



Pursuant to the Court’s scheduling and discovery order and Local Patent Rule 4-2, Defendants<sup>1</sup> hereby provide the following preliminary proposed claim constructions and identification of extrinsic evidence for the claim terms and claim elements that should be construed by the Court. For purposes of this 4-2 Statement and reservation of Defendants’ rights, Defendants include below claim terms and claim elements whose construction Defendants believe to be unwarranted in light of the dispositive nature of Defendants’ pending Motions to Dismiss on issue preclusion grounds. Dkt. Nos. 20, 23. A decision by the Court in Defendants’ favor on those motions will render moot any need to construe any terms below that contain the “optimize” term (or any terms which solely appear with respect to claims containing the “optimize” term), because the presence of the “optimize” term in those claims renders those claims indefinite as a matter of law due to issue preclusion. *See* Dkt. Nos. 20, 23.

In IV’s Disclosure of Asserted Claims and Infringement Contentions dated November 14, 2017, IV asserts against at least one Defendant the following claims of the following patents:

- U.S. Patent No. 6,628,629: Claims 1-4;<sup>2</sup>
- U.S. Patent No. 7,359,971: Claims 12-15, 18, 21, 22, 25-27, 33, and 37;<sup>3</sup>
- U.S. Patent No. 7,412,517: Claims 1, 4, 12, and 15; and
- U.S. Patent No. RE46,206: Claims 1, 2, 6, 8, 9, 11, 15-20, 27, 29-33, 38, 41, 44-46, 48-52, 109, 111, 112, 114, 115, 118, 120-124, 126, 129, 132-135, 140, 144, and 146.<sup>4</sup>

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<sup>1</sup> “Defendants” refers to the defendants in the above-captioned cases, including: T-Mobile USA, Inc., T-Mobile US, Inc., Ericsson Inc., and Telefonaktiebolaget LM Ericsson.

<sup>2</sup> IV has since dropped Claim 2 of the ‘629 Patent. To the extent IV is later permitted to re-assert this claim, Defendants reserve the right to modify the list herein.

<sup>3</sup> IV has since dropped Claims 13 and 26 of the ‘971 Patent. To the extent IV is later permitted to re-assert either of these claims, Defendants reserve the right to modify the list herein.

Defendants' preliminary proposed claim constructions and identification of extrinsic evidence appear in Exhibit A, are based upon information currently available to Defendants.<sup>5</sup> Defendants have not completed discovery and have not received Plaintiff's proposed constructions. Defendants, therefore, reserve the right to amend or otherwise supplement the preliminary proposed constructions as appropriate in light of their plain and ordinary meaning and Plaintiff's proposed constructions, including but not limited to in the parties' forthcoming Local Patent Rule 4-3 statement. Nothing in this submission should be construed to be an admission by Defendants. Defendants specifically reserve the right to argue that any of the claim terms identified herein need not be construed by the Court. Defendants reserve the right to offer evidence and argument regarding the construction of any terms or elements that are identified by IV, or to argue for a plain meaning where it is evident that IV's apparent interpretation deviates from that plain meaning.

Defendants will identify intrinsic support at the time identified by the Court's scheduling order, including references to the claims of the asserted patents, specification, prosecution history, and prior art cited on the face of the asserted patents.

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<sup>4</sup> IV has since dropped Claims 45, 46, and 48-52, 115, 124, and 135 of the '206 Patent. To the extent IV is later permitted to re-assert any of these claims, Defendants reserve the right to modify the list herein.

<sup>5</sup> Defendants note that under Plaintiff's application of the claims, certain claims are invalid for failing to comply with 35 U.S.C. § 112 as described in Defendants' invalidity contentions. Defendants' proposed constructions for terms, phrases, or clauses with regard to claims and limitations that fail to satisfy 35 U.S.C. § 112 should in no way be read to imply that the claims satisfy 35 U.S.C. § 112. Moreover, Defendants' inclusion of materials referenced in this disclosure is not an admission that any of these materials constitutes extrinsic evidence as opposed to intrinsic evidence. Defendants reserve all rights to submit any of these materials or similar materials as intrinsic or extrinsic evidence in the event the applicable standard provides for categorization as one or the other.

Defendants do not contend presently that live expert testimony is necessary to construe the patents' claims, but Defendants reserve the right to present the testimony of Dr. Izhak Rubin via sworn declaration regarding the indefiniteness of the claims identified in the attached Exhibit A; and, if Plaintiff asserts such testimony or takes claim construction positions that otherwise necessitate such testimony, Defendants reserve the right to provide rebuttal testimony.

Claim construction discovery is ongoing, and Defendants reserve the right to supplement or amend their preliminary constructions and evidence in light of further claim construction discovery. Also, if Plaintiff later amends or supplements its infringement contentions, or seeks an improper interpretation of a term, phrase, or clause that has not been identified by the parties, Defendants reserve the right to seek the construction of that term, phrase, or clause.

Dated: May 23, 2018

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