

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

Intellectual Ventures I LLC and
Intellectual Ventures II LLC,

Plaintiffs,

v.

VMware, Inc.,

Defendant.

Civil Action No. 1:19-cv-01075-ADA

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Introduction

IV's Opening and Responsive briefs demonstrate that its proposed constructions align with the use of the disputed terms in the context of the claims in light of the specification, and consistent with the prosecution history of each patent. That these constructions are correct becomes even more evident in the context of each disclosed invention, which sprang from companies at the cutting-edge of their technical fields. Three of the patents-in-suit, RE 44,686 ("the '686 patent"), RE 42,726 ("the '726 patent") and RE 43,051 ("the '051 patent"), were invented at Ensim Corporation, where the inventors were all highly experienced in the fields of cloud computing and virtualization. Dkt. No. 9 at par. 27, 31. General Magic, the original assignee of U.S. Patent No. 7,949,752 ("the '752 patent"), was a pioneer in cloud computing. *Id.* at ¶ 20. 3Leaf Systems, Inc., where the inventions taught by U.S. Patent No. RE 44, 818 ("the '818 patent") were developed, was at the forefront of network virtualization. *Id.* at ¶ 35.

The extensive briefing has also revealed VMware's strategic approach to claim construction. Rather than filter each term through established claim construction canons, VMware employs creative arguments in the hopes of fostering non-infringement positions. For instance, the term "virtual server" is at issue in the '686 and '726 patents as well as the '051 patent. Despite the fact that the '051 patent is unrelated to the other two patents (which are related), VMware asks the Court to consider evidence from both the '051 patent and a patent incorporated by reference therein in construing the '686 and '726 patents. With respect to the '752 patent, VMware asks the Court to wholesale disregard previous constructions of the very same terms made by an experienced Magistrate Judge in a prior Report and Recommendation. VMware takes the term of art "hierarchical token bucket" from the '818 patent and argues that it should be limited to a specific, prior art algorithm that is not referenced by the patent's written description. And on two occasions, VMware touts a citation as being from a paragraph and sentence without the word "embodiment"—while not disclosing that the preceding paragraphs explicitly characterize those cites as preferred embodiments. These techniques do not result in

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