

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

SKYHOOK WIRELESS, INC.,

Plaintiff and
Counterclaim-Defendant,

v.

GOOGLE INC.,

Defendant and
Counterclaimant.

Case No. 1:10-cv-11571-RWZ

**SKYHOOK WIRELESS, INC.'S OPPOSITION TO GOOGLE INC.'S MOTION FOR
SUMMARY JUDGMENT OF INDEFINITENESS AND
SKYHOOK WIRELESS, INC.'S REPLY CLAIM CONSTRUCTION BRIEF**

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I. INTRODUCTION

Defendant brings a motion for summary judgment of indefiniteness in the hopes of invalidating Skyhook's patents and escaping liability for infringement. Defendant, however, falls far short of meeting its heavy burden of establishing on summary judgment that there is clear, convincing, and undisputed evidence of invalidity. Defendant's arguments are built on fundamental misunderstandings of the law and mischaracterizations of the facts. Its reliance on the declaration of Dr. Acampora further undermines the credibility of its arguments.¹ As already demonstrated in Skyhook's Opening Claim Construction Brief ("Skyhook's Opening Brief"), the facts show that the scope of the disputed claim terms is discernible to those of ordinary skill in the art and that these claim terms are not indefinite.

In the alternative, Defendant proposes constructions for the disputed claim terms. But in construing the claim terms, Defendant ignores the clear instructions of the Federal Circuit that preferred embodiments and illustrative examples in the specification should not be used to narrow the claim terms absent a clear and unmistakable disclaimer. Skyhook therefore respectfully requests that the Court reject Defendant's proposed constructions, and adopt Skyhook's proposed constructions, which are supported by the intrinsic and extrinsic evidence.

¹ It is well-settled that expert testimony is disfavored in claim construction. Because "extrinsic evidence consisting of expert reports and testimony is generated at the time of and for the purpose of litigation," it "can suffer from bias that is not present in intrinsic evidence." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1318 (Fed. Cir. 2005) (en banc). Defendant's expert, Dr. Acampora, is a prime example of why expert testimony is disfavored. Dr. Acampora is a professional expert who has been deposed around 50 times and whose fees for expert witness consulting over just the past two years have been around \$1.5 million. (Pl. Ex. A (Acampora Dep. Tr.) 17:18-19:1.) In addition, as discussed below, Dr. Acampora argues for positions that are contrary to positions that he has taken in his own patents and publications. Finally, Dr. Acampora's opinions are based on Defendant's incomplete instructions to him regarding the law. While Skyhook submits its own expert declaration to correct some of the inaccuracies in Dr. Acampora's declaration, Skyhook maintains the position that expert testimony is not relevant to the claim construction issues in this case.

II. INDEFINITENESS IS APPROPRIATELY SUBMITTED TO THE JURY WHEN THERE ARE GENUINE DISPUTES OF MATERIAL FACTS

Because "[t]he definiteness inquiry focuses on whether those skilled in the art would understand the scope of the claim when the claim is read in light of the rest of the specification," the Federal Circuit has found that "definiteness . . . is amenable to resolution by the jury where the issues are factual in nature." *BJ Servs. Co. v. Halliburton Energy Servs., Inc.*, 338 F.3d 1368, 1372 (Fed. Cir. 2003). District courts are permitted "in appropriate circumstances," to submit "an indefiniteness dispute to the jury." *Dow Chem. Co. v. Nova Chems. Corp.*, 629 F. Supp. 2d 397, 403 (D. Del. 2009); *see also Amgen, Inc. v. F. Hoffman-La Roche Ltd.*, 581 F. Supp. 2d 160, 198 (D. Mass. 2008) (denying Roche's motion for judgment as a matter of law or a new trial after a jury finding of indefiniteness, noting that the Court is not permitted to re-weigh evidence).

Defendant relies heavily on the expert declaration of Dr. Acampora in arguing that the asserted claims are indefinite. Skyhook submits that the scope of the claims at issue is clear, and that the Court can properly construe these claims as a matter of law based on the intrinsic record. However, if the Court were inclined to consider the parties' respective extrinsic expert testimony in deciding the issue of indefiniteness, Skyhook respectfully requests that Defendant's motion for summary judgment of indefiniteness be denied because there would be a genuine dispute of material facts as to whether those skilled in the art would understand the scope of the claims.

III. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THE DISPUTED TERMS ARE AMENABLE TO CONSTRUCTION

To establish indefiniteness, Defendant must "show[] by clear and convincing evidence that a skilled artisan could not discern the boundaries of the claim based on the claim language,

the specification, and the prosecution history, as well as her knowledge of the relevant art area."² *Halliburton Energy Servs., Inc. v. M-I LLC*, 514 F.3d 1244, 1249-50 (Fed. Cir. 2008). "If the meaning of the claim is discernible, even though the task may be formidable and the conclusion may be one over which reasonable persons will disagree," then "the claim [is] sufficiently clear to avoid invalidity on indefiniteness grounds." *Exxon Research & Eng'g Co. v. United States*, 265 F.3d 1371, 1375 (Fed. Cir. 2001). "Only claims 'not amenable to construction' or 'insolubly ambiguous' are indefinite." *Haemonetics Corp. v. Baxter Healthcare Corp.*, 607 F.3d 776, 783 (Fed. Cir. 2010). Defendant has failed to carry its burden.

A. The "Logic" Limitations Are Not Means-Plus-Function Elements

Skyhook has submitted both case law and dictionary evidence in its Opening Brief confirming that the "computer-implemented logic" claim terms recite sufficient structure so that they should not be construed as means-plus-function claim terms. This is consistent with the opinion of Skyhook's expert. (Kotz Decl. ¶¶ 58-60.) Defendant argues otherwise, relying primarily on the opinion of Dr. Acampora that "logic" "is not a structural term" but is instead a functional term signifying "a series of defined steps for performing a function." (Acampora Decl. ¶ 87.) This opinion is simply not credible for a number of reasons.

First, Defendant's argument that logic is simply "a series of defined steps for performing a function" is inconsistent with prior usage of the word "logic" by both Dr. Acampora and Defendant. For example, Dr. Acampora's patents and publications use the word "logic" in a manner that denotes structure, specifically, hardware in the form of digital circuitry.³ Similarly,

² Defendant apparently did not instruct Dr. Acampora that patents are presumed valid and invalidity must be proven by clear and convincing evidence. (*Compare* Pl. Ex. A (Acampora Dep. Tr.) 130:17-133:16, 136:4-20, 132:25-133:13, *with* Acampora Decl. p. 26-28, 34.)

³ *E.g.*, Anthony S. Acampora, *An Introduction to Broadband Networks* 1 (1994) ("[e]mitter coupled logic . . . can operate at clock speeds approaching 1 GHz") (Pl. Ex. B); U.S. Patent No. 4,425,639 7:60-63 ("the technology for building the satellite switch changes from exotic, custom high-speed logic to

Defendant's own patents use the word "logic" synonymously with both computer software and/or hardware.⁴ Because Dr. Acampora's and Defendant's own prior non-litigation usage of the word "logic" suggests, at the very least, "some structure," the presumption that § 112 ¶ 6 does not apply is determinative. (*See* Pl. Ex. H⁵ (Skyhook's Opening Brief) (Dkt. #49) at 25-26.) Dr. Acampora's and Defendant's usage is also consistent with Skyhook's claim construction for "logic" as hardware and/or software.

Second, Dr. Acampora admits that the word "logic" in the '988 patent claims is limited to the context of computers. (Pl. Ex. A (Acampora Dep. Tr.) 204:16-19 (claim 1 of the '988 patent relates to a "Wi-Fi location server," which Dr. Acampora admits is a computer).) As described in Skyhook's Opening Brief and in the paragraph above, "logic" in the context of computers has a meaning that is clearly structural. Thus, Dr. Acampora's example that "thinking could be logical" is inapplicable. Indeed, Dr. Acampora did not disagree that with "more context," "a definition of logic" in the context of computers and computer electronics could include "hardware . . . or a combination of software and hardware," suggesting that the term denotes at least some structure. (*Id.* at 208:2-17.)

Third, Dr. Acampora erroneously believes that in order for a claim term to define sufficient structure to avoid application of § 112 ¶ 6, the specification must describe the structure and not just use the claim term. To illustrate his misunderstanding, Dr. Acampora was asked in deposition about a phrase from his own published textbook: "emitter coupled logic." Dr.

presently commercially available logic families") (Pl. Ex. C); U.S. Patent Application No. 20080039130 ¶ 76 ("Each agent is most commonly a small radio transceiver plus logic and power supply") (Pl. Ex. D).

⁴ *E.g.*, U.S. Patent No. 7,869,667 B1 12:48 ("[c]omputer programs [are] also called computer control logic") (Pl. Ex. E); U.S. Patent No. 7,627,548 5:61-62 ("Search engine software/logic may provide a mechanism for receiving query information . . .") (Pl. Ex. F); U.S. Patent No. 7,751,592 12:51-54 ("This logic may include hardware, . . . software, or a combination of hardware and software.") (Pl. Ex. G).

⁵ All citations in the form "Pl. Ex. ___" are to the exhibits attached to the declaration of Samuel K. Lu filed concurrently herewith.

Acampora admits that "emitter coupled logic" has a meaning well understood to those of ordinary skill in the art, specifically, as a class of electronics. (*Id.* at 208:21-25.) However, in the context of a hypothetical claim construction, Dr. Acampora believes that the phrase "emitter coupled logic" is functional (and therefore should be construed as a means-plus-function claim term) unless the specification describes how such "emitter-coupled logic" is structured. (*Id.* at 219:14-220:19.) But Dr. Acampora's understanding of the law is incorrect. The law simply requires that the referenced "class of structures [be] identifiable by a person of ordinary skill in the art." *Linear Tech. Corp. v. Impala Linear Corp.*, 379 F.3d 1311, 1322 (Fed. Cir. 2004).

Defendant's legal arguments are similarly flawed. Defendant relies on *ABB Automation Inc. v. Schlumberger Res. Mgmt. Servs., Inc.*, No. CIV.A. 01-077-SLR, 2003 WL 1700013 (D. Del. Mar. 27, 2003), which provides absolutely no reasoning for its conclusion that "'logic' does not recite sufficient structure to avoid means-plus-function analysis." *Id.* at *1. But *ABB Automation* has been effectively overruled. After this lower court case was decided, the Federal Circuit made clear that claim terms need only convey "some structure" in order to avoid application of § 112 ¶ 6, *Apex Inc. v. Raritan Computer, Inc.*, 325 F.3d 1364, 1373 (Fed. Cir. 2003) (emphasis added) (decided April 2, 2003). Subsequent Federal Circuit case law established that the circumstances must be truly "unusual" or "exceptional," involving "a nonce word or verbal construct," for a claim that does not use the word "means" to be interpreted in means-plus-function form. *Lighting World, Inc. v. Birchwood Lighting, Inc.*, 382 F.3d 1354, 1360, 1362 (Fed. Cir. 2004). Defendant's reliance on an old, unreasoned case is unsurprising, because recent, reasoned decisions show that "logic" and related terms do not invoke § 112 ¶ 6. (*See* Pl. Ex. H (Skyhook's Opening Brief) (Dkt. #49) at 27.)⁶

⁶ Defendant also relies on *Laitram Corp. v. Rexnord, Inc.*, 939 F.2d 1533 (Fed. Cir. 1991), for the proposition that if "logic" were interpreted to mean "software and/or hardware," it would "not provide the

Finally, it is clear that "logic" is not a "nonce word" because the Federal Circuit has used the term "logic for" in its own claim constructions. See *SuperGuide Corp. v. DirecTV Enters.*, 358 F.3d 870, 895 (Fed. Cir. 2004) (interpreting claim term as "at least nonvolatile memory and logic for storing 'event timer information sequences' that are used to control the recording of a television program").

B. If § 112 ¶ 6 Were To Apply To The "Logic" Limitations, The Specification Would Disclose Sufficient Corresponding Structure

Because the "logic" terms are not means-plus-function limitations, Skyhook need not identify a corresponding structure in the specification. But even if the "logic" terms were to fall within § 112 ¶ 6, the specification would disclose sufficient corresponding structure. Moreover, due to "the statutory presumption of validity," Defendant must "prov[e] the lack of corresponding structure by clear and convincing evidence." *Default Proof Credit Card Sys., Inc. v. Home Depot U.S.A., Inc.*, 412 F.3d 1291, 1297 (Fed. Cir. 2005). Defendant has not done so.

1. The Specification Need Only Disclose Minimal Corresponding Structure

The required structural disclosure "is not a high bar." *Biomedino, LLC v. Waters Techs Corp.*, 490 F.3d 946, 950 (Fed. Cir. 2007). "All one needs to do . . . is to recite some structure corresponding to the means in the specification." *Atmel Corp. v. Info. Storage Devices, Inc.*, 198 F.3d 1374, 1382 (Fed. Cir. 1999) (emphasis added) (noting that a "total omission of structure" will not meet the requirement).

Where a specially-programmed computer is the corresponding structure, "a highly detailed description of the algorithm" is not required, *Aristocrat Techs. Austl. Pty Ltd. v. Int'l Game Tech.*, 521 F.3d 1328, 1338 (Fed. Cir. 2008), because "knowledge of one skilled in the art

requisite concreteness." (Def. Mem. at 18.) But this is not an accurate summary of *Laitram* because the case says nothing about the requisite level of "concreteness" where the word "means" is not used.

can be called upon to flesh out a particular structural reference in the specification for the purpose of satisfying the statutory requirement of definiteness." *Creo Prods. Inc. v. Presstek, Inc.*, 305 F.3d 1337, 1347 (Fed. Cir. 2002).

As a result of this low bar, the Federal Circuit has held corresponding software structure indefinite only when "there was no algorithm at all disclosed in the specification." *E.g.*, *Aristocrat*, 521 F.3d at 1337; *see also, e.g., In re Aoyama*, No. 2010-1552, 2011 WL 3796243, at *4 (Fed. Cir. Aug. 29, 2011) (specification "fail[ed] to provide any structure or algorithm whatsoever"); *Finisar Corp. v. DirecTV Group, Inc.*, 523 F.3d 1323, 1340 (Fed. Cir. 2008) (specification provided "nothing more than a restatement of the function, as recited in the claim"). An even more lenient standard applies when specified functions "can be achieved by any general purpose computer without special programming." *In re Katz Interactive Call Processing Litig.*, 639 F.3d 1303, 1316 (Fed. Cir. 2011). In such instances, no algorithm need be disclosed. *Id.* (for generic functions such as "processing," "receiving," and "storing," "it [is] not necessary to disclose more structure than the general purpose processor that performs those functions").

2. Dr. Acampora Cannot Read Or Write Source Code And Thus Cannot Opine On What An Ordinary Artisan Would Understand

In support of its § 112 ¶ 6, indefiniteness argument, Defendant relies on the declaration of Dr. Acampora. However, Dr. Acampora cannot read or write source code. (Pl. Ex. A (Acampora Dep. Tr.) 69:2-6.) An ordinary artisan would need to be able to write source code in order to program the "Wi-Fi server" to implement the claimed inventions. (Kotz Decl. ¶ 32.) Consequently, Dr. Acampora's opinions of what an ordinary artisan would understand and would be able to "flesh out" from the patent specification should be accorded no weight in this context.

3. Computer Implemented Logic To Add Records To The Database . . .

Adding records to a database is equivalent to "storing" records. (Kotz Decl. ¶ 63) This function "can be achieved by any general purpose computer without special programming." *In re Katz*, 639 F.3d at 1316. Accordingly, no algorithm needs be disclosed. *Id.* Alternatively, "there [is] no need for a disclosure of the specific program code if software [is] linked to the [claimed function] and one skilled in the art would know the kind of program to use." *Med. Instrumentation & Diagnostics Corp. v. Elekta AB*, 344 F.3d 1205, 1214 (Fed. Cir. 2003). One of ordinary skill in the art would know to use any commercially available database program to accomplish this function. (Kotz Decl. ¶ 65.)

4. The Remaining Logic Limitations

The patent specification also recites sufficient structure for the remaining logic limitations. In some instances, the corresponding algorithm is known in the art and simply referring to the algorithm provides sufficient structural disclosure. *Cf. Atmel*, 198 F.3d at 1382 (merely referring to, but not describing, "an Improved Voltage Multiplier Technique" that was known in the art was sufficient structural disclosure). In all instances, the specification provides a description of the algorithm that goes far beyond a mere recitation of the claimed function.

<u>Logic Limitation</u>	<u>Corresponding Structure</u>
"logic to recalculate position information for Wi-Fi access points previously stored in the database to utilize position information for the newly-discovered readings of previously stored Wi-Fi access points"	<p>"[E]xisting access points are repositioned based on any new data recorded by the scanners. The . . . <u>algorithm</u> factors in the number of records and their associated signal strengths to weight stronger signal readings more than weaker signals" (Def. Ex. C⁷ ('988) 12:33-37 (emphasis added); <i>see</i> Kotz Decl. ¶¶ 66-68.)</p> <p>"[T]he <u>algorithm</u> would include a weighting value based on the age of the records" (Def. Ex. C ('988) 12:25-26 (emphasis added); <i>see</i> Kotz Decl. ¶¶ 66-68.)</p>

⁷ All citations in the form "Def. Ex. ___" are to the exhibits attached to the declaration of Susan Baker Manning in support of Defendant's Motion for Summary Judgment.

<p>"computer-implemented clustering logic to identify position information based on error prone GPS information"</p>	<p>The corresponding algorithm uses "clustering techniques," (Def. Ex. C ('988) 12:6-7), which refers to a well-known type of statistical analysis. (Kotz Decl. ¶ 70.)</p> <p>The specification further provides a specific example of the results of the clustering technique. (Def. Ex. C ('988) 12:7-11; <i>see</i> Kotz Decl. ¶ 71.) <i>Cf. Rembrandt Data Techs., LP v. AOL, LLC</i>, 641 F.3d 1331, 1342 (Fed. Cir. 2011) (noting that disclosing the results of an algorithm may be sufficient if "a skilled artisan would have known the algorithm necessary to accomplish the described outcomes").</p>
<p>"logic to determine a weighted centroid position for all position information reported for an access point"</p>	<p>Determination of a weighted centroid position is a well-known algorithm. (Kotz Decl. ¶ 74.)</p> <p>The specification provides further details, making clear that the weighted centroid calculation "factors in the number of records and their associated signal strengths to weight stronger readings more than weaker signals." (Def. Ex. C ('988) 12:35-37; Kotz Decl. ¶ 75.)</p>
<p>"logic to identify position information that exceeds a statistically-based deviation threshold amount away from the centroid position"</p>	<p>The specification states that the algorithm "determines the standard deviation based on the distribution of the reported locations" and then "uses a definable threshold based on the sigma of this distribution to filter out access points that are in error." (Def. Ex. C ('988) 12:13-17; Kotz Decl. ¶¶ 77-80.)</p>
<p>"the clustering logic . . . excludes such deviating position information from the database and from influencing the calculated position of the Wi-Fi access points"</p>	<p>Excluding deviating position information from a database is the opposite of adding information to the database. Thus, "excluding" information from a database is a generic function that "can be achieved by any general purpose computer without specific programming," and no corresponding algorithm need be disclosed. Alternatively, one of ordinary skill in the art would know to use any commercially available database program to accomplish this function. (Kotz Decl. ¶¶ 82-83.)</p> <p>As for excluding the deviating position information from influencing the calculated position information, the '988 patent discloses the following algorithm: "[o]nce these error records are marked, the centroid is recalculated with the remaining location records to calculate the final centroid." (Def. Ex. C ('988) 12:17-19; Kotz Decl. ¶ 84.) As previously mentioned, determination of a weighted centroid position is a well-known algorithm. (Kotz Decl. ¶ 74.)</p>

C. "Said Chosen Algorithm Being Suited For The Number Of Identified Wi-Fi Access Points"

Defendant describes the requirement that the chosen algorithm be "suited for the number of identified Wi-Fi access points" as a "purely subjective" inquiry. Defendant is wrong. Whether a given algorithm is suited for a given number of access points would be readily apparent to one of skill in the art. (Kotz Decl. ¶¶ 86-88.) *Cf. Litecubes, LLC v. N. Light Prods., Inc.*, 523 F.3d 1353, 1373-74 (Fed. Cir. 2008) (jury properly determined that a material was "'suitable to' the specific use of retaining cold or heat"). The specification explains that because "[d]ifferent algorithms perform better under different scenarios," "[t]he decision of which algorithm to use is driven by the number of access points observed." (Def. Ex. E ('245) 7:7-13.) Indeed, there would be no reason to deliberately choose one particular algorithm if it were not more suitable than other available algorithms. Accordingly, an algorithm is "suited for" a particular number of access points if the algorithm was chosen "based on" the number of access points. (*Id.* at 5:45-48.)

The case law cited by Defendant is distinguishable. In *Datamize*, the term "aesthetically pleasing" was insolubly ambiguous because "the meaning of the claim language would depend on the unpredictable vagaries of any one person's opinion of the aesthetics." *Datamize, LLC v. Plumtree Software, Inc.*, 417 F.3d 1342, 1350 (Fed. Cir. 2005). As the Court noted, "beauty is in the eye of the beholder" *Id.* at 1350. Which algorithm produces better location determination does not present such a challenge. In *Halliburton*, "fragile gel" was indefinite because the claim did "not adequately distinguish the fragileness of the invention from disclosed prior art, it [was] ambiguous as to whether an upper bound of fragileness is contemplated, and it [was] ambiguous as to its requisite ability to suspend drill cuttings." *Halliburton*, 514 F.3d at 1256. No similar issue is present here. And in *Union Pacific*, the precise meaning of the

disputed claim term "comparing" was not explained in the patent specification. *Union Pac. Res. Co. v. Chesapeake Energy Corp.*, 236 F.3d 684, 692 (Fed. Cir. 2001). The *Union Pacific* Court could thus not determine which of the two competing meanings for "comparing" should apply.⁸

D. "Predefined Rules"

"Outside the context of the patent," Dr. Acampora understands the meaning of "predefined" and "rule." Predefined is "something that was defined before this process was begun, as an example." (Pl. Ex. A (Acampora Dep. Tr.) 222:11-223:5.) And "rule" is "an instruction to be followed." (*Id.* at 221:14-19.) This understanding is consistent with the plain and ordinary meaning of "predefined rule." Thus, this claim term need not be construed further.

Defendant disagrees, asserting the alleged breadth of the claim term "predefined rules" as a basis for indefiniteness.⁹ However, Defendant vastly overstates the breadth of this limitation. It is true that "predefined rules," standing alone, is quite broad. However, the claim term further requires "using the recorded location information . . . in conjunction with predefined rules" to determine whether to include or exclude new data. None of Defendant's absurd examples of predefined rules would fall under this claim. For example, determining whether a Wi-Fi access point should be included or excluded based simply on "whether it is Tuesday" would not "us[e]

⁸ Defendant lists several other imagined flaws with this term, arguing that the specification "never explains how the number of access points impacts what algorithm is appropriate, never identifies the possible algorithms, and never identifies any algorithm as suited or not suited." These criticisms are more properly made in the context of an invalidity argument based on enablement or written description, but even then, they are without merit. The independent claim does not require a particular algorithm, only the dependent claims. Moreover, the allegedly undisclosed information would be readily apparent to an ordinary artisan. (Kotz Decl. ¶¶ 87-88.)

⁹ Defendant's reasoning on this point is difficult to decipher, and the cases to which it cites are unenlightening. For example, *Halliburton* and *Datamize* are generic indefiniteness cases with little, if any, similarity to the "predefined rules" at issue here. Defendant also cites to a dissenting opinion, containing reasoning that a term was indefinite because it was "used inconsistently" within the patent. *See S3 Inc. v. NVIDIA Corp.*, 259 F.3d 1364, 1372 (Fed. Cir. 2001) (Gajarsa, J., dissenting). Defendant has not argued that "predefined rules" is used inconsistently, so the relevance of Judge Gajarsa's dissent in *S3* is unclear.

the recorded location information." Similarly, a rule that always includes *every* observed access point would not satisfy the claim requirements. (Kotz Decl. ¶¶ 91-92.)

More fundamentally, claim terms are not indefinite merely because they are broad. *Ultimax Cement Mfg. Corp. v. CTS Cement Mfg. Corp.*, 587 F.3d 1339, 1352 (Fed. Cir. 2009) ("Breadth is not indefiniteness."). Claims that are overbroad may be challenged under the written description and enablement requirements, which Defendant improperly raises in footnote 7 of its motion. However, written description and enablement are not relevant to Defendant's motion for summary judgment of *indefiniteness*.

E. The '988 And '694 Patents Do Not Claim Both A Method And An Apparatus

Both the '988 and '694 patents claim a product, specifically, a database containing calculated position information or a Wi-Fi server having such a database. Defendant asserts that these claims are actually method or process claims masquerading as product claims because the "calculated position information is obtained from recording multiple readings" Defendant is incorrect. Such claims are known in patent law as "product by process claims." *See Amgen Inc. v. F. Hoffman-LA Roche Ltd.*, 580 F.3d 1340, 1367 (Fed. Cir. 2009) ("[I]t is well established that product claims may include process steps to wholly or partially define the claimed product.") (quoting *In re Luck*, 476 F.2d 650, 653 (C.C.P.A. 1973)).

In *Amgen*, a claimed product properly contained a "source limitation" for one of its components, requiring that the component be "*purified from* mammalian cells grown in culture." *Id.* (emphasis added). Similarly, the "calculated position information" in both the '988 and '694 patents must be "*obtained from* recording multiple readings" in a specified manner. The "obtained from" requirement is simply a "source limitation," *id.*, and conforms to the well-settled doctrine that "a claim may validly describe a new product with some reference to the method of production." *Id.* at 1366-67.

Defendant's citations to *IPXL* and *Rembrandt* are unavailing, because the methods in those cases were methods for *using*, not *creating*, a product. Defendant is undoubtedly aware of this distinction because Defendant selectively cites to *Manual of Patent Examination Procedure* § 2173.05(p), which explains the difference between *valid* claims that define a product by its method of creation, *id.* at § 2173.05(p)(I), and *indefinite* claims that recite "both an apparatus and the method of using the apparatus," *id.* at § 2173.05(p)(II). Tellingly, Defendant neglects to mention that "a product claim that defines the claimed product in terms of the process by which it is made, is proper." *Id.* at § 2173.05(p)(I).

**F. The "Reference Symmetry" Claim Terms Are Amenable To Construction—
Even By Defendant's Expert—And Therefore Are Not Indefinite**

Defendant argues that the "reference symmetry" claim terms "are unintelligible" for two reasons: (1) "the claims have no comprehensible frame of reference for the 'reference symmetry,'" and (2) "nothing in the patents gives any objective standard for when 'reference symmetry' exists and when it does not." (Def. Mem. at 12-13.)

1. Frame Of Reference

Defendant's frame of reference argument is directed at two claim terms. First, from the '988 patent, "recording multiple readings of the Wi-Fi access point at different locations around the Wi-Fi access point so that the multiple readings have reference symmetry relative to other Wi-Fi access points in the target area." Defendant argues that this term requires raw scanning data to have reference symmetry, which "makes no sense because there need not be any user or user device present during scanning." (*Id.* at 12.) Second, from the '694 patent, Defendant argues that "wherein the database records for substantially all Wi-Fi access points in the target area provide reference symmetry within the target area" requires that "some unidentified thing

'within the target area' is 'provide[d] reference symmetry' by the database records themselves."
(*Id.* at 13.)

Defendant's argument is deliberately obtuse. The clear purpose of the database, which Defendant acknowledges, is to calculate the location of mobile devices. (Def. Mem. at 31-32 ("The inventors' purpose was to provide a useful location system, with as complete a set of information about Wi-Fi access point locations as possible."); Def. Ex. C ('988) 4:4-9, 5:33-37.) Mobile devices are, obviously, mobile. If the user were anywhere in the target area, the goal would be to calculate her location as accurately as possible. To do this, the database should contain calculated Wi-Fi access point locations distributed throughout the target area, so that wherever the user were, there would tend to be Wi-Fi access points distributed around her. Indeed, Defendant's expert admitted that this is what he understands reference symmetry to mean. (Pl. Ex. A (Acampora Dep. Tr.) 170:15-171:5.)

Defendant's indefiniteness argument appears to be that reference symmetry as described in the patent specification cannot be cleanly mapped onto the claim language. (*See* Def. Mem. at 12-13; Pl. Ex. A (Acampora Dep. Tr.) 169:23-170:2 ("I know what the reference point is that they have in mind in the specification. I don't even know what the reference point is in the . . . claim. And if you'd like, I can explain that.")) But this is not sufficient to establish indefiniteness. These claim terms are amenable to the constructions proposed by Skyhook, as explained in Sections VII.A and VIII.A of Skyhook's Opening Brief. (Pl. Ex. H (Dkt. #49).) It is evident in light of the teachings in the specification that the claim terms are describing a distribution of calculated positions of Wi-Fi access points in the target area such that if a user whose location were being calculated is in the target area, the calculated positions of the

observed Wi-Fi access points in range of the user would tend to be distributed around the user with reduced arterial bias.

Skyhook's interpretation is confirmed by the prosecution history of the '988 patent, which as part of the intrinsic record, is relevant to interpreting its claims. There, the applicants explained what they mean by reference symmetry in claim 1 of the '988 patent:

[S]ignificant errors in position calculation can result when the reference points used for the calculation lack symmetry around the physical location of the device performing the calculation. Unsymmetrical location data (or "arterial bias") occurs when individuals (e.g., wardrivers) collect location data for Wi-Fi access points without following designated scanning routes. Such data tends to aggregate around heavily traffic [sic] areas (or "arteries").
(Def. Ex. G ('988 patent prosecution history) Reply to Non-Final Office Action of Nov. 30, 2007, p. 8.)

Thus, symmetry can relate to both to (1) the distribution of Wi-Fi access points around the device performing the calculation and (2) the distribution of Wi-Fi access points throughout a target area, as shown in Figure 3 of the patents. Defendant "offer[s] no compelling explanation for why the examiner, who is deemed to be one of ordinary skill in the art, did not consider the term . . . in the context of the specification to be ambiguous." *See Nutramax Labs., Inc. v. Theodosakis*, No. CCB-08-879, 2009 WL 2778388, at *5 (D. Md., June 8, 2009).

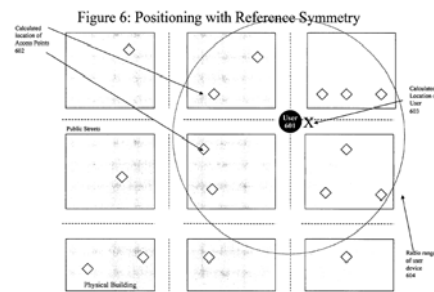
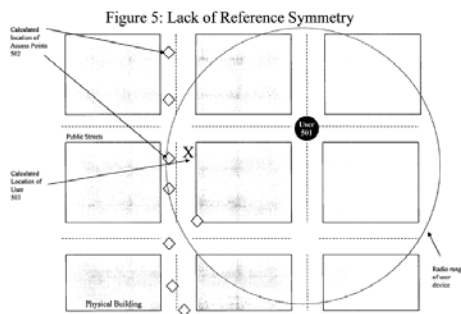
2. Objective Standard

Defendant asserts that the claims must identify "the dividing line between a balanced or symmetrical distribution and a non-infringing one." (Def. Mem. at 13.) But "[t]he degree of precision necessary for adequate claims is a function of the nature of the subject matter." *Miles Labs., Inc. v. Shandon Inc.*, 997 F.2d 870, 875 (Fed. Cir. 1993); *see also Hybritech, Inc. v. Monoclonal Antibodies, Inc.*, 802 F.2d 1367, 1385 (Fed. Cir. 1986) (finding that "claims clearly are definite" when the language of the claims "is as precise as the subject matter permits").

Thus, parties "seeking to invalidate a patent for indefiniteness face a difficult burden. Not only must they prove their claims by clear and convincing evidence, the degree of definiteness required for a given claim varies depending upon the state of the art." *Amgen*, 581 F. Supp. 2d at 198.

Here, the subject matter makes further precision impossible. As Defendant's expert admits, the distribution of Wi-Fi access points in a target area is unpredictable because Skyhook's system takes advantage of Wi-Fi access points that are installed by third parties rather than, to use Dr. Acampora's words, "intentionally seeding" Wi-Fi access points. (Pl. Ex. A (Acampora Dep. Tr.) 168:11-18, 167:14-21 ("They have no way of knowing if this is going to be produced or not because they have no way of knowing in advance where the access points are The access point locations may not be conducive to production of reference symmetry.").) Some areas may have Wi-Fi access points more evenly distributed than others (though, given the density of Wi-Fi access points in most cities this may not be a wide variation). (Kotz Decl. ¶ 111.)

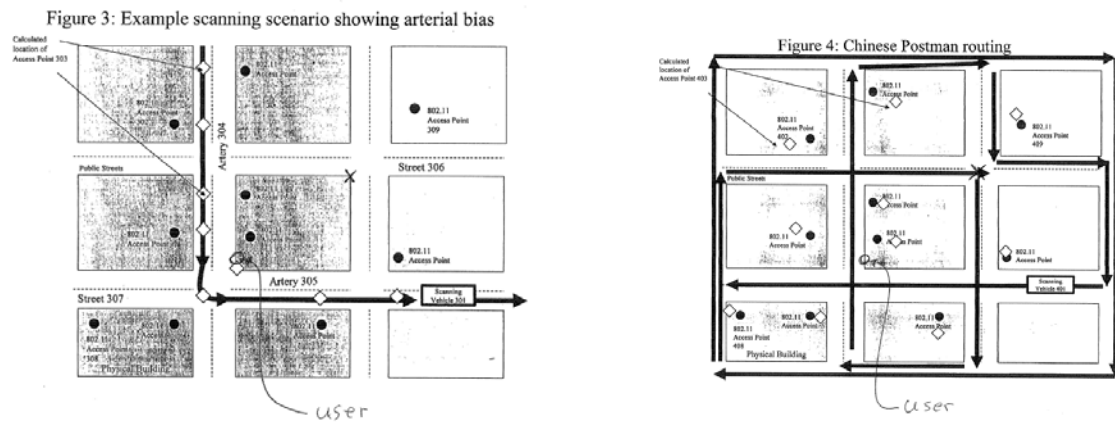
Moreover, Defendant's argument "that nothing in the patents gives any objective standard for when 'reference symmetry' exists and when it does not" is contradicted by Figures 5 and 6 of the '988 patent.



It is clear from comparing Figure 5 (no reference symmetry) with Figure 6 (reference symmetry) that reference symmetry with respect to a user as shown requires the calculated locations of

access points (white diamonds) to be distributed around a user whose location is being calculated (black circle). Figure 6 also shows that this distribution does not have to be exactly symmetrical or balanced as Defendant argues that this claim term should be interpreted. These figures alone provide accused infringers with an objective standard by which to measure reference symmetry. Reference symmetry exists when "the calculated positions of the observed Wi-Fi access points in range of the user tend to be distributed around the user with reduced arterial bias." An accused infringer could map the locations of the Wi-Fi access points collected in its database and determine whether this is the case. "[A] patentee need not define his invention with mathematical precision in order to comply with the definiteness requirement." *Oakley, Inc. v. Sunglass Hut Int'l*, 316 F.3d 1331, 1341 (Fed. Cir. 2003).

Indeed, Defendant's argument "that nothing in the patents gives any objective standard for when 'reference symmetry' exists and when it does not" is contradicted by Defendant's own expert. Defendant's expert unambiguously demonstrated his understanding of reference symmetry during his deposition. (Pl. Ex. A (Acampora Dep. Tr.) 173:2-179:11, 181:21-182:13.) He was asked to draw a circle on Figures 3 and 4, and to label the circles "user" as shown below:



(Pl. Ex. I (Dep. Ex. 1).) Then Dr. Acampora was asked which of Figures 3 and 4 had better reference symmetry. He had no difficulty identifying Figure 4 as having better reference symmetry than Figure 3. (Pl. Ex. A (Acampora Dep. Tr.) 182:9-13.) Accordingly, the "reference symmetry" claim terms are not indefinite. Taking into account Defendant's high

burden of demonstrating indefiniteness by clear and convincing evidence, Defendant has not and cannot establish that the "reference symmetry" claim terms are insolubly ambiguous.¹⁰

G. The Claim Term "Avoid[s] Arterial Bias" Is Not Indefinite

Defendant asserts that the claim term "avoid(s) arterial bias" is indefinite "because, given any reading other than 'eliminate,' the term 'avoid' is necessarily relative." (Def. Mem. at 14.)

But as discussed above in Section III.F.2, relative terms are not per se indefinite.

Defendant also asserts that "avoid(s) arterial bias" is "purely subjective" because "nowhere in the specification does it describe the amount of avoidance necessary to meet this claim limitation." (Def. Mem. at 14-15.) This is not true. As explained in Section VI.D of Skyhook's Opening Brief, this claim term simply requires that "when the claimed technique is practiced, arterial bias is reduced compared to when the claimed technique is not practiced." (Pl. Ex. H (Dkt. #49).) Determining whether a reduction has occurred is not "purely subjective." Indeed, one can make an objective determination that Figure 4 shows a reduction in arterial bias from Figure 3 because the calculated locations of the access points are not pulled towards the arteries.

This claim construction is as precise "as the subject matter permits" and "reasonably apprise[s] those skilled in the art both of the utilization and scope of the invention." *Shatterproof Glass Corp. v. Libbey-Owens Ford Co.*, 758 F.2d 613, 624 (Fed. Cir. 1985). The degree by which arterial bias will be avoided will depend on numerous factors, including the number of roads in the target area, the location of each of the Wi-Fi access points in the target area, and the

¹⁰ Furthermore, the "so that" clauses in claim 1 of both the '694 patent and the '988 patent "only express the necessary result of what is recited in the claims." *See Tex. Instruments Inc. v. U.S. Int'l Trade Comm'n.*, 988 F.2d 1165, 1172 (Fed. Cir. 1993) (holding that the "whereby/to preclude" clauses at issue "merely describe the result of arranging the components of the claims in the manner recited in the claims" and thus "do not contain any limitations not inherent to the process found in [the] claims"). If you have a database of substantially all Wi-Fi access points in a target area obtained by recording multiple readings of each Wi-Fi access point at different locations around the Wi-Fi access point, you will necessarily

capabilities of the scanning device used to collect Wi-Fi access point information. (Kotz Decl. ¶ 125.) *See, e.g., Young v. Lumenis, Inc.*, 492 F.3d 1336, 1346-47 (Fed. Cir. 2007) (Although the claim term "near" was not defined in the specification and the prior art was close, its use "as opposed to a precise numerical measurement" was appropriate given the subject matter because application of the claim "will vary from animal to animal based on the animal's size.").

Datamize, 417 F.3d 1342, relied on by Defendant, is inapposite. At issue in that case was whether the term "aesthetically pleasing" was indefinite. *Id.* at 1348-49. As the Court noted, "beauty is in the eye of the beholder" *Id.* at 1350. "The scope of claim language cannot depend solely on the unrestrained, subjective opinion of a particular individual purportedly practicing the invention." *Id.* at 1350 (emphasis added). The Court only required "some objective standard" rather than a "purely subjective" standard to satisfy the definiteness requirement. *Id.* (emphasis added). Here, in contrast, a person having ordinary skill in the art can objectively determine whether arterial bias has been reduced.

IV. DEFENDANT'S PROPOSED CONSTRUCTIONS IMPROPERLY LIMIT THE SCOPE OF SKYHOOK'S CLAIMS

Skyhook has already addressed Defendant's proposed constructions in its Opening Brief, (Pl. Ex. H (Dkt. #49)), and will not repeat those argument here. However, Defendant raises a few arguments in its brief that were not addressed in Skyhook's Opening Brief.

A. The Claims Are Not Limited To Using The Chinese Postman Routing Model

1. The Preferred Embodiment Is Not Limiting

The Federal Circuit has repeatedly "cautioned against limiting the claimed invention to preferred embodiments or specific examples in the specification." *Ekchian v. Home Depot, Inc.*, 104 F.3d 1299, 1303 (Fed. Cir. 1997). "Even when the specification describes only a single

"avoid arterial bias" and create "reference symmetry." As such, the "so that" clauses do not create any

embodiment, the claims of the patent will not be read restrictively unless the patentee has demonstrated a clear intention to limit the claim scope using 'words or expressions of manifest exclusion or restriction.'" *Gemstar-TV Guide Int'l, Inc. v. Int'l Trade Comm'n*, 383 F.3d 1352, 1366 (Fed. Cir. 2004). However, for some reason, Defendant's attorneys failed to provide Dr. Acampora with this important legal principle in his instructions regarding claim construction. (*Compare* Pl. Ex. A (Acampora Dep. Tr.) 130:17-133:16, 136:4-20, *with* Acampora Decl. p. 26-28, 34.) Defendant also ignores this key legal principle in its claim constructions.

Dr. Acampora (and Defendant) argue that the claims are limited to the preferred embodiment, the Chinese Postman routing model. But the '988 and '694 patent specifications disclose that the Chinese Postman routing model is only one example of a routing algorithm:

- "Preferred embodiments of the invention include a methodology for identifying a target region for coverage and then using the Chinese Postman routing algorithm for planning the vehicle route." (Def. Ex. C ('988) 8:41-44 (emphasis added).)¹¹
- Figure 4 is titled "Chinese Postman routing" and is described as "depict[ing] an example using a programmatic route for a scanning vehicle according to certain embodiments of the invention." (*Id.* at 5:1-3 (emphasis added).)
- "FIG. 4 describes an optimized routing algorithm known as the Chinese Postman . . ." (*Id.* at 8:31-33 (emphasis added).)
- "The programmatic route includes substantially all drivable streets in the target geographical area . . ." (*Id.* at Abstract (emphasis added).) But in a Chinese Postman model, every drivable street (and not just substantially all drivable streets) must be driven. (*Id.* at 8:31-34.) Therefore, the Chinese Postman algorithm is not the only possible algorithm practicing the claimed invention.
- "Another approach is [to] develop routing algorithms that include every single street in the target area so as to avoid arterial bias . . ." (*Id.* at 8:28-30 (emphasis added).) Thus, the patent contemplates a plurality of routing algorithms.

additional limitations to the claims and bear no weight in an infringement analysis. *See id.*

¹¹ Because the '988 and '694 patents share an almost identical specification, Skyhook will cite only to the '988 patent for brevity.

It is abundantly clear from these citations that the Chinese Postman routing model is only a preferred embodiment of the invention. It is only one of multiple routing algorithms.

Therefore, at most, the claims would require driving substantially all streets in a target area. But this can be achieved without using the Chinese Postman routing model, as Dr. Acampora acknowledged. (Pl. Ex. A (Acampora Dep. Tr.) 110:2-11 ("Q. But one could drive other routes that cover each edge at least once but that don't minimize the distance, correct? . . . A. . . . I suppose that one could do that, but that's not what's in the patent."); 224:24-225:19 ("Q. Would one of ordinary skill in the art know how to drive a vehicle in a systematic manner along every street without utilizing the Chinese Postman model? . . . A. If I thought about it, I could probably create some sort of brute-force approach . . .").)

Defendant's response to this is that the claims require "both non-random, systematic data collection, and purposeful avoidance of arterial bias." This in turn requires the Chinese Postman routing model because otherwise certain streets will be driven more than others, thus leading to arterial bias. (Def. Mem. at 29; *see also* Pl. Ex. A (Acampora Dep. Tr.) 110:25-111:6.) But Defendant's argument fails because the Chinese Postman routing model already drives a number of streets more than once. (*See* Def. Ex. C ('988) Fig. 4.) Driving an additional street or two would actually reduce arterial bias, not increase it. (Kotz Decl. ¶ 132.) In addition, there are any one of a number of techniques to reduce the effects of such arterial bias, including discarding data for streets driven more than once. (Kotz Decl. ¶ 133.)

2. The '988 Or '694 Patent Prosecution Histories Do Not Contain A Clear And Unmistakable Disclaimer

Defendant uses the prosecution history of the '988 and '694 patents to justify the limitations that it has inserted into its proposed constructions of "target area," "arterial bias," and what it calls "the location terms." Defendant argues that the inventors disclaimed the Random

Model of data collection and every other method of collecting data except for the Chinese Postman routing model. (Def. Mem. at Sections IV.A-C.)

But statements made during the prosecution of a patent application will not limit claim scope unless the applicant "unequivocally disavowed" or "expressly relinquished claim scope during prosecution." *Omega Eng'g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1323-24 (Fed. Cir. 2003). This is "because the prosecution history represents an ongoing negotiation between the PTO and the applicant, rather than the final product of that negotiation, [and] it often lacks the clarity of the specification and thus is less useful for claim construction purposes." *Phillips*, 415 F.3d at 1317. "There is no 'clear and unmistakable' disclaimer if a prosecution argument is subject to more than one reasonable interpretation, one of which is consistent with a proffered meaning of the disputed term." *Sandisk Corp. v. Memorex Prods., Inc.*, 415 F.3d 1278, 1287 (Fed. Cir. 2005).

Defendant cites the following material from the '988 patent prosecution history in support of its argument:

- "Unsymmetrical location data (or 'arterial bias') occurs when individuals (e.g., wardrivers) collect location data for Wi-Fi access points without following designated scanning routes." (Def. Mem. at 25.)
- "[N]one of the cited references teach or suggest conducting an audit of an area to build a reference database" (*Id.* at 28.)
- "[T]he location data collected by wardrivers is often inaccurate, incomplete, and grows organically rather than being collected in a systematic fashion" (*Id.* at 28-29.)
- "Collecting multiple readings of Wi-Fi access points in a systematic fashion" (*Id.* at 29.)
- "[B]y performing a planned audit" (*Id.*)
- Amending claim 1 to require the underlined language: "recording multiple readings of the Wi-Fi access point at different locations around the Wi-Fi access

point so that the multiple readings have reference symmetry relative to other Wi-Fi access points in the target area and so that the calculation of the position of the Wi-Fi access point avoids arterial bias in the calculated position information." (*Id.* at 7.)

The only evidence Defendant cites in the '694 patent prosecution history is amending claim 1 to include the underlined language:

wherein said calculated position information is obtained from recording multiple readings of the Wi-Fi access point at different locations around the Wi-Fi access point so that the multiple readings avoid arterial bias in the calculated position information of the Wi-Fi access point, and

wherein the database records for substantially all Wi-Fi access points in the target area provide reference symmetry within the target area. (*Id.* at 8.)

Notably, Defendant's citations to the prosecution histories of the '988 and '694 patents do not mention the Chinese Postman routing model. Thus, there is no "clear and unmistakable" disavowal of claim scope limiting the claims only to the Chinese Postman routing model.

3. Any Alleged Disclaimers In The '988 And '694 Patent Prosecution Histories Are Inapplicable To The '245 And '897 Patents

The claims of the '245 and '897 patents issued without amendment, and Defendant does not argue that any disclaimers were made in their patent prosecution histories. (Def. Mem. at 9.) Instead, Defendant argues that the statements made in the prosecution of the '988 and '694 patents "are directly relevant to the construction of the claims of each of these closely-related patents-in-suit." (*Id.* at 29.) However, the doctrine of prosecution disclaimer generally does not apply when the claim term in the related patent uses different language. *See Ventana Med. Sys., Inc. v. Biogenex Labs., Inc.*, 473 F.3d 1173, 1182 (Fed. Cir. 2006).

In this case, neither the '245 patent nor the '897 patent claim a database of recorded Wi-Fi access point locations. Instead, the '245 patent claims "[a] method of locating a user-device having a Wi-Fi radio" and the '897 patent claims "[a] method of calculating the position of Wi-Fi-enabled devices." Defendant tries to extend its prosecution disclaimer argument to these

patents by characterizing them as claiming "methodologies for determining the location of a mobile device using the same database disclosed in the '988 and '694 patents." (Def. Mem. at 3.) But there is nothing in the claims requiring the use of the same database claimed in the '988 and '694 patents.

B. Defendant's Construction Of "Substantially All Wi-Fi Access Points In The Target Area" Is A Blatant Attempt To Avoid Infringement

Defendant proposes a claim construction that would require Skyhook to (1) scan Wi-Fi access points that cannot be scanned and (2) take a census of all Wi-Fi access points in a target area, including those that cannot be scanned, in order to establish infringement. Defendant's claim construction makes no sense technically and is not supported by the patent specifications.

As an initial matter, the patent specifications are clear that the Wi-Fi access points referred to in the claims are those that are capable of being "observed" by the device used to collect Wi-Fi signals. (Def. Ex. C ('988) 8:44-47 ("... ensuring that all observable access points are detected and mapped by the system." (emphasis added)).) Defendant, however, asserts that scanning only observable Wi-Fi access points is insufficient. "Substantially all Wi-Fi access points in the target area" must include "all but an insignificant number of Wi-Fi access points in the target area."

Defendant then misleadingly claims that "'substantially all Wi-Fi access points' already accounts for the possibility that some small number of access points could be excluded from the database, whether because they are unobservable o[r] for some other reason." (Def. Mem. at 31 n.9.) It relies on Dr. Acampora's declaration which states that "[t]he number of unobservable access points is likely to be quite small relative to the total number of access points in the target area." (Acampora Decl. ¶138.) But Dr. Acampora's testimony during his deposition is inconsistent with this statement in his declaration. Dr. Acampora admitted that Wi-Fi access

point range "was not necessarily intended to be beyond—much beyond a few hundred feet," and a Wi-Fi signal in one part of his own house is unobservable in another part of his house. (Pl. Ex. A (Acampora Dep. Tr.) 37:1-4, 38:22-25 ("But in terms of—of coverage, parts of my house have great coverage, and other parts of my house where I have no signal.")) Thus, Defendant offers up a claim construction that is technically impossible to achieve—scanning "all but an insignificant number of Wi-Fi access points in the target area."

Moreover, Dr. Acampora's claim construction suggests that in order to establish infringement of this limitation, one would need to conduct a survey to count the total number of Wi-Fi access points in the targeted geographic area to determine whether "substantially all" of these Wi-Fi access points had been scanned. (*Id.* at 238:2-239:17, 245:8-246:17.) But Defendant knows full well that conducting such a survey would be impossible. (*Id.* at 247:2-247:21 ("Q. . . . As an expert in WIFI technology, if I were to ask you how would you go about determining the number of WIFI access points on the island of Manhattan how would you go about doing that? He smiles. . . . A. . . I'm not sure it could be done."))

Finally, Defendant's hypothetical makes it clear that it interprets the claim term to require that the database contain substantially all Wi-Fi access points that are in existence in the target area today, rather than at the time the database was created. This is not required by the intrinsic evidence.

C. "Arterial Bias" Can Be Caused In Non-Random Ways

The only dispute with respect to this term is whether arterial bias must be "due to the tendency of random scanning to result in a greater number of scans from heavily trafficked roads." There is nothing in the claim language or the specifications that requires this. It is clear that the Random Model is used in the specifications merely to illustrate one way in which arterial bias can occur. (*See* Def. Ex. C ('988) 7:55-8:27.) There are other, non-random, ways in which arterial bias can be created, as Defendant's expert admitted during his deposition. (Pl. Ex. A

(Acampora Dep. Tr.) 191:11-192:3.) For example, instructing drivers to only drive streets that are at least a certain number of lanes wide would also create arterial bias and in a non-random fashion. Accordingly, Defendant's proposed construction should be rejected.

V. DEFENDANT AGREES TO SKYHOOK'S CLAIM CONSTRUCTIONS

After Skyhook filed its Opening Brief, Defendant agreed to three of Skyhook's claim constructions. They are: "simple signal strength weighted average model," "triangulation technique," and "weighted centroid position."

VI. CONCLUSION

Defendant has failed to present clear and convincing evidence of indefiniteness. Consequently, its motion for summary judgment should be denied. Furthermore, Defendant's proposed claim constructions should be rejected for improperly seeking to narrow the scope of Skyhook's claims. Finally, Skyhook respectfully requests that the Court adopt its proposed constructions, which are supported by the language of the claims, the patent specifications, and the extrinsic evidence.

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I, Samuel K. Lu, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on September 28, 2011.

/s/ Samuel K. Lu

Samuel K. Lu