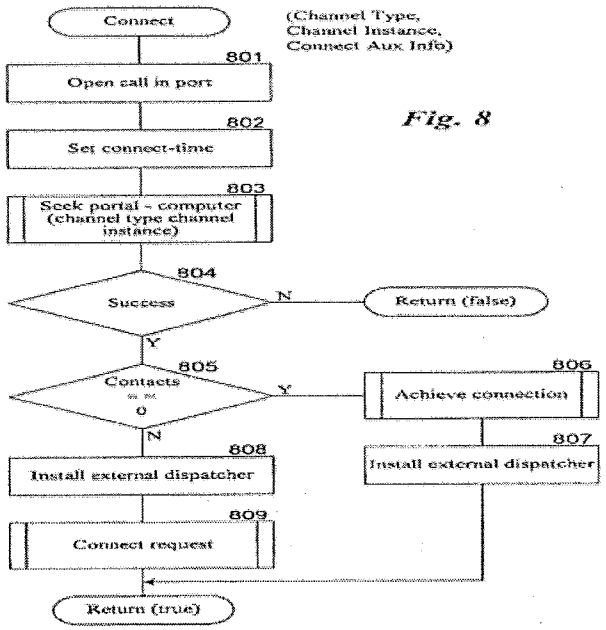

Fig. 8

[7] Defendants' claim that the structure for Term 4 is not disclosed is belied by their identification in IPRs of "a directory web site where customers can locate and subscribe to broadcast channels of interest" as the corresponding structure under the broadest reasonable interpretation (BRI) standard and of corresponding structures in the prior art. *See, e.g.,* Ex. D-20 at 13-14, 49- 51.

2. Defendants' Responsive Statement[8]

The parties do not "essentially agree on the function for Term 4" as Plaintiff alleges. Defendants' function properly reflects the claim language and is about connecting to "the identified broadcast channel," i.e., the broadcast channel identified in Terms 1 and 3. Plaintiff replaces "the" with "an" and substantially broadens the function in an effort to find corresponding structure in the specification. This tactic should fail for multiple reasons.

Plaintiff's first cites to Fig. 8, which relates to the "broadcaster component ... processing ... the connect routine ...." **A-1**, 3:7-8. There is no algorithm cited in any portion of Fig. 8. Each block is simply a black box that describes a function or generic "algorithm," but no block, or description in the specification, provides details of steps that would be carried out to implement any of these generic algorithms or functions. *See* related discussion of Fig. 8, Block 801 ("hashing algorithm"), Block 802 ("identify" algorithm), Blocks 803-805, 808 ("seek portal computer routine"), Block 806 ("achieve connection routine"), Block 807-808 ("external dispatcher"), and Block 809 ("connect request routine"). Mere "black boxes" are insufficient. *See, e.g., ePlus, Inc. v. Lawson Software, Inc.*, 700 F.3d 509, 518 (Fed. Cir. 2012) (finding "black box" labeled "Purchase Orders" did not disclose sufficient structure for a "generate purchase orders" function).

Plaintiff's citation to Figures 3A and 3B is irrelevant; these figures do not describe the use of the "broadcaster component," which the PTAB said must be included. C-4, pp. 10-11 ("[T]he corresponding structure is at least the 'broadcaster component.'"); C-5, pp. 10-11 (same).

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[8] Plaintiff insisted on addressing the means plus function terms out of sequence in this joint brief (i.e., starting with Term 4) over Defendants' objections. Defendants believe the terms should be addressed in order both because that is how the terms appear in the claims and because Plaintiff's order is illogical. "Identifying" the broadcast channel (Term 1) will occur before "connecting" to the identified channel (Term 4). Defendants intend to address the terms in order at the claim construction hearing.

Figs. 3A and 3B do not disclose an algorithm at all; they only disclose one connection scenario. The only part of this citation that describes the connecting function states "the process of connecting to the broadcast channel includes … connecting to each identified neighbor." **A-2**, 5:22-34. This alleged "algorithm" is "nothing more than a restatement of the function, as recited in the claim" and is insufficient. *Finisar Corp. v. DirecTV Grp., Inc.,* 523 F.3d 1323, 1340 (Fed. Cir. 2008).

3. Acceleration Bay's Reply Statement

Acceleration Bay's construction of Term 4 is appropriate because it identifies a structure with an algorithm supported by the specification and Acceleration Bay provides expert opinion on how a POSA would understand the specification and figures. Medvidović Decl., ¶¶ 56-61. In contrast, Dr. Kelly has no responsive opinion on this term, and Defendants rely on attorney argument, without reference to what a POSA would understand from the figures, flow diagrams, and the specification. The steps of Figure 8 are not a "black box," because a POSA would understand the clear meaning of each step (such as "open call in –port," "set connect-time," step 804's success in connection yes/no tree), especially in view of the further discussion of these actions in the specification cited above. Medvidović Decl., ¶¶ 57, 59-61. Figures 3A and 3B and the associated discussion further illustrate the corresponding steps. *Id.*, ¶ 58.

4. Defendants' Sur-Reply Statement

Plaintiff cited Figure 8 in its opening brief, but its newest position relies only on blocks 801-806: ignoring blocks 807-809. § VI.B.3, 7. But the entirety of Figure 8 illustrates the "connect routine." A-1, 3:8-9; KSRD¶27-33. Specifically, blocks 801-806 are for locating a fully connected portal computer, and blocks 807-809 are for initiating the process of connecting to the identified broadcast channel. *See* A-1, 18:11-15 and 18:47-56; KSRD¶27-33. While Figure 8 does not disclose connecting to the identified broadcast channel (only initiating), the entirety of

Figure 8 must be addressed. *Id.* There is no algorithm for blocks 807-809 because they do not provide *any* details of steps that would be carried out to implement these functions. *Id.* Blocks 801-806 and Figures 3A and 3B disclose no sufficient algorithm. KSRD¶33-35.

C. Term 1, 2 ("Means for identifying a broadcast channel for a game of interest" and "means for identifying a game of interest...")

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
1 "Means for identifying a broadcast channel for a game of interest"	Governed by 35 U.S.C. § 112(6): **Function:** identifying a broadcast channel for a game of interest **Structure:** a processor programmed to perform the algorithm disclosed in steps described in '344 Patent at 16:57-17:1, which involves connecting to a web server and downloading a broadcaster component that identifies the broadcast channel for the game of interest	This term is indefinite. Function: identifying a broadcast channel for a game of interest Structure: Indefinite because no/insufficient algorithm disclosed
2 "Means for identifying a game of interest includes accessing a web server that maps games to corresponding broadcast channel"	"Means for identifying a game of interest" is construed above. No further construction necessary.	This term is indefinite. Function: identifying a game of interest includes accessing a web server that maps games to corresponding broadcast channel Structure: Indefinite because no/insufficient algorithm disclosed

1. Acceleration Bay's Opening Statement

The function of terms 1 and 2 is set forth in their plain language, respectively "identifying a broadcast channel for a game of interest" and "identifying a game of interest." Defendants agree as to the function of the elements, but incorrectly argue they are indefinite for lack of structure. To the contrary, the '344 Patent sets forth a specific algorithm for performing the

function: "***When joining a game***, the user would ***download the broadcaster component*** and the game application program ***from the web server.... The web server would also provide the*** channel type and ***channel instance associated with the game*** and the identification of the portal computers for the game." Ex. A-1 at 16:57-17:1; *see also* 17:65-18:7; Fig. 8 (illustrating algorithm for processing the broadcast channel connect routine); 17:67-18:56 (describing steps in Fig. 8). A POSA would understand that the '344 Patent therefore discloses the steps to identify the broadcast channel for the game. Medvidović Decl., ¶¶ 51-52; *see also* Ex. D-15 at 14, 48-49 (Defendants' IPR petition identifying under BRI as corresponding structure "a game web site through which players can view the state of current games and register new games" and alleged corresponding structures in prior art).

The Federal Circuit has explicitly approved of using and found definite similar narrative explanations of the steps to perform the functions of computer-related means-plus-functions elements. *See Typhoon Touch Techs., Inc.,* 659 F.3d at 1384-85 ("'the term 'algorithm' as a term of art in its broad sense, i.e., to identify a step-by-step procedure for accomplishing a given result.'") (citations omitted); *WMS Gaming Inc. v. Int'l Game Tech.*, 184 F.3d 1339, 1349 (Fed. Cir. 1999) (construing means plus function term as a microprocessor programmed to perform the algorithm steps shown in a figure).

2. Defendants' Responsive Statement

Plaintiff relies upon Figure 8 and 17:67-18:56 to support the "identifying" function for Terms 1 and 2, but that part of the specification is irrelevant because it relates to the "connecting" function of Term 4 (*e.g.*, '344 pat., 3:8-9 ("Fig. 8 is ... the connect routine")), not the identifying functions. The broadcast channel is first identified (Term 1), and then the separate "connecting" function occurs (Term 4). Unable to provide corresponding structure and algorithms for the distinct claim elements of identifying and connecting, Plaintiff resorts to using

the same support. But identifying and connecting are different terms having different functions and require different support. Fig. 8 and the related disclosure provide no support whatsoever for "identifying."

Plaintiff also reproduces a quote that relates to "joining a game" that only occurs after "identifying a broadcast channel for a game of interest." **A-1**, 16:58-63. The "identifying" function is performed by "a game web site through which players can view the state of current games and register new games." **A-1**, 16:57-61. Plaintiff provides no citation to disclosure that explains how the web site performs the identifying function. This is not surprising because there is no such disclosure, as the PTAB held. **C-4**, pp. 8-10. ("Simply reciting 'software' without providing some detail about the means to accomplish the function is not enough."). The only "identifying" that occurs in Plaintiff's citation is that the web server provides "the identification of the portal computers" for the user to connect to after the game of interest has been identified. **A-1**, 16:65-17:1. But this is not the "identifying" of these claim terms. Plaintiff also cites 16:57-17:1, which relates to receiving and saving information "when joining a game," but that is not related to identifying a game before joining and is not the type of function that constitutes an algorithm, as this Court has previously held. *FO2GO LLC v. Adobe Sys. Inc.,* 2016 WL 747977, at *4 (D. Del. Feb. 24, 2016) ("The reference ... fails to provide an algorithm, as it merely recites the functional steps of receiving and saving the message.").

3. Acceleration Bay's Reply Statement as to Terms 1, 2, 3

Defendants offer no expert analysis in response to Dr. Medvidović's opinion that the cited portions of the specification disclose the structure corresponding to Terms 1, 2 and 3. Instead, Defendants incorrectly claim that Acceleration Bay offers the same construction for these elements as for Term 4. To the contrary, Acceleration Bay cited the portion of the specification disclosing the structure for "identifying," and also specifically noted where the

related "connecting" process (Term 4) is identified in the specification. Plt. Br. at Terms 1-4 (citing the specification for "identifying" steps and separately citing Fig. 8 for disclosing the related "connecting" steps). Indeed, Acceleration Bay's citation of "identifying" is used as part of the algorithm, while the "connecting" steps are cited as additional support because it flows from the "identifying" step that identifying information is used to connect. Accordingly, Defendants' arguments referring to those portions of the specification miss the mark.

Defendants also are incorrect that the cited portions only relate to joining a channel for a game or topic of interest after it has already been identified. In fact, the cited portions explain how to receive from a web server information that "provide[s] the channel type and channel instance associated with the game and the identification of the portal computers for the game" to "join a game," thereby disclosing structure for the claimed function of identifying the broadcast channel for a game of interest. A-1, 16:65-17:1, 17:65-18:7; Medvidović Decl., ¶¶ 49-52.

For the '966 Patent, Defendants mistakenly argue that the relevant citation (A-2, 16:41-51) only refers to identifying a portal computer. However, the citation explains that the "information delivery service may provide a directory web site where consumers can locate and subscribe to broadcast channels of interest," confirming that the broadcast channel of interest is identified prior to identifying a portal computer. Medvidović Decl., ¶¶ 53-55.

The PTAB's comments on these terms were based on the parties' limited analysis and did not include an assessment of any expert opinion. C-4, IPR2015-01972, pp. 9-11, 20; C-5, IPR2015-1953, pp. 9-11, 20. Moreover, unlike the disclosure at issue in Fo2Go LLC, the specification here provides specific descriptions of how to perform the algorithm, including "download[ing] the broadcaster component and the game application program from the web server" because the "game web server would include a mapping between each game and the

broadcast channel on which the game is to be played." A-1, 16:59-63. Thus, there is a specific identification of how the algorithm is performed.

4. Defendants' Sur-Reply Statement

Because no algorithm is disclosed, Plaintiff argues that the provision of identifying information after "joining a game" is the purported algorithm. KSRD¶6-26. But *identifying* occurs before *joining* a game (i.e., connecting to the broadcast channel). A-1, 16:34-36 ("Each player joins a game … by ***connecting*** to the broadcast channel on which the game is played."); KSRD¶6-26. Plaintiff does not dispute that "a game web site" performs the claimed function, but there is no algorithm for how it does so. § VI.C.3; KSRD¶6-26. Term 3 is analogous to Terms 1-2, and thus indefinite for the same reasons. *Id.*, ¶6-26.

D. Term 3 ("Means for identifying a broadcast channel for a topic of interest")

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
3 "Means for identifying a broadcast channel for a topic of interest"	Governed by 35 U.S.C. § 112(6): **Function:** identifying a broadcast channel for a topic of interest **Structure:** a processor programmed to perform the algorithm disclosed in steps described in '966 Patent at 16:41-51, which involves connecting to a web server and downloading a broadcaster component that identifies the broadcast channel for a topic of interest	This term is indefinite. Function: identifying a broadcast channel for a topic of interest Structure: Indefinite because no/insufficient algorithm disclosed

1. Acceleration Bay's Opening Statement

The parties agree that the function of Term 3 is "identifying a broadcast channel for a topic of interest." The '966 Patent specification sets forth an algorithm for performing this function: "***The information delivery service*** may provide a ***directory web site where consumers can locate and subscribe to broadcast channels of interest***.... When a user decides to subscribe

to a broadcast channel, ***the broadcaster component*** and information delivery service application program ***may be downloaded to the user's computer*** if not already available on the user's computer. Also, the channel type and ***channel instance associated with that broadcast channel*** and the identification of the portal computers for that broadcast channel ***may be downloaded to the subscriber's computer.***" Ex. A-2 at 16:41-51 (emphasis added); Medvidović Decl., ¶ 54. The specification further describes the relevant steps. *See, e.g., id.* at 16:30-40 (describing different broadcast channels for topics of interest which may be selected), 16:55-17:10 (identifying relevant broadcast channels), Fig. 8 (flow chart of steps to connect to broadcast channel), 18:2-19:31 (describing steps in Fig. 8). The term is therefore definite because the specification explains to a POSA the specific steps for performing the function of "identifying a broadcast channel for a topic of interest." Medvidović Decl., ¶ 55; *see also* Ex. D-20 at 14, 49-50 (Defendants' IPR petition identifying under BRI as corresponding structure "'a directory web site where consumers can locate and subscribe to broadcast channels of interest' or equivalents thereof" and pointing to corresponding disclosure in prior art).

2. Defendants' Responsive Statement

Plaintiff again cites to an irrelevant part of the specification (Figure 8 and 18:2-19:31), which relates to the "connecting" function of Term 4. § VI.C.2. The functions of identifying and connecting are distinct and the same support cannot properly be used for both. *Id.* Plaintiff reproduces a quote that mentions the "directory web site" used for identifying but then jumps straight to "when a user decides to subscribe to a broadcast channel." § VI.D.1. Plaintiff provides no citation for how the web site performs the identifying function because, as noted above, there is none, as the PTAB held. **C-5**, pp. 8-10. The only "identifying" that occurs in Plaintiff's citation is "the identification of the portal computers," which occurs *after* the user has identified

"the topic of interest." A-2, 16:41-51. And Plaintiffs citations to "receiving and saving" are unavailing for the reasons addressed above. § VI.C.2.

3. Acceleration Bay's Reply Statement

See Section VI.C.3

4. Defendants' Sur-Reply Statement

See Section VII.C.4

E. Term 5 ("Means for identifying the portal computer")

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
5 "Means for identifying the portal computer"	Governed by 35 U.S.C. § 112(6): **Function:** identifying a portal computer using a dynamically selected call-in port **Structure:** a processor programmed to perform the algorithm described in the '497 Patent at 12:34-36 and 12:49-52, which involves performing the steps of the seeking computer having a list of portal computers to connect to and selecting the port number of the portal computer using a port-ordering algorithm	This term is indefinite. Function: identifying the portal computer Structure: Indefinite because no/insufficient algorithm disclosed

1. Acceleration Bay's Opening Statement

Acceleration Bay's construction of the function of Term 5 comes straight from the claim, "identifying a portal computer" where the portal computer has a "dynamically selected call-in port." The specification discloses the relevant algorithm, illustrated in Figure 9 (reproduced below). Medvidović Decl., ¶ 63. A processor of a seeking computer is programmed to have a list of portal computers "through which it can connect to the broadcast channel." Ex. A-6 ('497 Patent) at 12:34-36. The processor is programmed to then select[] a port number according to the algorithm and then dials each portal computer at that port number." *Id.* at 12:49-52;

Medvidović Decl., ¶ 63. Thus, the specification discloses an algorithm for performing the function of "identifying the portal computer." Medvidović Decl., ¶ 64; *see also* Ex. D-35 at 8, 54 (Defendants' IPR identifying corresponding structure and purportedly mapping it to prior art).

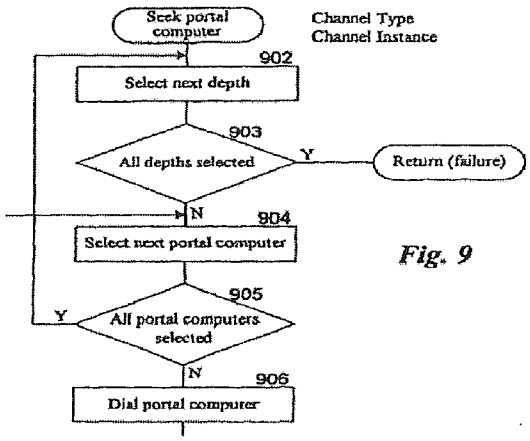

Fig. 9

2. Defendants' Responsive Statement

Claim 9 of the '497 patent has four purely functional § 112, ¶ 6 limitations, "means for": "identifying the portal computer" (this term), "identifying the call-in port of the identified portal computer …" (Term 6), "selecting the call-in port of the identified portal computer …" (Term 7), and "re-ordering …" (Term 8). Again, unable to provide support for these different terms, Plaintiff blurs the support for "identifying" (Terms 5 and 6) and "selecting" (Term 7). Claim 9 requires *first identifying* the portal computer (this term), *then identifying* the call-in port of the identified portal computer (Term 5) and *selecting* the call-in port of the identified portal computer (Term 6). Plaintiff's citations skip over the first "identifying" function entirely. Plaintiff starts by arguing that "a seeking computer is programmed to have a list of portal computers" then jumps to "[t]he processor is programmed to then *select[]* a port number…." *See* § VI.E.1 (citing A-6, 12:34-36 and 12:49-52). There is no citation to an algorithm for *identifying* the portal computer. A list of portal computers is *not* an algorithm for identifying the portal computer. Figure 9 is inapposite because it illustrates a routine for locating a fully connected process on an already identified portal computer. Blocks 902-906 relate to "selecting," not

"identifying." Lastly, Plaintiff's purported algorithm for this function incorporates the "port ordering algorithm," which is also indefinite, as explained in Term 6. Plaintiff does not identify any algorithm that performs the function of identifying a portal computer.

3. Acceleration Bay's Reply Statement

Defendants' expert offers no opinion in response to Dr. Medvidović's showing that the structure for this function is fully disclosed. Defendants concede Acceleration Bay identifies an algorithm, but incorrectly contend that it is limited to functions other than identifying a portal computer. Defendants argue that a "list of portal computers is not an algorithm." Def. Opp. at Term 5. However, Plaintiff's construction is not a "list of portal computers;" rather it is *selecting* a portal from that list. Term 6 then provides an algorithm for identifying the port number to go with the selected portal.

4. Defendants' Sur-Reply Statement

It appears all parties agree that "having a list of portal computers" is not an algorithm. § VI.E.3. Plaintiff then says that its construction is "*selecting* a portal [sic] from that list." *Id.* But this is not Plaintiff's construction, which refers instead to "selecting the port number of the portal computer." MD, 20. Even if Plaintiff intended to say that the "selection" of a portal computer from a list of portal computers is the algorithm, Plaintiff's newest position suffers from two insurmountable flaws. First, neither of the two portions of the '497 patent identified by Plaintiff (12:34-36, 12:49-52) say anything about selecting the portal computer from the list. KSRD¶37-43. Second, there is nothing to say how "selecting" is performed (e.g., is it the first on the list, the odd computers on the list, etc.?). *Id.* "Selecting" is not an algorithm at all, it is just a function, *id.*, as Plaintiff admits by proposing a construction under § 112, ¶ 6 for the "selecting" term.

F. Term 6 ("Means for identifying the call-in port...")

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
6 "Means for identifying the call-in port of the identified portal computer by repeatedly trying to establish a connection with the identified portal computer through contacting a communications port or communications ports until a connection is successfully established"	Governed by 35 U.S.C. § 112(6): **Function:** identifying the call-in port of the identified portal computer by repeatedly trying to establish a connection with the identified portal computer through contacting a communications port or communications ports until a connection is successfully established **Structure:** a processor programmed to perform the algorithm described in the '497 Patent at 12:46-65, which involves performing the steps of the seeking computer contact the portal computer using the dynamically selected call-in port and repeating the process with the next dynamically selected port number if no acceptable broadcast channel is found	This term is indefinite. Function: "identifying the call-in port of the identified portal computer by repeatedly trying to establish a connection with the identified portal computer through contacting a communications port or communications ports until a connection is successfully established" Structure: Indefinite because no/insufficient algorithm disclosed

1. Acceleration Bay's Opening Statement

The parties agree that the function of Term 6 is "identifying the call-in port of the identified portal computer by repeatedly trying to establish a connection with the identified portal computer through contacting a communications port or communications ports until a connection is successfully established." The specification discloses a processor programmed to perform the two-step algorithm that accomplishes the function, and illustrates corresponding steps in Figure 9, reproduced above. Ex. A-6 at 12:46-65; Medvidović Decl., ¶ 66. *First*, the processor running on the seeking computer "selects a port number according to the [port-ordering] algorithm." The specification further elaborates on this step, providing that "the call-in ports are likely allocated at lower-ordered port numbers." Therefore, the algorithm can be designed to "first dial[] the port numbers that are most likely to be call-in ports of the broadcast

channel." Ex. A-6 at 12:54-58; Medvidović Decl., ¶ 64. *Second*, "if no acceptable call-in port to the broadcast channel is found, then the seeking computer selects the next port number and repeats the process." Ex. A-6 at 12:52-54; Medvidović Decl., ¶ 68. The second step may involve "a maximum search depth [meaning] that the seeking computer [may iterate the process until successful]." Ex. A-6 at 12:58-60; Medvidović Decl., ¶ 69. Defendants' IPR petition under BRI identifies corresponding structure and disclosures in the prior art. Ex. D-35 at 8-10, 56.

2. Defendants' Responsive Statement

While the parties agree on the function that must be performed to meet this § 112, ¶ 6 term, Plaintiff overlooks entirely the language requiring that the "means" use a "port ordering algorithm." Nothing about the snippets of description cited by Plaintiff describes any aspect of the algorithm as "using a port ordering algorithm," as required by the claim. Even if Plaintiff had attempted to scour the description for a port ordering algorithm used in performing the claimed "identifying" function, all it would find is a generic "hashing algorithm." A-6, 11:64-65. Such a broad class of functions may be implemented in many different ways. KD¶110. Identifying a broad class of algorithm types amounts to prohibited "pure functional claiming." *Advanced Ground Info. Sys., Inc. v. Life360, Inc.*, 830 F.3d 1341, 1349 (Fed. Cir. 2016). The Federal Circuit recently affirmed a finding of indefiniteness on similar grounds. *Alfred E. Mann Found. for Sci. Research v. Cochlear Corp.*, 841 F.3d 1334, 1342-44 (Fed. Cir. 2016) (finding disclosed "logarithmic conversion algorithm" was inadequate corresponding structure because "the logarithmic conversion may be implemented through various unspecified algorithms"). Hashing algorithms are a generic class of functions, not specific algorithms. KD¶109-111.

3. Acceleration Bay's Reply Statement

Defendants and their expert concede that the '497 Patent discloses an algorithm structure for the recited function. Their criticism is limited to the incorrect theory that, "Plaintiff

overlooks entirely the language requiring that the 'means' use a 'port ordering algorithm.'" There is no such requirement in Term 6. Defendants appear to be confusing the "means for identifying the call-in port" (which does not recite using a port ordering algorithm) with the separate limitation, "means for selecting the call in-in port of the identified portal computer ***using a port ordering algorithm***" (Term 7). This argument should be rejected as based on a non-existent claim requirement.

G. Term 7 ("Means for selecting the call-in port ...")

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
7 "Means for selecting the call-in port of the identified portal computer using a port ordering algorithm"	Governed by 35 U.S.C. § 112(6): **Function:** selecting the call-in port of the identified portal computer using a port ordering algorithm **Structure:** a processor programmed to perform the algorithm described in the '497 Patent at 11:60-12:12, which involves performing the steps of using a port ordering algorithm for selecting the call in port of the identified portal computer by using an algorithm that provides a sequence of port numbers	This term is indefinite. Function: "selecting the call-in port of the identified portal computer using port ordering algorithm" Structure: Indefinite because no/insufficient algorithm disclosed

1. Acceleration Bay's Opening Statement

The parties agree that the function of Term 7 is "selecting the call-in port of the identified portal computer using a port ordering algorithm."[9] The term is definite because the '497 Patent discloses a processor programmed to perform the algorithm to do this: "[t]o minimize this time, the broadcast technique uses a port ordering algorithm to identify the port number order that a portal computer should use when finding an available port for its call-in port." The '497 Patent

[9] The relevant structure is the algorithm for *selecting* the call in port using a port ordering algorithm, not the port ordering algorithm itself, which neither party contends is a means-plus-function element. Medvidović Decl., ¶ 76.

then provides examples of ways to use a port ordering algorithm. '497 Patent at 11:60-12:12; Medvidović Decl., ¶ 74; *see also* Ex. D-35 at 10, 58 (Defendants' IPR identifying corresponding structure for Term 7 and purportedly mapping it to prior art).

2. Defendants' Responsive Statement

The only possible structure for "selecting" is a "port ordering algorithm," which may be a "hashing algorithm." *See, e.g.*, A-6, 11:64-65. This is inadequate corresponding structure. *See supra* § VI.F.2.

3. Acceleration Bay's Reply Statement

Acceleration Bay identifies the algorithm for the structure of the function of "selecting the call-in port of the identified portal computer using a port ordering algorithm." Medvidović Decl., ¶¶ 73-76. Defendants do not dispute that there is support for the structure of the function, they only incorrectly contend that the port ordering algorithm must be limited to a hashing algorithm and that a hashing algorithm is not definite. Defendants have no answer to Dr. Medvidović's analysis that, according to the '497 Patent, the structure is an algorithm for ***using*** a port ordering algorithm, not the port ordering algorithm itself, which neither party previously contended was itself a mean-plus-function element. *Id.*, ¶ 76. Therefore, Defendants' citation to *Advanced Ground Information* is inapposite, because the hashing algorithm is an example of a port-ordering algorithm, not the selection process. *Id.* The specification supports an algorithm for the structure including performing the steps of using a port ordering algorithm for selecting the call in port of the identified portal computer by using an algorithm that provides a sequence of port numbers. *See generally*, A-6, 11:31-12:32 ("Port Selection"); specifically at 11:60-12:12 (showing how a port ordering algorithm can be used identify the port to be selected). Moreover, even if, as Defendants contend, the structure is the hashing algorithm, the specification specifically provides a description of using hashing algorithms based on "seeds." Therefore, the

claim is not merely claiming an unbounded class of algorithms, as in *Alfred Mann*. A-6, 11:64-12:32.

4. Defendants' Sur-Reply Statement

Plaintiff argues that the specification discloses an "algorithm" that has the following step: "using a port ordering algorithm for selecting the call in-port of the identified portal computer *by using an algorithm that provides a sequence of port numbers*." § VI.G.3. This is precisely why this term does not provide adequate corresponding structure. Merely claiming an "algorithm" in the abstract fails to provide adequate corresponding structure for a computer implemented "means." Plaintiff provides no support for the meaning of "hashing algorithms based on 'seeds,'" and simply saying "seeds" is not an algorithm or a meaningful limitation. A-6, 12:18-28.

H. Term 8 ("Means for re-ordering the communications ports...")

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
8 "Means for re-ordering the communications ports selected by the port ordering algorithm"	Governed by 35 U.S.C. § 112(6): **Function:** re-ordering the communications ports selected by the port ordering algorithm **Structure:** a processor programmed to perform the algorithm described in the '497 Patent at 12:18-12:28, which involves performing the steps of using the call-in port number generated by the port ordering algorithm, and if the connection is unsuccessful, reordering the communication ports	This term is indefinite. Function: "re-ordering the communications ports selected by the port ordering algorithm" Structure: Indefinite because no/insufficient algorithm disclosed

1. Acceleration Bay's Opening Statement

The parties agree on the function for this limitation: "re-ordering the communications ports selected by the port ordering algorithm." The term is definite because the '497 Patent

discloses a processor programmed to perform the algorithm that accomplishes this function:

> In one embodiment, ***each seeking computer may each reorder the first few port numbers*** generated by the hashing algorithm. For example, each seeking computer could randomly reorder the first eight port numbers generated by the hashing algorithm. The random ordering could also be weighted where the first port number generated by the hashing algorithm would have a 50% chance of being first in the reordering, the second port number would have a 25% chance of being first in the reordering, and so on. ***Because the seeking computers would use different orderings***, the likelihood of finding a busy port is reduced.

Ex. A-6 at 12:18-28 (emphasis added); Medvidović Decl., ¶ 78; *see also* Ex. D-35 at 11, 58 (Defendants' IPR identifying corresponding structure and purportedly mapping it to prior art).

2. Defendants' Responsive Statement

That "each seeking computer could randomly reorder" ports provides no algorithm at all. A-6, 12:18-28. Yet, this is the only "algorithm" Plaintiff can muster. § VI.H.1. Randomly ordering provides the what (i.e., randomized ports), but fails to provide the how (i.e., the algorithmic steps to accomplish randomization of ports). KD¶113. Absent an algorithm—i.e., the how—this term is indefinite too.

3. Acceleration Bay's Reply Statement

Defendants and Dr. Kelly's challenge to the definiteness of this term is limited to their incorrect contention that the '497 Patent only broadly describes random re-ordering. To the contrary, the cited portion of the specification specifically describes using a weighted seeding method to order the port numbers and, therefore, goes beyond simply identifying random re-ordering. A-6, 12:18-28; Medvidović Decl., ¶¶ 77-79. Accordingly, Acceleration Bay's construction is the proper construction.

4. Defendants' Sur-Reply Statement

Plaintiff contends that the use of a "weighted seeding method … goes beyond simply identifying random reordering." § VI.H.3. First, Plaintiff's construction is not limited to an

algorithm that performs "weighted reordering." Second, Plaintiff has not explained how weighting a random ordering is an algorithm either. Indeed, weighting port numbers provides no description of the steps for performing the claimed "re-ordering" function at all.

VII. TERMS 9, 11-15, 20-22, 28-35, 38-40

A. Acceleration Bay's Opening Statement: Terms 9, 11-15, 20-22, 28, 29, 31-35, 39, 40

Acceleration Bay contends that no construction is necessary for Terms 9, 11-15, 20-22, 28, 29, 31-35, 39 and 40 because one of ordinary skill in the art, and even lay persons, can readily understand their meaning and the Asserted Patents to do not ascribe to them a more specific, narrowed meaning. *Thorner v. Sony Computer Entm't Am. LLC*, 669 F.3d 1362, 1366-68 (Fed. Cir. 2012) (rejecting narrower construction in favor of broader plain meaning construction because the patentee did not explicitly redefine claim term); *Aventis Pharms. Inc. v. Amino Chems. Ltd.*, 715 F.3d 1363, 1373 (Fed. Cir. 2013) ("Courts are required therefore to 'look to the words of the claims themselves . . . to define the scope of the patented invention.'"). This principle alone dictates that these terms should be given their plain and ordinary meaning.

As Dr. Medvidović explains, each of these terms has a well understood plain and ordinary meaning, and the terms are used in the Asserted Patents consistent with that meaning. Medvidović Decl., ¶¶ 80, 88, 91, 95, 98, 101, 108, 112, 115, 128, 134, 136, 139, 142, 145, 158, 161. For example, the patents do not ascribe any special meaning to "computer" beyond the conventional meaning of the term, i.e., "any device capable of processing information to produce a desired result," rendering construction unnecessary. Medvidović Decl., ¶ 88, quoting Microsoft Computer Dictionary at 118 (5th Ed. 2002); *see also, e.g.,* Ex. A-4 at 1:34-45; 14:55-63. Similarly, a "participant" in a network is self-defining as an entity that is participating in that network, i.e., exchanging data with participants in the network. Medvidović Decl., ¶¶ 95-96;

see, e.g., Ex. A-4 at Abstract ("A technique for broadcasting data across a network is provided. An originating participant sends data to another participant, which in turn sends the data that it receives from a neighbor participant to its other neighbor participants."). The remaining terms are also used in the Asserted Patents consistent with their plain and ordinary meaning. Medvidović Decl., ¶¶ 80, 88, 91, 95, 98, 101, 108, 112, 115, 128, 134, 136, 139, 142, 145, 158, 161.

Because these terms are readily understood, Defendants' proposed constructions are unnecessary, unhelpful and confusing. Given Defendants' unnecessary nomination of myriad terms for construction, the page limit for this briefing permits only representative examples of unsupported limitations Defendants would read into these terms.

In many instances, under Defendants' constructions, the jury would have to grapple with constructions within constructions that cumulatively add limitations and result in a circular definitions. For example, Defendants define "neighbor" (Term 15) to mean "participant that has agreed to maintain a connection," but define participant (Term 13) using neighbor, and define connection (Term 14) using participant. Replacing the underlined terms with Defendants' other proposed constrictions for these terms (shown in brackets) illustrates the complexity and circular nature of Defendant's construction as shown below

> "Neighbor: a participant [component that maintains *m* connections to its *m* **neighbors** through which it can originate and receive broadcast messages] that has agreed to maintain a connection [point-to-point network channel maintained between the unique addresses of two participants through which data can be sent and received]"

None of this is necessary, because a "participant" in a network is readily understood as something participating in the network, a "connection" is a link between such participants, and a "neighbor" is a participant that can be connected to. Medvidović Decl., ¶¶ 95-96. 98-99, 101-102. Defendants' construction for "participant" also unnecessarily reiterates aspects of the m-

regular claim elements (as discussed for Term 17), adds an unsupported "agreement" requirement not found in the specification, and reads in another unsupported and confusing requirement that the connection is a "point-to-point network channel ... between ... unique addresses." *Id.*, ¶ 100.

Defendants import various other unsupported limitation into these terms. For "computer network" and "computers" (Terms 9, 11), Defendants' proposed construction unnecessarily imports the additional requirement that a computer network must include "two physical computers," which is not consistent with its plain and ordinary meaning because a POSA would understand that a computer network could comprise server software operating on separate hardware platforms; however, it could also comprise separate software processes operating on a single hardware platform as demonstrated in the specification and dependent claims. *See* Ex. A-1 at 15:29-31 ("Computer ... includes multiple application programs ... executing as separate processes"), Claim 10 ("The computer network of claim 1 wherein a computer hosts more than one participant"); Medvidović Decl., ¶ 82; *see also Phillips v. AWH Corp.*, 415 F.3d 1303, 1314 (Fed. Cir. 2005) ("Because claim terms are normally used consistently throughout the patent, the usage of a term in one claim can often illuminate the meaning of the same term in other claims.")(citation omitted). Defendants' construction for "computer network" is further problematic in relying on a construction-within-a-construction, defining "computer network" with "computer," itself a defined term, unnecessarily adding more complexity and confusion.

Defendants' proposed construction for "a plurality of participants" (Term 12) unnecessarily imports additional requirements of a "specific group" of participants. There is no such requirement in the specification, which specifically contemplates the selection of random participants. Medvidović Decl., ¶ 93.

Defendants propose limiting "data" (Term 20) to "the payload inside a network

message." All network messages are data, not just their "payload," and Defendants' construction would confusingly require the jury to parse between a message and a message payload, a distinction not made in the Asserted Patents. *Id.*, ¶¶ 110-111.

For "peers" (Term 21), Defendants propose a bizarre construction requiring equal "privilege" and "equipotent computers," which are not consistent with the understanding of one of skill in the art and will only serve to confuse the jury. *Id.*, ¶ 113. This goes beyond the plain meaning of peers in a network, which can include computers, or specific software elements running on computers, communicating, where each simultaneously acts as a client, thus able to make requests of other peers and a server, and thus able to respond to requests from other peers. *Id.*, ¶ 114.

For broadcast channel (Term 22), Defendants seek the requirement that the network must have a "unique identifier," which is not required by the claims or intrinsic record. *Id.*, ¶¶ 117-118.

B. Term 22("broadcast channel," "broadcast channels.")

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
22 "Broadcast Channel" & Broadcast Channels"	No construction necessary: plain and ordinary meaning	'344, '966, '634 "broadcast channel": "a communications network with a unique identifier consisting of interconnected participants where each participant receives all data broadcasted on that uniquely identified communications network" '147 "broadcast channel": "a communications network with a unique identifier consisting of interconnected computers where each computer receives all data broadcasted on that uniquely identified communications network" All "broadcast channels": "more than one broadcast channel"

1. Defendants' Responsive Statement

Consistent with the claims and the specifications, Defendants' construction is that a broadcast channel has a unique identifier and each computer on the broadcast channel receives all data broadcast. In contrast, Plaintiff's improperly proposed construction is a network for broadcasting information, which has no defined boundaries. Only Defendant's construction is supported by the claims and specifications. The patents confirm that each computer must receive all data broadcasted on the broadcast channel: "[e]ach computer that is connected to the broadcast channel receives all messages that are broadcast while it is connected." A-1, Abstract. Because the data sent over each broadcast channel is unique to that broadcast channel, each broadcast channel must be uniquely identified. KD¶97-104. The specifications note that the

broadcast channel must contain a unique identifier, referred to as a "session identifier" that "identifies the broadcast channel to which [a] process wants to connect." See, e.g., A-1, 18:2-5; 12:4-9; 29:13-24 ("[T]he channel instance or session identifier may be a very large number … to help prevent an unauthorized user to maliciously tap into a broadcast channel"); see also D-14, 208:25-215:17 [redacted]

[redacted]

2. Acceleration Bay's Reply

There is no basis for Defendants' request to read in a limitation that a broadcast channel must have a "unique identifier." As support, Defendants point to an optional embodiment that a channel could be identified by a large number for security purposes, but such exemplary language does not support reading a limitation into every claim. A-1 at 29:13-24 ("[T]he channel instance or session identifier ***may be*** a very large number.") (emphasis added). The only reference to unique in the specification confirms it is just an option. A-1 at 12:4-12 ("it is ***possible*** for a computer to be connected to multiple broadcast channels that are uniquely identified by channel type and channel instance.") (emphasis added). Defendants also seek to read in confusing and redundant requirements regarding the interconnected nature of the participants and "each participant receives all data." This is yet another instance of Defendants' attempt to complicate the claims by reiterating other claims elements. The claims separately recite the nature of the connections between the participants, and do not require that ***all*** data sent over the network are broadcast to ***all*** participants (as Defendants argue). Instead, the claim simply provides that it is satisfied when "an originating participant sends data to the other participants by sending the date through each of its connections," which does not preclude the possibility that some messages are only exchanged between certain participants.

3. Defendants' Sur-Reply Statement

See Section VII.C.3.

C. Term 20("data.")

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
20 "Data"	No construction necessary: plain and ordinary meaning	"the payload inside a network message"

1. Defendants' Responsive Statement

The term needs to be construed because Plaintiff has advanced a broad and confusing definition of the term that could confuse a jury and improperly enlarge the claims. While the claims use the term "data," the specifications loosely refer to "messages," as the transfer of data. This "data" transfer is understood to mean "the payload inside a network message." KD¶84-96. Messages are generally transmitted between computers via packets. KD¶86. "The three principal elements of a packet include: 1. Header - control information such as synchronizing bits, address of the destination or target device, address of originating device, length of packet, etc., 2. Text or payload - the data to be transmitted, and 3. Trailer - end of packet, error detection and correction bits." DEx. 2, at "packet".

Plaintiff's belated construction that "data" is "information" is vague and confusing and would not be helpful to the trier of fact. The term information has many meanings, including common meanings, including knowledge, news, facts, etc.[10] None of these is consistent with the patents and each has the capability to cause confusion or error. Defendants' construction is both accurate and helpful. The point of the broadcast channel is that all participants get exactly the same data. KD¶21-24, 96-104. Plaintiff's own expert confirms this, stating that "broadcasting

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[10] Plaintiff also complains that "[a]ll network messages are data, not just their 'payload.'"

involves the transmission of a packet...." KDEx. 2, 118:14-21. For both broadcasting and multicasting, every member of the network gets the same exact data of a packet, i.e., the same payloads. KD¶96.

2. Acceleration Bay's Reply Statement

Defendants fail to rebut Plaintiff's showing that "data" requires no construction because it has a well-understood meaning, and there is nothing that Defendants point to in the intrinsic record that shows "data" has a special meaning in the context of the Asserted Patents. The patents' discussion of distributing messages to participants does not support Defendants' proposal that data must be limited to the payload section of an identical message exchanged in the network. To the contrary, the patents specifically contemplate for variation in the data being exchanged and that message may be sent using XDR which is a standard data serialization format independent of the lower networking layers. A-1, 14:22-30 ("The computers connected to the broadcast channel may internally store their data in different formats."); *see also* A-1, Abstract, 14:27-30. "Payload" does not appear in the Asserted Patents. *See also* discussion of Broadcast Channel (Term 22).

3. Defendants' Sur-Reply Statement

Plaintiff's two arguments fail. The intrinsic evidence all confirms that the claims ***do*** require that all data sent over the network be broadcast to ***all*** participants by the flooding steps of Terms 38-40.[11] This also confirms that Defendants' construction for data is correct. Plaintiff's arguments about XDR do not change the conclusion that all participants must receive the same

[11] *See, e.g.*, B-1 (9/10/03 Amend.), ("Claim 1 dictates and requires that each participant [] rebroadcasts received messages to its neighbors other than the neighbor from which the node received the message."); B-3 (12/17/03 Amend.), 12 ("[I]n ... the present invention, data flows from each computer to all of the other computers "); E-28, 12-13 ("[T]o broadcast a message, [described claimed flooding steps] ... In this way, the message is propagated to each computer using the underlying network, thus broadcasting the message to each computer....").

message, i.e., the same internet payloads. KSRD ¶44-49. Plaintiff argues against requiring a "unique identifier" because "the channel instance or session identifier ***may be*** a very large number." § VII.B.2. But this merely comments on the size of the identifier, not that it is optional. The specification confirms a user must know the "channel instance" (unique identifier) to join a broadcast channel. A-1, Figs. 6, 8-9, 11:33-12:12, 15:9-28, 16:57-18:56.

D. Terms 38-40

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
38 "Wherein an originating participant send data to the other participants by sending the data through each of its connections to its neighbor participants"	No construction necessary: plain and ordinary meaning	"data is sent from an originating participant to the other participants by broadcasting data through each of its connections to its *m* neighbor participants"
39 "wherein each participant sends data that it receives from a neighbor participant to its other neighbor participants"	No construction necessary: plain and ordinary meaning	"each participant receives data from a neighboring participant and rebroadcasts the received data to its m-1 other neighbor participants"
40 "Wherein each participant sends data that it receives from a neighboring participant to its neighbor participants"	No construction necessary: plain and ordinary meaning	"each participant receives data from a neighboring participant and rebroadcasts the received data to its at least *m*-1 neighbor participants"

1. Defendants' Responsive Statement

The Broadcast Patents are directed to a method of broadcasting and rebroadcasting data, called "flooding," through an m-regular non-complete broadcast channel. A-1, A-2, A-4. Flooding requires that data be broadcast and then rebroadcast: first, a participant sends data to each of its at-least-three neighbor participants; and second, each of those neighbor participants forwards the data to each of its at-least-two "other" neighbor participants (the "Flooding Steps").

Under the guise of "plain and ordinary meaning," Plaintiff offers a non-plain meaning construction that reads the word "each" out of the claims. Moreover, under either construction, the claims are invalid as indefinite because the claims each improperly add method steps to an apparatus claim.

These limitations disclose a participant sending data to ***each*** of its neighbors and that neighbor participant then rebroadcasting the same data (i.e., forwarding it) to each of its m-1 or m neighbors. Plaintiff's expert offers a new previously undisclosed construction that the "plain meaning" of these terms excludes the word "each" in these limitations and does not even require rebroadcasting to "m" or "m-1" neighbors as expressly stated in the claim.

Plaintiff's expert argues that "Defendants' proposed construction[s] [for terms 39 and 40] suggests that the data must be sent to all neighbor participants (by requiring *m*-1); however, the claim language only requires it be sent to other neighbor participants—not necessarily all participants." MD¶160. But this previously undisclosed construction is belied by Plaintiff's previous arguments to preserve the validity of the patents in this case. Plaintiff previously argued that "in a 4-regular network, each participant has four neighbors. Participants pass data to their neighbors in the network, who then forward the message to their neighbors, and so on, rather than being directly connected to all the participants in the network." See, e.g., D.I. 28, p. 2 (emphasis added). Plaintiff further argued, consistent with defendants' construction, that "each participant has a set number of neighbors." Id. Thus, in order to establish inventive concept of the patents, plaintiff argued narrowly that the participant must send the message in question to each and every one of its neighbors, who then forward it on to each of their neighbors, which in turn means the message will be propagated over the entire network. KD¶33-35. As cited above, Plaintiff argued that the participant(s) sends a message to "its" m number of neighbors, who then sends it to "their" m number of neighbors, not some subset thereof. Plaintiff's new assertion that

not all participants need to receive the data contained in the message is contradicted by the positions it has consistently taken in this case and the plain language of the limitation.

Plaintiff's assertion that these terms need not be construed is also wrong because there is a "fundamental dispute" regarding these terms that directly impacts Defendants' invalidity positions, and, when a claim construction issue presents such a dispute, it is the "court's duty to resolve it." O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co., 521 F.3d 1351, 1362 (Fed. Cir. 2008). These limitations render the Flooding Claims5 indefinite as improper mixed method and apparatus claims under either party's construction, as alleged in Defendants' May 6, 2016, Invalidity Contentions. See IPXL Holdings, LLC v. Amazon.com, Inc., 430 F.3d 1377, 1384 (Fed. Cir. 2005).

Under Defendants' construction, and that offered by Plaintiff's experts, the asserted claims of the Broadcast Patents require the steps of broadcasting and rebroadcasting of data. Plaintiff's two experts admit that at least some steps must be taken, in arguing that the claim language "requires [the data] be sent to other neighbor participants—not necessarily all participants." MD¶160 (emphasis added); see also D.I. 28, p. 13 ("[T]he Broadcast Claims further define the scope of the inventions by requiring that a participant originating a message sends data through each of its connections to its neighbor participants, and that each participant send data that it receives to its other neighbor participants."). (emphasis added) (citations omitted).

These method steps are limitations found in apparatus claims. It is black-letter law that "a single claim covering both an apparatus and a method of use of that apparatus" fails to meet the requirements of § 112 because "it is unclear whether infringement ... occurs when one creates a[n infringing] system, or whether infringement occurs when the user actually uses [the system in an infringing manner]." IPXL, 430 F.3d at 1384. This type of mixed subject matter, or hybrid, claim

"is not sufficiently precise to provide competitors with an accurate determination of the metes and bounds of protection involved and is ambiguous and properly rejected" under 35 U.S.C. § 112 ¶ 2. IPXL, 430 F.3d at 1384.

2. Acceleration Bay's Reply Statement

Defendants waived their argument that Terms 38-40 are indefinite, presenting it for the first time in their opposition brief. Defendants did not include these terms among the 13 other terms they identified as indefinite in the Joint Claim Chart. D.I. 117.

To the extent the Court even considers this waived theory, these are not hybrid method/system claims, and Defendants offer no expert opinion to support their flawed argument. The claims respectively disclose a "computer network for providing a game environment for a plurality of participants," "distributed game system," "computer network" and "information delivery service." Terms 38-40 further define the networks by specifying that the participants exchange messages. This is different from reciting a method (i.e., a series of steps) for exchanging messages. Thus, these claims do not recite both a system and a method for using that system. Instead, these claims resemble Claim 1 at issue in *IPXL* which was not indefinite and recited a "financial transaction system for executing financial transactions" with an "input mechanism enabling a user ***to use*** the displayed transaction information ***to execute*** a financial transaction." *IPXL Holdings, L.L.C. v. Amazon.com, Inc.,* 430 F.3d 1377, 1379 (Fed. Cir. 2005) (emphasis added); *Microprocessor Enhancement Corp. v. Texas Instr. Inc.,* 520 F.3d 1367, 1375 (Fed. Cir. 2008) ("apparatus claims are not necessarily indefinite for using functional language...[claim] is clearly limited to a pipelined processor...*capable* of performing the recited functions, and is thus not indefinite under *IPXL Holdings.*").

In *Scientific Telecommun's LLC v. Adtran, Inc.*, Judge Robinson distinguished *IPXL* and found similar networking claims definite. 2016 WL 6872311, at *4 (D. Del. Nov. 21, 2016).

Like Terms 38-40, those claims covered a network, including components that performed certain functions: "internetwork switch comprising: a first set of ports … and said … switch ***using said association data to forward traffic***… ≠wherein a third set of ports on the router ***connect the router*** to the second set of ports…" *Id.* at n.27 (emphasis added). The Court rejected the same argument Defendants assert here, that stating the actions the participants can perform renders the claim indefinite, finding that "the 'wherein' clause places additional limitations on the second set of ports and the learning mechanism, but claim 2 does not recite a system and a method for using that system. For these reasons, *IPXL* does not apply, and claim 2 is not indefinite." *Id.* Here, the wherein clauses similarly limits the nature of the participants in the network, but does not recite both a system and a method for using the system.

3. Defendants' Sur-Reply Statement

The meaning of these terms is clear. *See* Terms 20, 22, especially fn. 11. They are method steps, which make the claim invalid. Plaintiff does not dispute that "[w]hen an apparatus claim recites a method step, the claim is indefinite under § 112(b)" (Ex. C, 20), but argues that Terms 38-40 "define the networks by specifying that the participants exchange messages"[12] and implies that these limitations should be considered "functional language" that "limits the nature of the participants." § VII.D.2. Plaintiff still describes a method step: the participants are required to exchange messages. Even this is not proper functional language, which is typically couched as "capable of" or "configured to."

The intrinsic and extrinsic evidence all confirm that Terms 38-40 are method steps. The claims are directed to, e.g., a "computer network" that provides "a game environment" ***for the participants***. Terms 38-40 describe the steps those participants are required to ***take*** to broadcast

[12] Actually the messages are "broadcast," not "exchanged."

data to the other participants. These Terms are written in the active tense ("an originating participant sends data"), in contrast to present participle tense used to describe characteristics of the participant ("each participant having connections"); they are written in a sequence confirming they are method steps (1. "originating participant sends data ... to its neighbor participants" and 2. "each participant sends data that it receives from a neighbor participant to its other neighbor participants."). Ex. C, 20-24. The fact that "sending data" is found in two distinct parts of the claim demonstrates these are sequential steps that participants must take rather than an overall capability of the system, which would only need to be mentioned once. The Applicant and Plaintiff both confirmed that these are steps that the participants are ***required*** to perform. B-1, 9; MD¶160; DI 28, 13. Plaintiff's brief simply ignores this compelling intrinsic and extrinsic evidence.[13]

[13] Plaintiff's citations to cases involving claims with functional "capable of" language are unavailing. A limitation that the participants of the Broadcast Claims need only be "capable of" sending messages is no limitation at all and is in direct contradiction with Applicant and Plaintiff's representations that the claims ***require*** that these steps be performed in order to overcome the prior art described in Alagar. MD¶160; B-1 (9/10/03 Amend.), 9.

E. Terms 11, 13("computer," "participant," and variants thereof)

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
11 "Computer"	No construction necessary: plain and ordinary meaning	"physical computer that maintains *m* connections to its *m* neighbors through which it can originate and receive broadcast messages"
13 "Participant" & "Participants"	No construction necessary: plain and ordinary meaning	"participant": "component that maintains *m* connections to its *m* neighbors through which it can originate and receive broadcast messages" "participants": "more than one participant"

1. Defendants' Responsive Statement

Plaintiff's construction that a "participant" is "an entity that is participating in that network, i.e., exchanging data with participants in the network" is circular with no objective boundary for what a participant actually is. Defendants' constructions provides a defined boundary for the terms that is supported by the intrinsic evidence. The specification explains that each participant has a "broadcaster component" that allows it to participate in the network. A-1, 15:30-32. Using the "broadcaster component," "[e]ach computer connected to the broadcast channel allocates [m+1] communications ports for communicating with other computers" and that m of these "are the ports through which the messages of the broadcast channels are sent" and which "form the [m]-regular … graph." A-1, 6:11-21; 17:65-18:2 (FIGS. 8-34 are flow diagrams illustrating the processing of the broadcaster component). These ports are managed by the "broadcaster component," and each computer "interfaces with a broadcaster component 602 for each broadcast channel to which it is connected." **A-1**, Fig. 6; 15:30-39; 17:66-18:2; 20:27-28 ("[T]he routine sets the expected number of holes (i.e., empty internal connections) for this process…). The broadcaster component originates and receives broadcast messages. *Id.*, 16:25-

34 ("The broadcast component is invoked by the application program to broadcast messages in the broadcast channel."). Columns 17 to 29 and Figures 8 to 34 all explain that the broadcaster component maintains m connections to its neighbors and originates and receives broadcast messages. *Id.*, 17:65-18:2. Thus, the terms computer and participant are used in their plain and ordinary meaning, but with reference to their participation in the claimed broadcast channel through use of a broadcaster component.

2. Acceleration Bay's Reply Statement

See Section III.E, VII.M.2.

F. Terms 14, 15("connection," "neighbor" and variants thereof)

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
14 "Connection"; "Connections"; "Connected"; "Connect"; "Connecting"; "Interconnections"; and "Disconnecting"	No construction necessary: plain and ordinary meaning	"connection": "point-to-point network channel maintained between the unique addresses of two participants through which data can be sent and received" "connections": more than one connection "connected": "having a connection" "connect": "to form a connection" "connecting": "forming a connection" "interconnections": "connections between participants" "disconnecting": "breaking a connection"
15 "Neighbor"; "Neighbors"; and "Neighboring"	No construction necessary: plain and ordinary meaning	'344, '966, '634, '069 "neighbor": "participant that has agreed to maintain a connection" "neighbors": "pair of participants that have agreed to maintain a connection" '147 "neighbor": "computer that has agreed to maintain a connection" "neighbors": "pair of computers that have agreed to maintain a connection"

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
		All "neighboring": "being a neighbor of"

1. Defendants' Responsive Statement.

Defendants' proposed constructions recognize that neighbors have direct "point to point" connections to each other through which they send data. Defendants' construction is supported by the claims and specification. In the claims, "each participant" has "*connections* to at least three neighbor participants" and "an originating participant sends data to the other participants" of the network "by sending the data *through each of its connections* to its neighbor participants" and each of those m neighbor participants then "sends data that it receives from a neighbor participant to its other neighbor participants." A-1, claim 1 (emphasis added). The claimed connections are the direct connections between neighbors through which data is sent from a participant to a neighbor participant. Indeed, the PTAB noted that "participants have connections through which data can be sent or received." C-1, p. 16.

Further, the specification confirms that are sent to "each other connected computer using each computer's address." **A-1**, 4:14-19. The patents explain how each connection is established through a unique address including a different port for each connection to a neighbor: "[e]ach computer connected to the broadcast channel allocates [m + 1] communications ports for communicating with other computers. [m] of the ports are referred to as 'internal' ports because they are the ports through which the messages of the broadcast channels are sent." **A-1** at 6:11-15. The patents emphasize that a connection is established only if one participant ***agrees*** to a request initiated by another to make a connection, and describe internal messages to carry out this call and respond procedure. KD¶62; A-1, 17:40-63; Fig. 17 & 23:10-14.

Under the guise of plain and ordinary meaning, Plaintiff's belatedly proposed expansive constructions eviscerate the entire structure of the claims and are flatly contradicted by the claim language, specification, file history and representations to this Court. Plaintiff now argues that connections are simply "links" and neighbors are "network participants who can communicate." Under Plaintiff's constructions, all of the participants in the broadcast channel are "connected" and "neighbors" because they all "can communicate." KD¶53-66. Indeed, the entire purpose of the broadcast channel is allow communication among all of the participants so that they each receive all messages broadcast on the channel. Instead of citing to the claim language and columns explaining the nature and purpose of the connections established between neighbors, Plaintiff misleadingly cites to the term "connection paths," a completely different term used only once. MD¶99. Plaintiff's present constructions also conflict its constructions before the PTAB and this Court. C-1, p. 15 (connection is "an edge between two game application programs connected to a logical broadcast channel that overlays an underlying network."); DI 28, p. 7.

Defendants' constructions are consistent with the PTAB's and capture the essential elements of the exemplary TCP/IP connection used in the patents.

2. Acceleration Bay's Reply Statement

As discussed above, Defendants' construction for these terms improperly and unnecessarily reiterates that the network is m-regular, which is already plainly stated in the claims. Defendants' expert does not offer any opinion as to Term 15 either. Defendants invite error by seeking to import into the claims unrecited limitations that the connection between the participants must be based on a persistent "point to point" channel based on unique address and that the participants must reach an agreement regarding their connection. The specification does not support reading in these limitations and in fact specifically contemplates using the Internet as an underlying network system which has UDP as a core member of the Internet protocol suite

and XDR as a message format which is independent of the transport layer, and not based on persistent point to point connections. *See* A-1, Abstract, 14:27-30; wikipedia.org/wiki/User_Datagram_Protocol; wikipedia.org/wiki/External_Data_Representation. Defendants rely on a statement that messages can be sent "using each computer's address," but this statement does not include a requirement about a "unique" address or a persistent point to point link, and is described as merely being "one embodiment." A-1, 4:3-21. Moreover, that a concept appears in one embodiment (which is not even the case here) is not a basis to read that concept into the claims as a limitation. *Cadence Pharm. Inc. v. Exela PharmSci Inc.*, 780 F.3d 1364, 1369 (Fed. Cir. 2015) ("even if 'all of the embodiments discussed in the patent' included a specific limitation, it would not be 'proper to import from the patent's written description limitations that are not found in the claims themselves.'") (citation omitted).

Additionally, rather than "emphasize" that a connection is established only if the participants reach an "agreement," as Defendants contend, the portions of the specification identified by Defendants simply describe the use of communication protocols and messaging — and "agreement" does not even appear in the patents. Def. Opp. at Term 14, citing A-1, 17:40-63; Fig. 17, 23:10-14. All this means is that the participants are participating in the broadcast channel, captured by the plain meaning of "participant," but there is no support for Defendants' proposal that the participants must negotiate some "agreement" between themselves.

The PTAB's statement that "participants have connections through which data can be sent or received," also does not support reading in either limitation into the claims. C-1, p. 16.

3. Defendants' Sur-Reply Statement

Defendants' construction is the only logical way to interpret the term "connection" in light of the specific patented ***networking*** technology. *Nystrom v. TREX Co.*, 424 F.3d 1136, 1142–46 (Fed. Cir. 2005) (limiting claim term so that it was consistent with the specific

technology that was consistently described in the specification and file history); *see also,* § VII.F.1; *see also* E-28, 12-13 ("originating computer sends the message to … using its point-to-point connections"). Defendants' construction clearly defines the point-to-point connection. *See* KD¶53-66.[14]

G. Term 29("fully connected portal computer," "located portal computer.")

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
29 "Fully connected portal computer," & "located portal computer"	No construction necessary: plain and ordinary meaning	"a portal computer connected to exactly *m* neighboring participants of the network"

1. Defendants' Responsive Statement

These patents specifically define these terms and they have no plain and ordinary meaning. The patents state that "each fully connected computer has [m] internal connections." A-5, 14:52-53. Thus the "fully connected portal computer" is the "portal computer connected to exactly *m* neighboring participants."

The portal computer being connected to exactly *m* neighboring participants of the network is central to how a portal computer adds a seeking participant to a broadcast channel. **A-5**, 5:39-45 ("[a] seeking computer locates the broadcast channel by contacting the portal computers ***until it finds one that is currently fully connected to the broadcast channel.***") (emphasis added). To overcome prior art, the applicants added the limitation and explained that

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[14] Applicant expressly disavowed the permissive "can communicate" or "link" construction now advanced by Plaintiffs (which is not consistent with the technology at issue). Applicant stated the "neighbors" in Alagar are "any two mobile hosts that can 'hear' each other" and that this is "the opposite" of the claimed invention, which "requires" that each participant "connects to and forms a neighbor bond to exactly an m number of neighbors." B-1 at 9-10. This "neighbor bond" is precisely what Defendants' proposed construction captures and Plaintiff seeks to avoid.

the "fully connected portal computer" uses its *m* connections to identify *m* neighbors for the seeking participant to connect to in order to maintain m-regularity. **B-5** (May 10, 2004 Amend.) ("The ***portal computer*** directs the identification of ***a number of (for example four)***, randomly selected ***neighboring participants*** to which the seeking participant is to connect."). The patents explain that if the "seeking participant" does not connect to a portal computer connected to exactly m neighbor participants, then a broadcast channel cannot be formed. **A-5**, 12:65-13:5 ("When a seeking computer locates a portal computer that is itself not fully connected, the two computers do not connect ..."). Thus a "fully connected portal computer" can only refer to "a portal computer connected to exactly *m* neighboring participants of the network." For claim 19 of the '634 patent, the "located portal computer" has the same meaning.[15]

2. Acceleration Bay's Reply Statement

Defendants' construction of fully connected portal computer as limited to being connected to m, and only m participants, should be rejected as illogical and as reading out embodiments in the specification. The patents explain that a computer seeking to connect to a broadcast channel contacts a fully connected portal computer, which then identifies to the seeking computer which computers it should connect to. A-1, 5:18-55. Logically, there is no reason for the portal computer—which performs a matchmaking function—not to be connected to as many other participants as possible, so that it can handle multiple incoming requests to be joined to the broadcast channel. *See* A-1, 6:44-63 (seeking computer is transferred from the call-

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[15] The specification explains that the seeking computer will seek to "locate" several computers but the one that is finally located is the "fully connected portal computer." **A-4**, 5:20-24 ("To connect... the computer seeking the connection first locates a computer that is currently fully connected to the broadcast channel and then establishes a connection with four of the computers that are already connected to the broadcast channel."); *id.*, 5:67-6:2 ("The found portal computer then directs the identifying of [m] computers (i.e., to be the seeking computer's neighbors) to which the seeking computer is to connect.").

in port to a transfer port so that other computer can connect to the portal computer on the call-in port). Under Defendants' unreasonable construction, each participant seeking to join a broadcast channel (by connecting to m participants) would need an individual portal computer (because each one would have only m other participants to pass off). Defendants cite to the portion of the file history explaining that a portal computer identifies m neighbors for the particular seeking participant and the specifications' statement that the seeking participant will connect to m neighbors (making the participant fully connected), but it does not follow from either that the ***portal computer*** can have no more than m such neighbors ready to pass off. Def. Opp. at Term 29, citing B-5, A-5, 12:65-13:5. Defendants' construction should also be rejected as inconsistent with the disclosed embodiment where ***all*** participants in a broadcast channel are connecting through the ***same single portal computer*** (meaning it cannot have just m participants to pass to the seeking computers, each of which will require m neighbors). Defendants also ignore the teaching of a flexible port ordering algorithm to handle the challenge of connecting so many participants to a single portal, which only makes sense if the portal can have more than one set of m participants to identify. A-4, 12:14-19, 41-44. Defendants' expert does not offer any opinion for this term.

3. Defendants' Sur-Reply Statement

Plaintiff reads out the term "fully connected" from the claim. But Plaintiff tacitly agrees with Defendants' understanding of the term "fully connected." *See* § VII.G.2. ("[T]he seeking participant will connect to m neighbors (making the participant fully connected)."). Plaintiff argues Defendants' construction excludes the embodiment where "the portal can have more than one set of m participants to identify," but this irrelevant as the claimed methods are for adding one participant to one network, where the portal computer is fully connected to *that* network.

H. Term 31("sends an edge connection request....")

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
31 "Sends an edge connection request to a number of randomly selected neighboring participants to which the seeking participant is to connect"	No construction necessary: plain and ordinary meaning	"sends a message from the fully connected portal computer through a number of randomly selected connections until fully connected participants are identified to which the seeking participant is to connect"

1. Defendants' Responsive Statement

Defendants' construction is helpful for the jury because it clarifies that it is the fully connected portal computer that sends the "edge connection request." A-5, 13:35-37 ("a portal computer sends an edge connection request message"). It also defines the function of the "edge connection request" in view of the intrinsic evidence. The specification explains that the edge connection request is sent to identify fully connected participants to which the seeking participant is to connect. A-5, 5:20-24 ("[t]o connect... the computer seeking the connection" locates a fully connected computer and "then establishes a connection with four of the computers *that are already connected* to the broadcast channel.") (emphasis added). Applicant amended the claims to include this characteristic to overcome the prior art because the prior art *"fails to disclose a method for identifying a pair of participants of the network that are fully connected."* B-5, (May 17, 2004 Amend.), p. 9 (emphasis added).

2. Acceleration Bay's Reply Statement

Defendants' proposed construction is unhelpful and unnecessary, unsupported by any expert opinion, and should be rejected for simply reiterating other claim elements and using 5 other terms Defendants seek to construe, thus complicating, rather than clarifying, the claims. Medvidović Decl., ¶ 135. Defendants state that their construction clarifies that the portal

computer sends the request and identifies to whom the seeking participant should connect, but both concepts are already clearly stated in the claim, rendering the construction confusing surplusage: "a seeking participant contacts a fully connected portal computer, ***which in turn sends an edge connection request***" and "identifying a pair of participants ... to which the seeking participant is to connect." A-5, Claim 1.

3. Defendants' Sur-Reply Statement

Plaintiff does not dispute that the edge connection request identifies fully connected participants, and tacitly agrees with the meaning of "fully connected," as explained in Term 29.

I. Term 30 ("each participant being connected to three or more other participants.")

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
30 "Each participant being connected to three or more other participants"	No construction necessary: plain and ordinary meaning	"each participant being connected to *m* other participants, where m is 3 or more"

1. Defendants' Responsive Statement

Defendants' construction clarifies the limitation and is consistent with the specification's disclosure that each participant is connected to the same number of neighbors. The only technique the '069 patent discloses for maintaining an existing broadcast channel when adding a computer is with reference to Figures 3A and 3B, where each participant has the same number of neighbors. A-5, 5:55-6:9. The '069 patent does *not* disclose any technique for adding participants to a network that is not m-regular. *Id.*, 5:55-58 ("Since the broadcast channel is a 4-regular graph, each of the identified computers is already connected to four computers.").

2. Acceleration Bay's Reply Statements

Defendants' construction merely unnecessarily reiterates the m-regular limitation. Defendants' expert does not offer any opinion in support of Defendants' constructions.

3. Defendants' Sur-Reply Statement

Plaintiff does not dispute that each participant is connected to the ***same number*** of other participants. Defendants' construction confirms this for the jury

J. Term 34("list of neighbors.")

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
34 "List of neighbors"	No construction necessary: plain and ordinary meaning	"a list that specifically identifies each of the *m* neighbors of the first computer"

1. Defendants' Responsive Statements

A computer leaving the network sends all of its m neighbors a list of its m neighbors so that that specific group of m participants can connect with each other to maintain the m-regular graph: "[w]hen computer H decides to disconnect, it sends its list of neighbors to each of its neighbors (computers A, E, F and I) and then disconnects from each of its neighbors. When computers A and I receive the message they establish a connection between them as indicated by the dashed line, and similarly for computers E and F." A-3, 9:44-51. The "list of neighbors" specifically identifies all m of the neighbors of the departing computer.

2. Acceleration Bay's Reply Statements

See Section III.E.

K. Term 32("connection port search message.")

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
32 "Connection port search message"	No construction necessary: plain and ordinary meaning	"a message sent to locate a computer with less than *m* neighbors to which the computer sending the message can connect"

1. Defendants' Responsive Statement

Defendants' construction is helpful to the jury because it spells out the meaning of a technical term. The specification explains that a "connection port search message" is broadcasted when "it needs to establish a connection with another computer." A-3, 9:12-17. As explained above, each computer allocates m internal ports before setting up the claimed broadcast channel. If a computer has m connections, then all of its allocated m ports are used for a connection. In contrast, "[w]hen a computer with an available internal port receives the message," i.e., with less than m ports, "it can then establish a connection with the computer that broadcast the message." Id. (emphasis added). Thus the connection port search message is "a message sent to locate a computer with less than m neighbors to which the computer sending the message can connect."

2. Acceleration Bay's Reply Statement

Beyond improperly restating the m-regular limitation, Defendants' construction that the message is used to ***locate a computer to which the participant can connect***, unnecessarily restates what is already stated in the claim: "the … computer broadcasts a connection port search message … ***to find a … computer to which it can connect.***" A-3, Claim 1. Defendants' expert offers no opinion for this term.

3. Defendants' Sur-Reply Statement

Plaintiff incorrectly claims that the connection port search message is only "to find a … computer to which it can connect." The plain language of the claims specify that the connection port search message is "to find a third computer to which it can connect ***in order to maintain an m-regular graph…***" *Id.* Defendants' construction explains that the found third computer is one with fewer than m neighbors so connecting to the third computer maintains the m-regular graph, as explained in the file history. *See* B-3 (12/17/03 Amend.), 9 ("When a neighbor receives the port connection request…it will recognize the condition that its neighbor also has an empty port.").

L. Term 33 ("in order to maintain an m-regular graph.")

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
33 "In order to maintain an m-regular graph"	No construction necessary: plain and ordinary meaning	"to maintain the state of the broadcast channel as *m*-regular following the disconnection, where m is the same number before and after the disconnection"

1. Defendants' Responsive Statement

Defendants' construction spells out the plain and ordinary meaning of the term, i.e., the number of connections each computer has is the same number (*m*) before and after the disconnection. This is confirmed by Plaintiff's expert in the related *inter partes* review proceedings. DEx. 3, 77:15-19 ("Q. Right. So whatever M is, M should be the same before and after the healing mechanism is implemented, right? A. Yes."). In contrast, Plaintiff's construction is not the plain and ordinary meaning of "maintain." Plaintiff contends that "to maintain the broadcast channel as m-regular" resulting graph does not need to have the same *m*, contrary to the plain language of the claims and its expert.

Plaintiff's expert relies on a part of the specification that actually supports *Defendants'* construction. MD¶140 (citing **A-3**, 14:52-15:6). The specification explains that a broadcast channel can be maintained as m-regular when *m* (referred to as "internal connectors") is even. **A-3**, 14:52-15:6. It states, on the other hand, that a broadcast channel cannot be maintained as m-regular when *m* is odd. *Id.* ("In such a situation, the broadcast channel is neither m-regular nor m-connected."). Instead, a ***new*** computer needs to join before the broadcast channel seeks to become m-regular again. *Id.* ("When the next computer connects to the broadcast channel, it can again become m-regular and m-connected."). Plaintiff's construction is wrong because it asserts that "maintaining an m-regular graph" can be achieved by not maintaining an m-regular graph.

2. Acceleration Bay's Reply Statement

See Section III.E.

3. Defendants' Sur-Reply Statement

The claims were expressly amended to confirm that the graph is m-regular before and after the disconnection, where m has a set value. *See* B-3 (12/17/2003 Amend.), 4-8, 11 (claims amended to show each claim "***has*** an 'M' value of at least 3," and applicant argued that the "present invention provides important methods … for reconfiguring the M-regular graph ***that is the computer network***") (emphasis added). The preambles specify that the broadcast channel is m-regular before the disconnection. A-3, 28:53-55 and 30:7-8. And the last limitation of the claims specify that the broadcast channel is still m-regular after the disconnection. *Id.*, 28:65 and 30:18.

M. Term 9 ("computer network.")

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
9 "Computer Network"	No construction necessary: plain and ordinary meaning	"at least two physical computers that are interconnected"

1. Defendants' Responsive Statement

The term "computer network" refers to "at least two physical computers that are interconnected." This construction is important because Defendants do not sell physical computers. Indeed, the specification explains that computers are physical devices. *See, e.g.*, A-1, 4:1-30 (referencing "host computers"); *see, e.g.*, *Brooktrout, Inc. v. Eicon Networks Corp.*, 2004 WL 5643968, at *4-6 (E.D. Tex. 2004) (defining "computer network" to mean "a system of two or more interconnected computers," the ordinary meaning in the 1990s).

2. Acceleration Bay's Reply Statement

Defendants fail to explain how the single reference to "host computer" in the specification compels a confusing construction that a "computer network" must be "at least two ***physical computers*** that are interconnected." Defendants (and their expert) fail to address Dr. Medvidović's opinion that a "computer network could comprise server software operating on separate hardware platforms [or] separate software platforms operating on a single hardware platform." Medvidović Decl., ¶ 82.

N. Term 12 ("a plurality of participants.")

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
12 "A plurality of participants"	No construction necessary: plain and ordinary meaning	"the specific group of participants of the network"

1. Defendants' Responsive Statement

The specifications of the patents make clear that "a plurality of participants" refers to "the specific group of participants of the network." As § II.B [Defendants' Statement of Facts] outlines, the specification is not referencing a random group of participants, but rather a precise number of participants connected to a particular network. Defendant's construction provides greater assistance to the trier of fact regarding who or what the "plurality of participants" is on the disclosed network.

2. Acceleration Bay's Reply Statement

Defendants fail to establish that it is necessary to read "specific group" into the clear language of this claim, and do not cite any support in the record for this construction. Defendants' expert also does not offer any explanation.

O. Term 21("peers," "peer-to-peer connections.")

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
21 "Peers" & "Peer-to-Peer Connections"	No construction necessary: plain and ordinary meaning	'344, '966, '634 "peers": "equally privileged and equipotent participants of the network" '147 "peers": "equally privileged and equipotent computers of the network" All "peer-to-peer connections": "connections between peers"

1. Defendants' Responsive Statement

The definition Plaintiff's expert provides for "peers" appears similar to Defendants' construction that "peers" are "equally privileged and equipotent participants/computers of the network." While Plaintiff's expert contends that Defendants' construction "goes beyond the plain meaning of peers in a network," he goes on to explain that "peers" "can include computers or specific software elements running on computers communicating where each simultaneously acts as a client, thus able to make requests of other peers, and a server, thus able to respond to requests from other peers." MD¶113. This is consistent with Defendants' definition of peers because the ability to make requests and have them fulfilled by other peers indicates that the peers are equally privileged and equipotent, and is consistent with the intrinsic evidence. *See, e.g.*, A-1, 13:29-31 (indicating that all peers have the same knowledge of each other and have access to the same information even if there is a connection failure of a neighbor peer). Defendants' construction spells this out for the jury.

2. Acceleration Bay's Reply Statement

Defendants do not cite any intrinsic support to add their confusing construction to the

plain and ordinary meaning of these terms, which would require the jury to make determinations regarding the potency and privilege of network participants, neither of which are referenced in the Asserted Patents. Nor does their expert offer any opinion regarding this term.

P. Term 35("...in a state to coordinate ...")

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
35 "When the portal computer or the plurality of portal computers is in a state to coordinate the connection of the seeking computer to the network"	No construction necessary: plain and ordinary meaning	"when one or more portal computers are fully connected to the network and listening for requests from seeking computers to be connected to the network"

1. Defendants' Responsive Statement

As explained in "fully connected portal computer" (Term 29), a portal computer is in a state to coordinate when it is fully connected. Indeed, Defendants' construction reflects how Plaintiff characterized the '497 patent to the Patent Office when it said that "[t]he '497 Patent ... describes how the computer seeking the connection first locates a *computer that is fully connected to the broadcast channel.*" E-35, p. 3. The fully connected portal computer is central to adding a seeking participant to a broadcast channel. *See, e.g.*, A-6, 5:39-45 ("A seeking computer locates the broadcast channel by contacting the portal computers *until it finds one that is currently fully connected to the broadcast channel.*") (emphasis added); 12:41-45. If the portal computer is not fully connected, it is not "in a state to coordinate" a connection; the seeking computer will try another portal computer. E.g., A-6, Fig. 11, Block 1101, 20:3-7. Thus, this term should be construed to define the proper scope of what was actually invented and what the "in a state to coordinate..." language truly means. A-5, 12:65-13:5.

2. Acceleration Bay's Reply Statement

Defendants' construction attempts to read in a limitation that the portal computer must be "fully connected," which is not a requirement of Claim 1 of the '497 Patent in which this term appears, but is recited as a limitation in other claims in the Asserted Patents, such as Claim 19 of the '634 Patent, confirming under the doctrine of claim differentiation that it should not be read in here. *Discovery Pat.*, 769 F. Supp. 2d at 671. To the contrary, all that is required by the plain language of Claim 1 is that the portal computer is in a state such that it can "coordinate the connection of a seeking computer to the network." Defendants fail to explain what it means to be "listening for requests" or why that limitation is warranted over the plain language that the portal computer is "in a state to coordinate." Defendants' expert does not offer any opinion as to this term either.

3. Defendants' Sur-Reply Statement

Plaintiff has little substantive response. Plaintiff's attempt to invoke claim differentiation is flawed since it invokes a doctrine that addreses claims within the *same patent* by citing to claims in *different patents*. That doctrine does not apply to this term. Plaintiff's critique that Defendants "fail to explain" the meaning of "listening for requests" is not a legitimate criticisim; the phrase "listening on a port" is common phrasing in the art. *E.g.*, Ex. G ("LISTEN – represents waiting for a connection request from any remote TCP and port.").

VIII. TERM 37 (PORT ORDERING ALGORITHM)

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
37 "Port ordering algorithm"	No construction necessary: plain and ordinary meaning	"a rule-based procedure for generating an order of portal computer ports in a non-random manner"

A. Acceleration Opening Bay's Statement

The term "port ordering algorithm" requires no construction because its meaning is evident from its plain language: an algorithm used to select the order of ports. Medvidović Decl., ¶ 149. The claims confirm this, explaining that the port ordering algorithm is "used to identify the call-in port [] wherein the communications ports selected by the port ordering algorithm may be re-ordered..." Ex. A-6 at Claim 1. The specification's discussion of the "port ordering algorithm" is consistent with this plain and ordinary reading. For example, the Abstract states that, "A port ordering algorithm is used to identify the call-in port." *Id.* at Abstract.

Given this plain and ordinary meaning, Defendants' proposed construction should be rejected as unnecessary. It is further flawed because it excludes any port ordering algorithm that includes any random component. Defendants' proposal is contradicted by the specification's explanation that a port ordering algorithm can use a *mixture* of sequential and random steps to identify a call-in port. Ex. A-6 at 11:58-12:32; Medvidović Decl., ¶ 153. For example, the port ordering algorithm can use a hashing algorithm that may be "seeded" with channel types, thereby providing both random and non-random elements. Ex. A-6 at 11:58-12:32; Medvidović Decl., ¶ 153. That the port ordering algorithm can be random *in part*, is further confirmed by the Applicants' statement during prosecution that the order of the call-in ports may also be randomly re-ordered. Ex. B-6 (6/14/2004 Amend. and Request for Reconsideration) at 11, 13-14; Medvidović Decl., ¶ 154.

B. Defendants' Responsive Statement

As discussed in § II.B [Defendants' Statement Of Facts], network participants connect to applications running on computers through ports. According to the preferred embodiment, the seeking computer and the portal computer each use the same algorithm (called a "port ordering algorithm) to order ports for use in communication. KD¶41-44 (*citing* A-1, 11:61-12:12).

There are three reasons that Defendants' proposed construction should be adopted. First, while Plaintiff tells the Court not to construe this term, it is simultaneously telling the Patent Office that the term has a special meaning. D-7, pp. 12-14. Second, Defendants' construction is helpful to the jury because it presents a simple definition of the claimed algorithm and what it does in the context of the '497 patent. "A rule-based procedure for generating an order of portal computer ports" is a simple plain-English definition of the term. *E.g., Typhoon Touch Techs., Inc. v. Dell, Inc.*, 659 F.3d 1376, 1384 (Fed. Cir. 2011). Finally, Defendants' proposed construction is faithful to a specific disclaimer of claim scope made to overcome prior art during prosecution. Plaintiff disavowed "random port numbers," stating that the "port ordering algorithm minimizes the time required to locate the call-in port of a portal computer by identifying a non-random port number order that a portal computer should use when finding an available port for its call-in port." B-6 (Jun. 14, 2004 Amend.), p. 11. This clear and unambiguous statement defining the job of the port ordering algorithm limits this term to only "non-random" algorithms.

C. Acceleration Bay's Reply Statement

Defendants fail to justify the need to construe this term, and offer no expert analysis. Stating that an algorithm is a "rule-based procedure for generating an order of portal computer ports" does not provide any helpful guidance for the actual term "port ordering algorithm."

The real dispute is Defendants' attempt to manufacture a limitation that no ***portion*** of the algorithm can be random. That is a far cry from the statements during prosecution distinguishing prior art based on a purely random dialing order that had no non-random portion, and did not in any way disclaim algorithms that merely include a random ***component***. *See* B-6 (6/21/04 Amend.), p. 11. To the contrary, the specification clearly explains that the port ordering example can, for example, apply a deterministic "hashing algorithm" and then a separate random step. A-

6, 11:64-12:32 ("each seeking computer may each reorder the first few port numbers ***generated by the hashing algorithm***. For example, each seeking computer could ***randomly reorder*** the first eight port numbers generated by the hashing algorithm.") (emphasis added). Plaintiff's statement to the PTAB that the term refers to "provid[ing] a sequence of port numbers" is fully consistent, and does not rule out a portion of the process being random. D-7 at 12-14. Thus, Defendants' overly narrow construction should be rejected as inconsistent with the specification.

D. Defendants' Sur-Reply Statement

Plaintiff concedes that claim scope was disclaimed, but argues that Applicant did not disclaim non-random algorithms altogether. But, "the scope of surrender is not limited to what is absolutely necessary to avoid a prior art reference...." *Tech. Props. Ltd. v. Huawei Techs. Co.*, 849 F.3d 1349, 1359 (Fed. Cir. 2017). Here, the Applicant plainly characterized the invention as requiring "a non-random port ordering algorithm," which identifies "a non-random port number order." *See* A-6 (6/21/04 Amend.), 11, 13. Plaintiff disclaimed random port ordering algorithms that generate a random list of ports. Plaintiff's citations to the specification are unavailing because they do not impact the scope of claim disavowal, which is controlled by the prosecution history.[16]

[16] Plaintiff's citations pertaining to reordering of ports relates to a different limitation and does not impact the proper legal scope of "port ordering algorithm." Finally, even if the Court were to view the disclaimer above as being limited to "components" of an algorithm (whatever Plaintiff means by that), an algorithm that in part operates in a random manner to generate a list of ports will generate that list of ports in a random manner even if one step is non-random. *E.g.*, Ex. H, 166 ("Even for a fixed input, different runs of a randomized algorithm may give different results...").

IX. TERM 27 (COMPUTER READABLE MEDIUM)

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
27 "computer readable medium"	No construction necessary: plain and ordinary meaning	"any medium for storing or transporting computer readable instructions, including memory, storage devices, carrier waves and communications links."

A. Defendants' Responsive Statement

Defendants propose the plain and ordinary meaning of computer readable medium, which includes transitory signals (e.g. carrier waves), and Plaintiff offers no position. By adopting Defendants' construction and including transitory signals in the computer readable medium, six computer readable medium claims are unpatentable as not being within the scope of one of the four categories of statutory subject matter. *In re Nuijten*, 500 F.3d 1346, 1354-57 (Fed. Cir. 2007).

Defendants' construction is confirmed by the specification, which states that "computer-readable medium" includes both ***storage media and transmission media***, including transitory embodiments such as wirelessly communicated signals as well as non-transitory embodiments such as memory and storage devices. The patents state that computer readable media includes not just "memory and storage devices" but also any media that can store or transport data, including carrier waves for transmitting information via a signal and communications links. A-3, 15:56-65; see also A-4, 16:27-36. The patents confirm that computer readable medium includes carrier waves in explaining that data "may be stored or transmitted via a signal transmitted on a computer-readable media, such as a communications link." A carrier wave is a computer readable medium used to transport data, e.g., computer readable instructions, data structures, and other data via a signal. KD¶107.

The specification is consistent with the plain and ordinary meaning. To those of ordinary skill, the plain and customary meaning of "computer-readable medium" encompasses both transitory and non-transitory media. KD¶105-108. As recognized by the Patent Office, the ordinary meaning of that term "typically covers forms of non-transitory tangible media and transitory propagating signals per se in view of the ordinary and customary meaning of computer readable media, particularly when the specification is silent." KD¶108 (citing KDEx. 11). Plaintiff does not appear to dispute this construction—neither its brief nor its 52 page expert declaration disputes that this is the plain and ordinary meaning of this term.

As a direct consequence of Defendants' construction or the plain and ordinary meaning, claims 19 and 22 of the '634 Patent and claims 11-16 of the '147 Patent are invalid under 35 U.S.C. § 101 as alleged in Defendants' May 6, 2016, Invalidity Contentions. See, e.g., In re Nuijten, 500 F.3d 1346, 1354-57 (Fed. Cir. 2007). Claims that are broad enough to include a transitory, propagating signal are unpatentable because such embodiments are not directed to one of the four statutory categories of patent-eligible subject matter. See, e.g., Mentor Graphics Corp. v. Eve USA, Inc., 851 F.3d 1275, 1294 (Fed. Cir. 2017) (affirming patent ineligibility where claimed "machine-readable medium" covers carrier waves) (emphasis added).

B. Acceleration Bay's Reply Statement

Computer readable medium does not require construction because it has a well understood plain and ordinary meaning – a non-fleeting medium for storing instructions and data that a computer can read, such as hard disks, random access memory, read only memory, DVDs, USB drives, etc. Medvidović Reply Decl., ¶ 165; Pltf. Ex. 1 at 5-6, *Data Retrieval Tech. LLC v. Sybase, Inc.* (N.D. Cal. Jan. 24, 2011) ("computer-readable medium" is "a medium such as a hard disk or CD which can be read by a computer"); *Hewlett-Packard Dev. Co. v. Gateway, Inc.*, 2005 WL 6220718, at *1 (S.D. Cal. Sept. 7, 2005) (construing "computer readable medium" to

mean "including. but not limited to, a hard disk, floppy disk, random access memory (RAM), read-only memory (ROM), or optical disk.").

In arguing for a broader construction including "carrier waves and communication links," Defendants make the mistake of failing to read the claims as a whole. Moreover, the portion of the specification cited by Defendants demonstrates that their construction is incorrect. The term at issue is used in the claims with reference to ***storing instructions*** used to provide a broadcast channel: "computer readable medium ***containing instructions for controlling communications***." *See, e.g.,* A-4 at Claim 19 (emphasis added). Medvidović Reply Decl., ¶ 166. The specification explains that the instructions for implementing the broadcast channel are held in persistent storage devices (so they can be executed by the computer performing the steps), while noting, in contrast, that data structures and messages sent over the channel may be carried in communications links. A-3 at 15:56-65 ("The ***memory and storage devices*** are computer-readable medium that may ***contain computer instructions*** that implement the broadcaster component. ... the ***data structures and message structures*** may be stored or transmitted via a signal transmitted on a computer-readable media, such as a ***communications link***.") (emphasis added); Medvidović Reply Decl., ¶ 166. The specification does not suggest (as Defendants incorrectly argue) that the instructions used to provide the network are somehow stored in carrier waves (which are only used for carrying transmitted data and messages). *Id.* Carrier waves are not suitable to store instruction information for a computer to read. *Id.* Because the term "computer readable medium" is used in the claims only to describe how the instructions are stored or used on computers, and not how data are sent over the network, it should not be broadly construed to cover carrier waves and communications links.

Defendants admit they are attempting to render abstract otherwise patent eligible claims. Def. Opp. at Term 27. Defendants and their expert argue this construction is compelled by 2010

USPTO examiner guidelines, while failing to note that those guidelines expressly state that they are subject to the "broadest reasonable interpretation" standard, which is different from the narrowed *Phillips* standard applied by the Court. *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2144 (2016). Tellingly, Defendants did not include this unsupported argument in their motion on patent eligibility. D.I. 22. In addition to ignoring the context of the claims and specification, Defendants' broad brush approach is inconsistent with the claim construction principle that claims should be construed so as to preserve their validity. *Ruckus Wireless, Inc. v. Innovative Wireless Sols., LLC*, 824 F.3d 999, 1004 (Fed. Cir. 2016) ("If, after applying all other available tools of claim construction, a claim is ambiguous, it should be construed to preserve its validity"). Accordingly, either no construction is necessary for this simple term or the Court should only partially adopt Defendants' proposed construction to the extent of "medium for storing or transporting computer readable instructions, including memory and storage devices."

C. Defendants' Sur-Reply Statement

To avoid invalidity, Plaintiff makes a two-step argument. First, Plaintiff offers a belated construction of the term that imports the word "storage." § IX.B. Then Plaintiff argues that "Computer Readable ***Storage*** Medium" is limited to non-transitory media such as disks. *Id.*. To avoid invalidity, both steps of its argument must be correct; but, neither are.

First, "Computer Readable Medium" (CRM) is distinct from "Computer Readable ***Storage*** Medium." The patents broadly disclose CRM and, as is clear to a POSITA, the term is not relegated to "storage media" but also includes "transitory media." The patent and claims are about ***networking technology*** that describes computer-readable media as specifically including a "communications link." KSRD¶50-57; A-1, 15:61-67. Plaintiff argues that CRM is limited to "storage" media because the patents describe "computer readable medium ***containing instructions***" and that "[c]arrier waves are not suitable to store instruction information." § IX.B.

But Plaintiff's own case refused to limit CRM to "storage" even where storage was more relevant. *Data Retrieval Tech. LLC v. Sybase, Inc.*, (declining to import "storage" limitation even when the CRM claim was for "storing" a computer program). The argument is also technically wrong. Boeing's and Inventor Bourrsassa's other patents explicitly state that computer instructions ***can be contained in a carrier wave.*** Ex. E, ¶ 16 and Ex. F, ¶¶ 18, 20. Second, even assuming *arguendo* that the term CRM should be narrowed to "Computer Readable ***Storage*** Medium," that would not restrict the term to non-transitory media and would still include carrier waves. *See*, Ex. D. Indeed, as that PTO Memo (Ex. D) confirms, Plaintiff was free to initiate reissue proceedings before bringing this suit to try to limit the CRM terms to "non-transitory" computer readable media. This Court may not re-write the claims to preserve them.

X. TERM 10 (NETWORK)

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
10 "Network"	plain and ordinary meaning	Indefinite

A. Acceleration Bay's Opening Statement

"Network" does not require construction because it holds a plain and ordinary meaning and is well understood by those of skill in the art, i.e., a connected group of computers or computer processes. Medvidović Decl., ¶ 84. The usage of "network" in the asserted claims and specifications is consistent with this meaning. *Id.*; *see, e.g.,* Ex. A-2 at 4:5-8 (messages are broadcast "to those computers of the network that are currently connected to the broadcast channel."); Medvidović Decl., ¶ 85.

Defendants incorrectly contend that the term is indefinite for lack of antecedent basis in claim 13 of the '344 and '966 Patents, which state "wherein the network is m-regular." In the IPRs, Defendants took the opposite approach, arguing that "network" was found in the prior art

and did not require construction, while not suggesting it was indefinite. *See, e.g.,* Ex. D-20 at 12-15, 48. An antecedent basis may be present by "implication." *Energizer Holdings, Inc. v. Int'l Trade Commc'n,* 435 F.3d 1366 (Fed. Cir. 2006). Here, in each of these claims and consistent with its plain and ordinary meaning, network refers to the "plurality of participants, each participant having connections to at least three neighbor participants" identified in the claim right before the term "network" is introduced. Medvidović Decl., ¶ 86. That the "network" is the network of the plurality of participants is confirmed by the specification, which repeatedly describes the network as such. *See, e.g.,* Ex. A-1 at 4:3-22, 4:48-53; *Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, 806 F.2d 1565, 1576 (Fed. Cir. 1986) ("A decision on whether a claim is invalid under § 112, 2d ¶, requires a determination of whether those skilled in the art would understand what is claimed when the claim ***is read in light of the specification.***") (emphasis added). Thus, there is an antecedent basis for "network" and the term is definite.

B. Defendants' Responsive Statement

The dispute with respect to this term boils down to whether or not this term is indefinite for lack of antecedent basis in claims 13 of the '344 and '966 Patents, which state "wherein the network is m-regular." Plaintiff's expert argues that the term "network" refers to "the recited 'plurality of participants, each participant having connections to at least three neighbor participants.'" MD¶86. First, such a construction is not "consistent with [the] plain and ordinary meaning" of the term "network." Indeed, because claim 13 of the '344 and '966 Patents does not define the claim scope of what "network" actually refers to, the claims are indefinite. It is entirely unclear if "network" refers to the broadcast overlay or the underlying network. Or perhaps it refers to the "plurality of participants" as Dr. Medvidovic now argues. However, as previously discussed, Dr. Medvidovic describes these participants as "dynamic" and "changing"

(MD¶¶44-45) and thus even Dr. Medvidovic's new construction for the term fails to clearly set forth the scope of the claims.

C. Acceleration Bay's Reply Statement

Defendants do not rebut Dr. Medvidović's analysis that "network" refers to the network between the plurality of connected participants, and Defendants' expert is silent on the issue. Medvidović Decl., ¶86. Defendants inexplicably argue (without any explanation) that Dr. Medvidović's analysis is inconsistent with the meaning of a network, yet repeatedly claim that the networks at issue are used to connect participants. *See, e.g.,* Def. Opp. at Statement of the Facts. Moreover, that participants may be added and dropped (which is true of almost every network) does not render the meaning of the term indefinite.

XI. TERMS 23, 24, 25, 28, 36

A. Acceleration Bay's Opening Statement

1. Term 23 ("A non-routing table based computer network")

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
23 "A non-routing table based computer network having a plurality of participants"	No construction necessary: plain and ordinary meaning	The preamble is limiting and indefinite.

A non-routing table based computer network has the plain and ordinary meaning of a computer network that does not rely on routing tables to move messages between participants. Medvidović Decl., ¶ 119. Routing tables are well known in the art to be a table "which lists and keeps track of all possible routes between nodes." *Id.*, ¶ 120, quoting *Wiley Electrical and Elec. Eng'g Dictionary* at 673 (John Wiley & Sons 2004).

Defendants argue that this term is indefinite because they do not understand what a non-routing table based network means, despite its well understood meaning to those of skill in the

art. Defendants' position is contradicted by their position in the IPR proceedings that this limitation did not require construction and is disclosed by the prior art (which necessarily entails understanding its meaning). *See, e.g.,* Ex. D-38 at 8, 19, 44 ("Shoubridge discloses a non-routing table based, local broadcast mechanism."). Thus, Defendants' IPR positions further confirm that the meaning of this term can be determined with reasonable certainty. *See Cox Commc'ns, Inc. v. Sprint Commc'n Co.*, 838 F.3d 1224, 1231 (Fed. Cir. 2016).

2. Term 24 ("A non-routing table based computer-readable medium containing instructions for controlling communications ...")

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
24 "A non-routing table based computer-readable medium containing instructions for controlling communications of a participant of a broadcast channel within a network"	No construction necessary: plain and ordinary meaning	work seek to maintain at all indefinite.

As discussed above, "non-routing table based" is a definite term. Defendants incorrectly argue that Term 24 is indefinite in reciting a "non-routing table based *computer-readable medium*." Read as a whole, the term makes clear that the computer-readable medium contains "instructions for controlling communications . . . within a network" and that the nature of the network is that it is non-routing table based. Medvidović Decl., ¶ 124. In connection with the IPRs, Defendants had no trouble understanding this limitation or arguing (incorrectly) that it is found in the prior art. *See, e.g.,* Ex. D-38 at 22-24.

3. Term 25 ("...non-routing table based, non-switch based method")

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
25 "A computer-based, non-routing table based, non-switch based method for adding a participant to a network of participants"	No construction necessary: plain and ordinary meaning	The preamble is limiting and indefinite.

A POSA would understand term 25 to require a network that is not based on routing tables or switch-based methods. Medvidović Decl., ¶¶ 125-126. As discussed above, routing-table and non-routing table based networks are well known. A switch or a network switch is also well-recognized technology that connects computers to create a single network where the switch serves as a controller of the network. *Id.*, ¶ 127. A non-switch method, therefore, is a method of creating a network without relying upon such a controller. Thus, there is no merit to Defendants' argument that this term is indefinite.

4. Term 36 ("Wherein the communications ports selected by the port ordering algorithm may be re-ordered")

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
36 "Wherein the communications ports selected by the port ordering algorithm may be re-ordered"	No construction necessary: plain and ordinary meaning	Indefinite. If not indefinite, then "wherein the order of communications ports selected by the port ordering algorithm must be able to be re-ordered"

This term does not require any construction as it has a plain and ordinary meaning: the order ports are selected by the algorithm may be changed. Medvidović Decl., ¶ 147. Defendants argue that the use of the term "may" renders the claim indefinite. Their argument misses the mark because "may" means that the system is capable of, but need not always, change the order

that ports are selected. *See AutoAlert, LLC v. Dominion Dealer Sols., LLC*, Case No. SACV 12-1661-JLS(JPRx), 2014 WL 12042564, at *2-4 (C.D. Cal. Dec. 23, 2014) (finding that the phrase "may affect whether it is favorable" is not indefinite as a matter of law); *Qualcomm Inc. v. Broadcom Corp.,* Civil No.. 05CV1392-B(BLM), 2006 WL 6142779, at *1 (S.D. Cal. May 2, 2006) (construing "***may be*** dynamically activated or deactivated" to mean "***capable of*** being electronically activated or deactivated during operation") (emphasis added).[17]

B. Defendants' Responsive Statement

1. Terms 23-26, 28: Preambles

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
26 "A method of disconnecting a first computer from a second computer, the first computer and the second computer being connected to a broadcast channel, said broadcast channel forming an m-regular graph where m is at least 3, the method comprising:" "A computer-readable medium containing instructions for controlling disconnecting of a computer from another computer, the computer and the other computer being connected to a broadcast channel, said broadcast channel being an m-regular graph where m is at least 3"	No construction necessary: plain and ordinary meaning	The preambles are limiting.
28. "A method in a computer for locating a computer through which to connect to a	No construction necessary: plain and ordinary meaning	The preamble of claim 1 is a limitation. This limitation should be construed to mean "[a] method executed in one

[17] Defendants' position is inconsistent with their IPR argument that term 36 was known in the prior art because a POSA "would have also understood that the order of the ports selected by the port ordering algorithm ***could be*** altered." Ex. D-35 at 50 (emphasis added)(citation omitted).

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
network" "A component in a computer system for locating a call-in port of a portal computer"		computer for locating another computer through which to connect to a network. The preamble of claim 9 is a limitation. This limitation should be construed to mean "a software module providing instructions to allow a computer executing those instructions to locate a call-in port of a portal computer."

Defendants' proposed that the preambles are limiting and specific constructions for Term 28, and Plaintiff appears to agree because it did not brief those terms. Thus, the remaining issue is whether Terms 23-25 are indefinite for having the modifying terms "non-routing table based" and "non-switch based." These terms were added during prosecution and were not in the original specifications. The Internet uses routing tables, and the accused instrumentalities all use the Internet. Therefore, the accused instrumentalities would not infringe. However, Plaintiff's expert opines that the term "non-routing table based" refers to the "computer network" so that the preambles mean "a computer network that does not rely on routing tables to move messages from one participant to another." MD¶119-127. Plaintiff applies a similar meaning to "non-switch based." MD¶127. These interpretations fail to inform, with reasonable certainty, a POSITA about the scope of the invention.6 Certainly, there is no common understanding of the term "non-routing table base computer readable medium." A-4, claim 19. The intrinsic evidence provides no explanation for what these limitations mean. And, Plaintiff's use of the term "rely" shows that the scope of these terms are indefinite. Dr. Medvidovic provides no explanation for what "rely" means, and it is the type of unrestrained and subjective term that has been held indefinite. *See, e.g., Interval Licensing LLC v. AOL, Inc.*, 766 F.3d 1364, 1373 (Fed. Cir. 2014)

(holding "unobtrusive manner" indefinite because the specification did not "provide a reasonably clear and exclusive definition, leaving the facially subjective claim language without an objective boundary"). For instance, Plaintiff's interpretation allows for sending some messages that "rely" on routing tables, without any explanation for why.

2. Term 36 ("... may be re-ordered.")

Term	Plaintiff's Proposed Constructions	Defendants' Proposed Constructions
36 "wherein the communications ports selected by the port ordering algorithm may be re-ordered"	No construction necessary: plain and ordinary meaning	Indefinite. If not indefinite, then "wherein the order of communications ports selected by the port ordering algorithm must be able to be re-ordered"

Defendants' construction is clearer because it explains that the system "must" always be capable of changing the order that ports are selected.

C. Acceleration Bay's Reply Statement

1. Terms 23, 24, 25 ("Non-routing table based...")

Defendants fail to carry their burden to establish that these terms are indefinite, conceding, as they must, that they were able to argue to the PTAB that prior art practiced these limitations. In response to Dr. Medvidović's opinion that these terms mean what they plainly say (e.g., a "non-routing table based network" is a network "that does not rely on routing tables to move messages from one participant to another"), Defendants simply make the bald claim that "These interpretations fail to inform, with reasonable certainty, a POSITA about the scope of the invention." Def. Opp. at Term 23. Defendants' expert did not offer an opinion supporting Defendants' untenable view.

2. Term 36 ("...may be re-ordered")

Defendants appear to have abandoned their argument that this term is indefinite.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CERTIFICATE OF SERVICE

I, Philip A. Rovner, hereby certify that on June 21, 2017, the within document was electronically filed with the Clerk of the Court using CM-ECF which will send notification to the registered attorney(s) of record that the document has been filed and is available for viewing and downloading from CM-ECF.

I further certify that on June 21, 2017, the within document was served on the following counsel as indicated:

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