

United States District Court,  
C.D. California.

**In re KATZ INTERACTIVE CALL PROCESSING PATENT LITIGATION.**

**This document relates to,**

This document relates to:

**Ronald A. Katz Technology Licensing L,**  
Ronald A. Katz Technology Licensing LP.

v.

**Reliant Energy, Inc., et al,**  
CV 07-2096 RGK (FFMx).

**Ronald A. Katz Technology Licensing L,**  
Ronald A. Katz Technology Licensing LP.

v.

**TD Bankworth, Inc., et al,**  
CV 07-2099 RGK (FFMx).

**Ronald A. Katz Technology Licensing L,**  
Ronald A. Katz Technology Licensing LP.

v.

**Ahold, Inc., et al,**  
CV 07-2101 RGK (FFMx).

**Ronald A. Katz Technology Licensing L,**  
Ronald A. Katz Technology Licensing LP.

v.

**Time Warner Cable, Inc., et al,**  
CV 07-2134 RGK (FFMx).

**Ronald A. Katz Technology Licensing L,**  
Ronald A. Katz Technology Licensing LP.

v.

**American Int'l Group, Inc., et al,**  
CV 07-2192 RGK (FFMx).

**Ronald A. Katz Technology Licensing L,**  
Ronald A. Katz Technology Licensing LP.

v.

**American Airlines, Inc., et al,**  
CV 07-2196 RGK (FFMx).

**Ronald A. Katz Technology Licensing L,**  
Ronald A. Katz Technology Licensing LP.

v.

**Aetna, Inc., et al,**  
CV 07-2213 RGK (FFMx).

**Ronald A. Katz Technology Licensing L,**  
Ronald A. Katz Technology Licensing LP.

v.

**Citibank, N.A., et al,**

CV 07-2220 RGK (FFMx).

**Ronald A. Katz Technology Licensing L,**

Ronald A. Katz Technology Licensing LP.

v.

**Genesys Conferencing, Inc., et al,**

CV 07-2254 RGK (FFMx).

**Ronald A. Katz Technology Licensing L,**

Ronald A. Katz Technology Licensing LP.

v.

**American Electric Power Co., Inc., et al,**

CV 07-2257 RGK (FFMx).

**Ronald A. Katz Technology Licensing L,**

Ronald A. Katz Technology Licensing LP.

v.

**Cox Communications, Inc., et al,**

CV 07-2299 RGK (FFMx).

**Ronald A. Katz Technology Licensing L,**

Ronald A. Katz Technology Licensing LP.

v.

**DirecTV Group, Inc., et al,**

CV 07-2322 RGK (FFMx).

**Ronald A. Katz Technology Licensing L,**

Ronald A. Katz Technology Licensing LP.

v.

**Earthlink, Inc., et al,**

CV 07-2325 RGK (FFMx).

**Ronald A. Katz Technology Licensing L,**

Ronald A. Katz Technology Licensing LP.

v.

**Tracfone Wireless, Inc., et al,**

CV 07-2326 RGK (FFMx).

**Ronald A. Katz Technology Licensing L,**

Ronald A. Katz Technology Licensing LP.

v.

**Ford Motor Co., et al,**

CV 07-2327 RGK (FFMx).

**Ronald A. Katz Technology Licensing L,**

Ronald A. Katz Technology Licensing LP.

v.

**General Electric Capital Corp, et al,**

CV 07-2336 RGK (FFMx).

**Ronald A. Katz Technology Licensing L,**

Ronald A. Katz Technology Licensing LP.

v.

**General Motors Corp., et al,**

CV 07-2339 RGK (FFMx).

**Ronald A. Katz Technology Licensing L,**

Ronald A. Katz Technology Licensing LP.

v.

**Humana, Inc., et al,**

CV 07-2340 RGK (FFMx).

**Ronald A. Katz Technology Licensing L,**

Ronald A. Katz Technology Licensing LP.

v.

**Regions Financial Corp., et al,**

CV 07-2356 RGK (FFMx).

**Ronald A. Katz Technology Licensing L,**

Ronald A. Katz Technology Licensing LP.

v.

**Bancorp, et al,**

CV 07-2360 RGK (FFMx).

**CVS Caremark Corporatio,**

CVS Caremark Corporation.

v.

**Ronald A. Katz Technology Licensing LP,**

CV 07-3002 RGK (FFMx).

No. 07-ml-01816-B RGK (FFMx)

**Feb. 21, 2008.**

## **Order RE: Claim Construction**

R. GARY KLAUSNER, **District Judge.**

### ***I. INTRODUCTION***

In approximately fifty different lawsuits, plaintiff Ronald A. Katz Technology Licensing, L.P. ("RAKTL") has alleged that various defendants infringe claims from its family of related interactive call processing patents. The Judicial Panel on Multidistrict Litigation consolidated these cases for pretrial proceedings and transferred the consolidated case to this Court (07-MDL-1816). This Court has grouped the different cases based roughly on the date they were transferred. On August 15, 2007, this Court issued an order in the Group B cases allowing the parties to file claim construction briefs on thirty disputed claim terms.

### ***II. JUDICIAL STANDARD***

Interpretation of patent claims is a question of law allocated to the Court. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 116 S.Ct 1384, 1396, 134 L.Ed.2d 577 (1996). "In the exercise of that duty, the trial judge has an independent obligation to determine the meaning of the claims, notwithstanding the views asserted by the adversary parties." *Exxon Chemical Patents, Inc. v. Lubrizol Corp.*, 64 F.3d 1553, 1555 (Fed.Cir.1995).

Words in a claim are generally given their ordinary and customary meaning. *Phillips v. AWH Corp, et al.*, 415 F.3d 1303, 1312 (Fed.Cir.2005) ( *en banc* ) (citations omitted). The ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention. *Id.* at 1313. The person of ordinary skill in the art is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification. In addition to consulting the specification, we also look to the patent's prosecution history. *Id.* at 1317. The specification and the prosecution history are both considered intrinsic evidence.

A long line of cases indicates that the intrinsic record is the primary source for determining claim meaning. In *Phillips v. AWH Corp*, the Federal Circuit reaffirmed this principle in an *en banc* decision. *Id.* at 1312-1324. Under this approach to claim construction, evidence extrinsic to the patent document "can shed useful light on the relevant art," but is less significant than the intrinsic record in determining the "legally operative meaning of disputed claim language." *Vanderlande Indus. Nederland BV v. Int'l Trade Comm'n*, 366 F.3d 1311, 1318 (Fed.Cir.2004). Particularly, the Federal Circuit's case law suggests that extrinsic evidence cannot alter any claim meaning discernible from intrinsic evidence. *See, e.g., Intel Corp. v. VIA Techs., Inc.*, 319 F.3d 1357, 1367 (Fed.Cir.2003) ("When an analysis of intrinsic evidence resolves any ambiguity in a disputed claim term, it is improper to rely on extrinsic evidence to contradict the meaning so ascertained.").

These patents have been asserted in several prior litigations. Two of them resulted in claim construction rulings. *See Katz v. AT & T Corp.*, 63 F.Supp.2d 583 (E.D.Pa.1999) ("AT & T"); *Verizon Cal. Inc. v. Ronald A. Katz Tech. Licensing L.P.*, 326 F.Supp.2d 1060 (C.D.Cal.2003) ("Verizon"). These orders address some of the terms at issue here. Neither party asserts that this Court is bound by these earlier decisions. Nonetheless, in the interest of judicial consistency, this Court has reviewed these decisions and has deferred to their findings when well reasoned. *See Markman*, 116 S.Ct. at 1396 ("But whereas issue preclusion could not be asserted against new and independent infringement defendants even within a given jurisdiction, treating interpretive issues as purely legal will promote (though it will not guarantee) intrajurisdictional certainty through the application of *stare decisis* on those questions not yet subject to interjurisdictional uniformity under the authority of the single appeals court."). However, when this Court found that the prior decisions were not well reasoned or were not based on the most recent law or facts, this Court departed from those decisions and made its own rulings. FN1

FN1. The law of claim construction has evolved and recent reexamination proceedings on plaintiff's patents have shed new light on the meaning of some claims.

### **III. PLAINTIFF'S PATENTS**

Plaintiff's interactive call processing patents generally describe technology that enables telephone callers to exchange information with computer systems through a telephone network. There are approximately thirty patents in suit. The patents can be grouped by one of eight common specifications. For ease of reference, this Court adopts the informal titles that plaintiff has used to describe these specifications. The following patents have claim terms being interpreted in this decision.

1. The "Statistical Interface" patents include U.S Patent Nos.: 5,684,863 ("the '863 patent"); 5,815,551 ("the

'551 patent"); 5,898,762 ("the '762 patent"); 6,678,360 ("the '360 patent"); 5,255,309 ("the '309 patent"); 6,292,547 ("the '547 patent"); and 5,561,707 ("the '707 patent").

2. The "Call Selectivity" patents include U.S. Patent Nos.: 5,128,984 ("the '984 patent"); 5,251,252 ("the '252 patent"); and 5,974,120 ("the '120 patent").

3. The "Conditional Interface" patents include U.S. Patent No. 4,930,150 ("the '150 patent").

4. The "Conditional Interface Plus" patents include U.S. Patent No. 5,351,285 ("the '285 patent").

5. The "Ticket System" patents include U.S. Patent Nos.: 6,044,135 ("the '135 patent"); and 5,787,156 ("the '156 patent").

6. The "Voice-Data" patents include U.S. Patent No. 6,335,965 ("the '965 patent").

7. The "Account Control" patents include U.S. Patent No. 6,512,415 ("the '415 patent").

8. The "Statistical Analysis" patents include U.S. Patent No. 4,792,968 ("the '968 patent").

This decision groups the claim construction issues by patent specification beginning with those terms that are common to multiple specifications.

#### ***IV. TERMS COMMON TO MULTIPLE PATENT SPECIFICATIONS***

##### ***A. "Acknowledgement number"-'762:32 and '965:31 FN2***

FN2. The 'XXX:Y format refers to the patent number and claim number where the disputed term appears. In many cases the claim in dispute is a dependent claim and the disputed term is actually found in the base claim.

The interactive call processing patents describe two types of transaction numbers-designation numbers and acknowledgement numbers.

This transaction has been designated by the number 4951684, and is further identified by the acknowledgement digits 6173. Please make a record of these numbers as they will be repeated. Specifically, the designation number is 4951684. The acknowledgement digits are 6173. Please acknowledge this transaction by pressing your telephone buttons to indicate the acknowledge digits 6173. ('762 patent at 8:43-49.)

The parties agree that the term "acknowledgement number" refers to a number used to confirm or acknowledge a transaction. However, the defendants contend that an acknowledgement number must also be used by a caller during the same call that the number was provided. Specifically, the defendants state that:

The patents do not describe an acknowledgement number that is only provided to the caller, without requiring the caller to provide it back during the same call to complete the transaction.FN3

FN3. Defendants' Response to Plaintiff's Opening Claim Construction Brief ("Defendants' Resp.") at p. 5.

The plaintiff disagrees and argues that the defendants are impermissibly importing limitations from one embodiment while ignoring other embodiments. *See*, *Chimie v. PPG Indus., Inc.*, 402 F.3d 1371, 1379 (Fed.Cir.2005). The plaintiff points to two embodiments-the '863 patent at 11:43-59 and the '965 patent at 12:57-59-that purportedly show that the caller need not repeat back the acknowledgement number during the call. However, plaintiff overstates its case. The first embodiment discusses the acknowledgement numbers but does not show how they are actually used. As plaintiff points out, the second embodiment states that a caller "may" repeat back an acknowledgment number. However, in this embodiment, if the caller fails to do so, the transaction is not confirmed.

Thus, all the embodiments identified by the parties show that an "acknowledgment number" is a number used by a caller to verify or acknowledge a transaction to the system during the call. However, that fact does not necessarily imply that the disputed term contains all these limitations. *Liebel-Flarsheim Co. et al., v. Medrad, Inc.*, 358 F.3d 898, 906 (Fed.Cir.2004)("Even when the specification describes only a single 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.' " (citation omitted)). This Court must walk the fine line of using the specification to interpret the meaning of a claim without importing limitations from the specification into the claim. *See*, *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed.Cir.2005) ( *en banc* ).

Here, the specifications consistently explain that a caller uses an "acknowledgment number" to verify or acknowledge a transaction. ( *See e.g.*, '762 patent at 8:55-58; '968 patent at 7:63-66.) All the disclosed uses of acknowledgment numbers only make sense when the term is linked to callers. However, there is nothing within the specifications to suggest that the "acknowledgment number" must be used during the same call. (Fory's Decl. at para. 40 .) Thus, this Court interprets an "acknowledgement number" to require use by caller, but does not require that it be used during the same call. Based on the foregoing, this Court defines the term "acknowledgement number" to mean "a number used by a caller to verify or acknowledge a transaction to the system."

**B. "DNIS"-'863:43; '551:19; '360:18; '120:34; '285:71; '135:9**

As discussed in *Verizon*, the term DNIS is a commonly understood acronym in the art for Dialed Number Identification Service, a service that identifies a dialed number. 326 F.Supp. at 1071. The parties appear to have a minor dispute about this term's construction. Plaintiff would construe the term to mean "signals or data that identify the number called." The defendants offer two definitions that would depend on the claim: (1) "DNIS [referring to signals]" means "signals that identify the number called", and (2) "DNIS [referring to data]" means "data that identify the number called." Defendants' proposed definition is a more precise version of the plaintiff's definition. These definitions are not unduly complicated, nor does the precision prejudice plaintiff. Therefore, this Court adopts defendants' construction.

**C. "Personal identification data"-'863:43, '547:18 FN4**

FN4. The plaintiff indicated that the disputed term appeared in 12 claims of 11 patents, (Plaintiff's Opening at p. 18). However, it appears those citations also referred to claims using the term "identification data." The meaning of that term is agreed upon. (Ex 1 to Byrnes Decl.) Therefore, this Order only addresses the meaning of "personal identification data."

In one embodiment, the specification of the '863 patent discusses restricting the use of the system by "verify[ing] identification data proffered by a caller." ('863 patent at 9:39-45.) The data might be "a credit card number or a personal identification number." Id. The Plaintiff offers the following definition for "personal identification data":

Data that identifies the caller as an individual to the world at large, which is distinct from the recited "customer number data." Examples of personal identification data may include name, address, telephone number, initials, social security number, etc.

Defendants argue the phrase means:

Data that is personal or specific to a caller that permanently identifies the caller to the world at large and is distinct from caller customer number data, a password, and PIN numbers.

The parties agree that "personal identification data" identifies the caller to the world at large and that the term is distinguishable from "customer number data." However, the parties' proposed definitions differ in several details. First, the defendants state that personal identification data is both specific to a caller and permanent. Second, the plaintiff's definition includes examples: name, address, telephone number, initials, social security number etc. while defendants' definition *excludes* specific examples: password and PIN numbers.

Plaintiff argues that its definition is consistent with the claims, representations to the PTO during the '707 reexam FN5 and with the *AT & T* ruling. 63 F.Supp. at 605-606 ("Nothing in the claim language instructs that "personal identification data "cannot be a *personal* identification number (PIN) or an expiration data from a credit card as long as the data identifies the individual."). However, the *AT & T* ruling was issued in 1999, several years before the '707 reexam. Since that ruling, plaintiff made several statements in reexam proceedings that narrow the meaning of personal identification data. As a result, this portion of the *AT & T* decision carries significantly less weight.

FN5. The '707 patent contains the same specification as the '547 and '863 patents.

In its appeal of the '707 reexam, plaintiff made several statements that clearly defined the term "personal identification data" narrowly. First, plaintiff provided a claim construction for the very term at issue here. Plaintiff stated:

"[P]ersonal identification data" should be interpreted as data that is "personal" or specific to a caller as in data that permanently identifies the caller to the world at large. The examples in the '707 specification of name, address, telephone number initials, name etc. are personal data items that identify a person. (Def. Ex. 29 at pp. 35-36.)

The plaintiff went on to distinguish a Yoshizawa reference FN6 by stating that "A password that is composed (and frequently changed) serves as an access code or PIN, rather than personal identification data." (Def. Ex. 29 at p. 50.) In response, plaintiff now argues that some passwords and pins may still be personal identification data "if they comprise data that identifies the caller as an individual to the world at large." (Katz's Opening Claim Construction Brief ("Plaintiff's Opening") at pp. 18-19.)

FN6. Yoshizawa apparent disclosed a telephone betting system where a subscriber inputs his account number and password. (Def.Ex. 28.)

"[T]he prosecution history can often inform the meaning of the claim language by demonstrating how the inventor understood the invention and whether the inventor limited the invention in the course of prosecution, making the claim scope narrower than it would otherwise be." Phillips, 415 F.3d at 1317. Furthermore "prosecution disclaimer may arise from disavowals made during the prosecution of ancestor patent applications." Omega Engineering Inc., v. Raytek Corp. 334 F.3d 1314, 1333 (Fed.Cir.2003). "When the application of prosecution disclaimer involves statements from prosecution of a familial patent relating to the same subject matter as the claim language at issue in the patent being construed, those statements in the familial application are relevant in construing the claims at issue." Ormco Corp. v. Align Technology, Inc., 498 F.3d 1307, 1314 (Fed.Cir.2007) (citations omitted). Here, plaintiff's statements are found in the prosecution of a related patent, the ' 707 reexam, and concern precisely the same claim language at issue here.

Therefore, these statements are applicable and this Court defines "personal identification data" to be "data that is personal or specific to a caller that permanently identifies the caller to the world at large and is distinct from caller customer number data, a password, and PIN numbers. Examples of personal identification data may include a name, address, telephone number or initials." FN7

FN7. The examples are those listed in the prosecution history. We have intentionally omitted the other examples plaintiff proffered.

**D. "Format" -'135:9, '150:11, '285:71, '360:18, '415:29, '551:19, '863:43, ' 120:34, '156:11, '252:6, '984:4**

The term "format" appears in a number of plaintiff's patents. The patent specifications generally use the term "format" to refer to a defined protocol, or more specifically a "call processing flow", that governs how a call processing system and callers communicate with each other for a particular application. In the *Verizon* case, this Court construed the term "interactive operating format" and "format" to mean:

[A] call processing flow implemented by at least one computer program that sets forth the content and sequence of steps to gather information from and convey information to callers through pre-recorded prompts and messages. *Verizon*, 326 F.Supp.2d at 1071.

Later, in ruling on various summary judgment motions, this court made the following two "clarifying statements":

[S]election of, or branching to, a module or subroutine within a computer program does not constitute selection of a separate format.

[S]election of (or branching to), a second computer program by a first computer program, that together implement a call process flow application does not constitute selection of another format. (*Verizon* SJ Order at pp. 44-52 attached as Ex. 21 to Byrnes Decl).



In this proceeding, plaintiff essentially asks this Court to adopt the definition provided in the *Verizon* claim construction order without the clarifying statements the Court provided in its later summary judgment order. Thus, plaintiff's proposed definition states:

[A] call process flow application implemented by at least one computer program that sets forth the content and sequence of steps to gather information from and convey information to callers through pre-recorded prompts and messages.

The plaintiff argues that the clarifying statements should be excluded from the definition because they: (1) addressed case specific issues for summary judgment purposes; and (2) inaccurately extrapolated discussion from the file history.

In contrast, the defendants' proposal states:

"Format" means "one or more computer programs used to implement one or more call process flows. A call process flow sets forth the content and sequence of steps to gather information from and convey information to callers through pre-recorded prompts. A computer program as it defines 'format,' includes modules and subroutines. Selection of, or branching to, a module or subroutine within a computer program does not constitute multiple formats. In addition, since a format also contemplates more than one computer program, selection of (or branching to) a second computer program by a first computer program that together implement a call process flow application does not constitute multiple formats. One phone number cannot be used to reach different formats."

Thus, the defendants seek to include the essence of the two clarifying statements, but their proposal rephrases the entire definition to imply that a format and computer program are the same thing. Finally, without any supporting argument, the defendants insert a sentence at the end of their proposed definition stating, "[o]ne phone number cannot be used to reach different formats."

This Court rejects the plaintiff's first argument regarding the clarifying statements. Although the clarifying statements were made in the context of deciding summary judgment motions, those statements are sufficiently general to be used for the purposes of claim construction.

Next, this Court addresses whether the clarifying statements are accurate constructions of the term "format." We first examine the specifications. They contain several flow diagrams that involve branching. Each of these flow diagrams is described as a format or a single format. ( *See e.g.* Figure 2, 2:43-44 of the '984 patent, Figure 3, 2:37-38 of the '863 patent.) These examples suggest that mere branching does constitute format selection. Otherwise, the diagrams would represent multiple formats and not "a" format.

In distinguishing the U.S. Patent No. 4,785,408 ("Britton", Ex. 32 to Simmons Decl.), plaintiff also made several statements that demonstrate that selecting formats is not the same as branching within a program. Britton discloses a graphical development tool that allows users to create an interactive voice response application by selecting and combining predefined modules and subroutines, and specifying the methods by which these modules interact. Britton states that a typical voice response application includes modules that "control the voiceware equipment to answer an incoming call, retrieve the appropriate speech response ..., and play it (e.g., and initial announcement) to the caller." (Britton at 3:51-55.)

Using the graphical development environment, the program creator first configures an overall structure for

the program by arranging a plurality of "interaction modules," and then specifies the parameters for each of the interaction modules. Id. at 4:56-68. An interaction module "can be thought of as a set of software routines which define all aspects of the necessary interactions between the relevant physical system and the end user for a particular transaction." Id. at 5:58-62. Certain control modules branch to selected operations of the application program based on external factors (e.g., time of day, etc.), while other control modules branch to selected operations based on touch-tone inputs. Id. at 6:32-59. Eventually, the application program, once specified and tested, is created by linking a library that includes the specified sequence of operations and other parameters to various run-modules.

In distinguishing Britton during the prosecution of application S/N 08/306,751, the plaintiff explained that format selection does not cover branching or selection of subroutines or modules within an application program:

Britton discloses a *switch module, which switches between branches of the program*, depending on which of a number of program branches is specified by the program producer.

Clearly, the branch alternatives are subroutines of a single program, which can hardly be considered as concurrently operating formats for access by different users. (Sept. 31, 1995 Amendment at p. 42, Ex 34 to Simmons Decl. (emphasis in original); *see also*, Ex. 31 at 11; Ex. 33 at 14 ("Britton does not appear to disclose a plurality of distinct operating formats...."))

These statements are found in the prosecution of related patents and concern precisely the same claim language at issue here. Therefore, this Court can properly rely on these statements to define "format." *See*, Ormco, 498 F.3d at 1314.

Together, the specification and file history show that selecting a format is not the same as branching within a program or jumping to a different program module. Thus, the clarifying statements are accurate.

Finally, the defendants seek to rephrase the claim construction provided in *Verizon* in a manner that would suggest that "format" is simply a computer program. That is not the case. As the plaintiff correctly notes a format is implemented by a computer program, but is not itself a computer program.

Based on the foregoing, this Court defines "format" as follows. Format refers to a call processing flow implemented by at least one computer program that sets forth the content and sequence of steps to gather information from and convey information to callers through pre-recorded prompts and messages. Selection of, or branching to, a module or subroutine within a computer program does not constitute selection of a separate format. Selection of (or branching to), a second computer program by a first computer program, that together implement a call process flow application also does not constitute selection of a separate format.

#### **E. "*Isolate a subset of callers*" -'968:7, '863:192**

Plaintiff suggests that this phrase should be given its ordinary meaning. Specifically plaintiff defines the phrase to mean "set apart one or more callers from a larger group based on some criteria ." In contrast, the defendants argue that the plaintiff is no longer entitled to the plain meaning because the plaintiff narrowed the scope of this phrase during the prosecution of the '968 patent. As a result, the defendants' proposed definition is: "identify a subset of callers following a *statistical analysis* of data from the callers."

Specifically, the defendants point out that the plaintiff distinguished U.S. Patent No. 4,439,636 ("Newkirk") in the May 4, 1988 Supplemental Amendment (Ex. 37 to Simmons Decl.) by suggesting that Newkirk did not perform a "statistical analysis." Although this distinction was made, the statement does not restrict the meaning of the phrase, "isolate a subset of callers." The defendants improperly focus on the first sentence of patentee's argument, which does not even mention the term in dispute here:

Distinct from applicant's development, Newkirk does not contemplate any operations related to statistical analysis. *Specifically, with respect to the claims herein, while the Newkirk utilizes a calendar clock and forms records for purposes of billing, the system does not store any form of "answer data." Furthermore, the system certainly does not contemplate interrelated processing as by comparing answer data or analysis of such data with external data.* ( *Id.* at p. 7, emphasis added).

The italicized language explicitly refers to two other limitations found in the pending claims- "answer data" and "comparing said answer data." *Id.* at pp. 2-3. Therefore, this portion of the file history does not restrict the meaning of isolating a subset of callers, and this Court adopts the claim construction proposed by the plaintiff.

#### **F. "Consumable participation key" -'309:42, '707:24, '156:11**

Both parties appear to agree that the term "consumable participation key" refers to "a number or word that allows a caller access to a service or part of service a predefined limited number of times and which cannot be refreshed or recharged." Indeed, this definition was previously adopted by the parties in *AT & T* (63 F.Supp.2d at 622) and by the USPTO during the reexam proceeding of the '707 patent. ( *See*, Sept. 29, 2006 Office Action at p. 92, Ex. 20 to Byrnes Decl.)

The defendants would further restrict the meaning of the phrase so that the number is "independent of both time and value." The defendants argue that these additional limitations are warranted in view of two statements made in the prosecution histories of the patents. Specifically, the plaintiff made the following two remarks during the prosecution of the '707 and '156 patents respectively:

A "consumable key" is a code provided by a caller, which is examined by the system to determine whether *any* further access to the system is to be allowed, without it being a function of time. A "consumable key" is *not* automatically refreshed. (March 13, 1996 Amendment at p. 35, Ex 38 to Simmons Decl., emphasis in original.)

Entenmann discloses a lottery system in which it is deemed "important to keep a record of how many times a customer has used the lottery to ensure that a prepaid amount of credit limit is not exceeded." That reference is to value and *not* to a consumable key, where a specific number of uses are permitted. (September 19, 1997 Amendment at pp. 24-25, Ex 39 to Simmons Decl., emphasis in original.)

Apparently, the defendants believe that the term "it" in the phrase "without it being a function of time" refers to the "consumable key." However, the more natural parsing of the phrase is to interpret "it" to refer to "further access." Thus, this statement merely indicates that further access is not simply a function of time; further access depends on whether the key has been consumed. Should the plaintiff attempt to interpret this limitation to be satisfied by access that is *purely* based on time, the defendants may seek a clarifying construction. Otherwise, this Court believes that plaintiff's proposal accurately conveys the meaning

addressed here.

As for the second statement made during the prosecution of the '156 file history, it is unclear why the statement "that reference is to value, not to a consumable key" leads to the conclusion that such a key is independent of value. Accordingly, this Court rejects defendants' proposal and defines "consumable participation key" to be "a number or word that allows a caller access to a service or part of service a predefined limited number of times and which cannot be refreshed or recharged."

**G. "*Limited use/limits on use/specifying limits on use*" -'863:192, '252:6, '120:34, '156:11, '135:9**

The plaintiff's patents teach that callers may enter numbers over the telephone to gain access to all or part of a service. Typically, the use of the numbers is subject to limits, such as a limited number of uses or a limited time period of usage. The term "limited use" and its variations appear in the claims of several different patents.

**1. "*Limit on use*" -'863:192, '135:9**

Previously, *AT & T* defined the term "limit on use" in the '863 and '707 patents to mean:

[A] control that limits a caller's access to a service based on some predetermined method of measuring the level of use. The term "limit on use" is not restricted to a specific method of measuring use, such as a limited number of accesses into the Katz system. 63 F.Supp.2d at 623-624.

None of the parties dispute this claim construction so far as it goes. Nonetheless, both parties have asked for some modifications. First, with respect to the '863 patent, both parties ask the Court to omit the second sentence from *AT & T*'s definition. However, the plaintiff adds the term "or system" after "caller's access to a service" while defendants omit the entire reference "to a service or system."

With respect to the '135 patent, the plaintiff has asked the Court to use the ordinary meaning of the term and the defendants have asked for the same definition they requested for the '863 patent. These requests are not substantively different. In deference to the *AT & T* decision which is substantively correct, this Court adopts that definition. "Limit on use" in the '863 and '135 patents means "a control that limits a caller's access to a service based on some predetermined method of measuring the level of use."

The Court finds no reason to separately construe the "specifying limits on use" because the jury should understand that term's meaning given the Court's definition of "limits on use."

**2. "*Limited use*" -'120:34, '252:6**

Next, the defendants argue that the '120 and '252 patent specifications specifically define "limited use" to mean a single use. In particular they cite to the following statement that is found in both specifications:

For example, such participation might be arranged by mail or other communication to provide a participant with a *limited use* (*i.e. one*) qualification number. ('252 patent at 5:53-56; *see also*, '120 patent at 6:13-15, emphasis added.)

Relying on Black's Law Dictionary, the defendants point out that "i.e." means "that is" and contrast that to the phrase "e.g.", which means "for example." *See*, Ex. 45 to Simmons Decl. Thus, the defendants argue that

the patentee has defined the term "limited use." When a patentee acts as its own lexicographer, the definition the patentee gives in the specification governs even if the ordinary meaning of that term differs. *See*, Phillips, 415 F.3d at 1316. At the same time, dependent claims 5 and 17 of the '252 patent specifically limit the claims to a single use. Under the doctrine of claim differentiation 'limitations stated in dependent claims are normally not to be read into the independent claim from which they depend. *See*, Curtiss-Wright Flow Control Corp. v. Velan, Inc. 438 F.3d 1374, 1381 (Fed.Cir.2006); Phillips, 415 F.3d at 1314-15. Since the corresponding independent claims already contained a "limited use" limitation, these dependent claims suggest that the "limited use" should not be construed to require only single use.

A statement in the specification must be sufficiently clear to put one reasonably skilled in the art on notice that the inventor intended to redefine the claim term. *See*, Merck & Co., Inc. v. Teva Pharmaceuticals USA, Inc., 395 F.3d 1364, 1370 (C.A.Fed.2005). Although the term "i.e. one" suggests that the patentee defined "limited use" to be one use, we see no other evidence in the specification that would support such a definition. Moreover, applying the doctrine of claim differentiation; the dependent claims contradict that interpretation. Therefore, this Court cannot say the inventor clearly redefined "limited use." As a result, this Court finds that the terms "limited use" and "limited-use" in the context of the '120 and '252 patents should carry their ordinary meaning. The defendants' proposal is rejected as incorrect. Plaintiff's proposal is also rejected as unhelpful and confusing.

### **3. "Limited number of uses"-'156:11**

Finally, the '156 patent uses the term "limited number of uses ." The plaintiff proposes that the plain meaning of the term should suffice. The defendants propose to define the term as "a control that limits a caller's access based on a predetermined number of uses." The defendants' definition adds the concept of "predetermined" to the plain meaning of the term. However, the defendants have not provided the Court with any reason why the limit must be predetermined. Accordingly, this Court finds that the term "limited number of uses" should be given its plain meaning.

### **H. "Means for processing"-'984:4; '252:6, '707:129**

#### **1. "Means for processing"-'984:4; '252:6**

The parties agree that the "means for processing" limitation in claim 4 of the '984 patent and claim '6 of the '252 patent is a means plus function limitation governed by 35 USC s. 112, para. 6. The construction of a means-plus-function limitation follows a two-step approach. First, the claimed function must be identified, staying true to the claim language and the limitations expressly recited by the claims. Next, the corresponding structures in the written description that perform those functions must be ascertained. *Omega Engineering*, 334 F.3d at 1321.

Here, the parties agree that the recited function is "processing calls in an interface format." However, they disagree about what structure in the specification discloses the claimed function. Both parties include the interface processor 26 in the corresponding structure. However, relying on *WMS Gaming, Inc. v. International Game Tech* 184 F.3d 1339 (Fed.Cir.1999), the defendants argue that the structure also includes the algorithmic structure of steps 52, 66-78 found in Figure 2. In *WMS Gaming*, the Federal Circuit stated:

In a means plus function claim in which the disclosed structure is a computer, or microprocessor, programmed to carry out an algorithm, the disclosed structure is not the general purpose computer, but rather the special purpose computer programmed to perform the disclosed algorithm. 184 F.3d at 1349.

In response, the plaintiff argues that "in order for the algorithm to be a required element of the claim construction, the algorithm must be both *disclosed* and the *point of novelty* of the claimed invention." (Plaintiff's Opening at p. 5.)

Plaintiff's first point is that an algorithm must be disclosed before it forms part of means plus element is not applicable. However, the '984 and '242 patents both disclose an algorithm that processes calls in an interface format. The defendants correctly point out that steps 52 and 66-78 of Figure 2 perform the recited function. ( *See*, '984 patent at 2:43-44, 6:63-68, 8:27-33.) Moreover, the flow chart shown in Figure 2 is clearly one way to disclose an algorithm. *See*, *Gobeli Research Ltd. v. Apple Computer, Inc.*, 384 F.Supp.2d 1016, 1023 (E.D.Tex.2005) ("[The patentee] could have provided figures or flow charts that describe the algorithm.")

As for plaintiff's second point, neither *WMS Gaming* nor any of the other cited cases suggest that the algorithm must be the "point of novelty" of the claimed invention to be considered part of the disclosed structure of a general purpose computer. Accordingly, this Court adopts the defendants proposal for the "means for processing" limitation found in claim 4 of the '984 patent and claim 6 of the '252 patent.

## **2. "Means for processing" -'707:129**

The defendants also briefed the "means for processing" limitation found in claim '129 of the '707 patent. The plaintiff's opening brief did not address this issue. This limitation is clearly different from the processing means discussed above, and it does not appear to be one of the thirty disputed terms that the parties were permitted to brief. Therefore, this Court declines to construe this phrase at this time. Moreover, the defendants also briefed invalidity under 35 U.S.C s. 112. This Court is already permitting the defendants to file a joint summary judgment motion based on any defense under 35 U.S.C s. 112. This Court will entertain any such arguments at that time.

## **V. TERMS WITHIN THE FORMAT QUALIFICATION PATENTS**

### **A. "Customer [identification] number/[caller] customer number [data]" -' 863:43, '762:32, '360:18, '965:31**

The parties appear to agree that phrases: (1) "caller customer number data", (2) "individual caller's customer number", (3) "customer number data", and (4) "customer identification number" from claim 43 of the '863 patent, claim 32 of the '762 patent, claim 17 of the '360 patent and claim 31 of the '965 patent respectively, have the same meaning. However, this Court only interprets the first three terms together and refers to them as "customer number." The Court interprets the fourth term, customer identification number, to have a different meaning.

#### **1. "[Caller] customer number [data]" -'863:43, '762:32, '360:18**

The plaintiff requests that this Court adopt a definition from the *AT & T* decision. Specifically, that court defined "caller customer number data" to mean "a number assigned to a customer by a vendor or merchant or recognized by a vendor or merchant for the purpose of identification of the customer." 63 F.Supp.2d at 606. The defendants' proposal differs in two respects. First, the defendants argue that all four phrases require that the vendor or merchant assign the number. Second, the defendants argue these numbers cannot be credit card numbers.

In support of their first argument, the defendants cite to a passage in the ' 863 patent that states that "the caller is asked for his customer number, as it appears on his catalog." Although the vendor assigned the customer number in this example, that fact does not imply that the claims must be limited accordingly. *See*, Liebel-Flarsheim, 358 F.3d at 906. The ordinary meaning of "customer number" does not suggest that it must be assigned by a vendor. Moreover, none of the cited portions of the specifications suggest that the patentee intended to deviate from the term's ordinary meaning.FN8 Therefore, this Court does not require that a customer number to be assigned by a vendor or merchant. In this respect, the Court's decision is consistent with the *AT & T* ruling.

FN8. The defendants recently supplemented the record with statements made during the reexam of the '415 patent. (Ex. 1 to Kane Decl.) The cited passage was made in the context of determining priority for a "negative list" and it does not limit the meaning of customer number.

With respect to the second argument, the defendants point out that "customer number" and "credit card number" are consistently referred to as two separate items in both the specifications and claims. For example, Figure 5 from the ' 863, '762 and '360 patents all illustrate storage locations for both a credit card number and customer number separately. ( *See also, e.g.*, '863 patent 11 :1-7; '762 patent at 11:17-20 and '360 patent at 11:22-26.) Moreover, several claims recite both a customer number and credit card number. ( *See, e.g.*, '762 patent, claims 17 and 45.)

In response, the plaintiff relies on the *AT & T* which considered the separate recitation of a customer number and credit card number as a mere example. 63 F.Supp.2d at 605. The plaintiff also points out that the specifications show that customers "may be identified by various forms of identifications such as, for example, credit card numbers, social security numbers, drivers license numbers, telephone numbers, or other identifying numbers." (Plaintiff's Opening at p. 12.)

Although these examples demonstrate that the patents identify customers in different ways, the term "customer number" is not used to generally refer to these various types of identifications. Instead, "customer number" is used to refer to one of those forms of identification. Underscoring that point, the patentee has also chosen to use both "customer number" and "credit card number" in the same claims.

In the absence of any evidence to the contrary, we presume that the use of different terms in the same claims connotes different meanings. *See*, Applied Medical Resources Corp. v. U.S. Surgical Corp., 448 F.3d 1324, 1333 fn. 3 (Fed.Cir.2006). Although we give some deference to the *AT & T* decision, this Court is not bound by that ruling. With respect to the definition of "customer number", this Court disagrees, and adopts defendants' proposal. Therefore, the Court defines customer number FN9 to mean a number assigned to a customer by a vendor or merchant or recognized by a vendor or merchant for the purpose of identification of the customer. The customer number is distinct from a credit card number.

FN9. This definition applies to (1) "caller customer number data", (2) "individual caller's customer number", and (3) "customer number data."

## **2. "Customer identification number"-'965:31**

In contrast, the term "customer identification number" in claim 31 of the ' 965 patent does not appear to

refer to the specific "customer number" that is repeatedly discussed in the specifications. Instead, this limitation corresponds to the more general concept of identifying customers mentioned in plaintiff's examples. In that context, the credit card number is merely one example of the customer identification number. Therefore, this term is not distinct from a credit card number. Again, we reject defendants' first argument here because there is nothing in the specification that suggests that the vendors need to assign this number. Accordingly, "customer identification number" in claim 31 of the '965 patent means a number assigned to a customer by a vendor or merchant or recognized by a vendor or merchant for the purpose of identification of the customer.

## **B. "*Qualifying ... access*" and qualification structure**

The parties have asked this Court to construe several limitations in the format qualification patents that use some variation of the term qualifying or qualification.

### **1. "*Qualifying ... access*"-'863:43, 192**

The system of claim 43 of the '863 patent relates to an analysis control system for use with a communication facility. The system includes a:

qualification structure coupled to said record structure for *qualifying access* by said individual callers to said *select format* ... (emphasis added). FN10

FN10. Claim 43 ultimately depends on claim 27 which contains the claim language in dispute.

Although the parties have asked the Court to construe the term "qualifying access", their disagreement relates to the larger phrase and whether the claim requires qualifying the caller to access the entirety of the format or merely part of the format. The plaintiff argues that the patent teaches that the caller is already interfacing with a format before the caller enters a qualification phase. For example, the specification describes how preliminary information is obtained prior to entering into the qualification phase. ('863 patent at 10:55-60.) The specification also discussed how a user may be "qualified" for a limited number of uses during a defined interval. *Id.* at 9:30-32. Therefore, the plaintiff argues that qualifying access only requires some additional access to the format.

The defendants make several arguments to demonstrate that qualifying access must refer to the entire format. First, they cite to the *AT & T* court's interpretation of the term "access" to mean "gaining or obtaining the ability to enter or make use of." The defendants argue that this definition requires that qualifying must occur prior to access to the selected format. 63 F.Supp.2d 604. Second, the defendants point to other claims that expressly limit access to "portions" of the format. ( *See e.g.*, '863 patent, claims 8 and 65, referring to qualification structures that restrict "extent of access" to the system.) Third, the defendants identify examples in the specification that show that callers must qualify to use the system. *Id.* at 3:39-44, 12:32-34. Finally, the defendants point out that claim 27 initially referred to "qualifying said individual callers" without mentioning "access" by the caller to "said select format." The defendants interpret the additional claim language to limit the claim to qualification to an entire format.

We address these arguments in turn. First, despite defendants' reliance, the *AT & T* interpretation of "access" is unhelpful. The *AT & T* court's definition refers to access to files and relates to a different issue. The evolution of the claim also does not help this Court construe this term.



This Court is left with several relevant facts. First, as plaintiff points out, the specification shows a system that qualifies callers for further access to a format. ('863 patent at 10:55-60.) Second, as defendants point out, the specification also shows a system that qualifies callers for access to entire formats. *Id.* at 3:39-44, 12:32-34. Third, there are claims that limit the "extent of access" and thus correspond to the examples plaintiff identified. Finally, the claim language of the claim itself refers to access to the selected format itself. Therefore, this Court interprets the disputed claim language to correspond to the portions of the specification identified by the defendants. Based on the foregoing, this Court rejects the plaintiff's proposal and construes the phrase "qualifying access" to mean determining whether a caller may enter or use.

As for claim 192 of the '863 patent, this limitation appears to address different issues from the limitation discussed here. It was not addressed in plaintiff's opening brief and it does not appear to be one of the thirty disputed terms that the parties were permitted to brief. Therefore, this Court declines to construe this phrase at this time.

## **2. "Qualification structure" -'309:42, '707:24, 129, '863:43, '551:19**

The term "qualification structure" is found across several different patents. Although it is not expressed in means plus function language, the parties agree that it is governed by 35 U.S.C. s. 112, para. 6.FN11 Thus, to construe this limitation, the claimed function must be identified and the corresponding structure(s) that perform the identified function must be ascertained. *Omega Engineering*, 334 F.3d at 1321. Each of the five claims at issue has a "qualification structure" with a different claimed function.

FN11. "[A] claim term that does not use "means";6439;6439 will trigger the rebuttable presumption that s. 112 para. 6 does not apply." *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1369 (Fed.Cir.2002). The presumption is rebutted if there is a showing that the claim term fails to "recite sufficiently definite structure" or else recites a "function without reciting sufficient structure for performing that function." *Id.* (citations omitted).

The parties identify the same claimed functions and some of the same corresponding structures, namely the processing unit 92 and qualification unit 93. However, they disagree over what additional structures should be included. The various recited functions generally relate to testing the caller to determine whether the caller should be permitted to use the system in some manner.

Through its expert, plaintiff argues that the patents disclose three alternative qualifying structures that perform the recited functions. (Lucantoni Decl. at para. para. 14-18.) First, Dr. Lucantoni states that the processing unit 92 and qualification unit 93 perform these functions. The defendants agree that these components form at least part of the corresponding structures. Second, Dr. Lucantoni states that the processors PR1-PRn is an alternative disclosed structure. Finally, Dr. Lucantoni states that one of ordinary skill reading the patents would understand that the central processing unit 251 is capable of performing the same functions as processors PR1-PRn.

This Court finds that processors PR1-PRn are not an alternative structure that performs the recited functions. Processors PR1-PRn reflect the *same* structures disclosed in Figure 4 shown at a higher level of abstraction. The '309 patent refers to Figure 4 as "showing an exemplary structural form for the processors PR1-PRn" ('309 patent at 10:5-8), and Figure 4 discloses processing unit 92 and qualification unit 93. To properly

interpret a means plus function limitation, this Court must select the specific structure that performs the recited function, and not a component that contains the structure. Therefore, this Court rejects plaintiff's second alternative.

As for central processing unit 251, at most, plaintiff has shown that a person of ordinary skill in the art would understand that processing unit 251 is capable of performing the recited function. However, that is not sufficient. "The duty of a patentee to clearly link or associate structure with the claimed function is the quid pro quo for allowing the patentee to express the claim in terms of function under section 112, paragraph 6." *See, Medical Instrumentation & Diagnostic Corp. v. Elekta AB*, 344 F.3d 1205, 1211 (Fed.Cir.2003). "The inquiry is whether one of skill in the art would understand the specification itself to disclose a structure, not simply whether that person would be capable of implementing a structure." *Biomedino, LLC v. Waters Technologies Corp.* 490 F.3d 946, 953 (Fed.Cir.2007). Therefore, this Court also rejects plaintiff's third alternative.

Next, this Court examines whether the defendants have correctly identified additional structures (beyond the processing unit 92 and qualification unit 93) that perform the specific recited functions. In claim 41 of the '309 patent the parties agree that the recited function of the qualification structure is "testing caller data signals specifying a consumable participation key as provided from at least one of said remote terminals." Citing to the '309 patent at 7:51-56, 17:1-6, 9:55-57 and 18:32-40, the defendants argue that the disclosed structure includes look-up table 99, use rate calculator 100, and the algorithmic structure disclosed, if any. The cited passages show that the qualification unit can use either the lookup table 99 or the use rate calculator to perform the recited function. However, the defendants have not cited to any algorithmic structure. Therefore, this Court finds that the structure corresponding to the recited function in claim 41 of the '309 patent is the processing unit 92 and qualification unit 93 using either a look-up table 99 or use rate calculator 100.

The recited functions of claims 24 and 129 of the '707 patent and claim 19 of the '551 patent are phrased slightly differently but they perform similar functions to claim 41 above. Therefore, this Court finds the same corresponding structures exist for the qualification structure in these claims. (*See also*, '707 patent at 12:49-56; 17:38-48, showing look-up table and use rate calculator involved in caller qualification.)

With respect to claim 43 of the '863 patent, the recited function for the qualification structure differs more substantially. The parties agree that the recited function is "qualifying access by said individual callers to said select format based on at least two forms of distinct identification including caller customer number data and at least one other distinct identification data element consisting of personal identification data provided by a respective one of said individual callers." Neither party identified passages in the patent that specifically correspond to this function. However, the Court notes that the '863 patent describes using both a credit card number and a customer number to qualify a caller at 10:55-11:37. This passage shows that the processor unit 92 and qualification unit 93 perform the recited function of claim 43, but there is no mention of the look-up table 99 or user rate calculator 100. As a result, this Court finds the structure that corresponds to the recited function in claim 43 of the '863 patent is the processing unit 92 and qualification unit 93.

### **C. "Analysis structure"-'309:42, '551:19; '547:18**

The term "analysis structure" appears in three claims in dispute. The specifics vary; however, in general these claims use the "analysis structure" to process caller signals. Although the term is not expressed in means plus function language, the parties agree that it is governed by 35 U.S.C. s. 112, para. 6.FN12 Thus,

to construe this limitation, the claimed function must be identified and the corresponding structure(s) that perform the identified function must be ascertained. *Omega Engineering*, 334 F.3d at 1321. The parties agree upon the specific claimed function for each of the three claims. However, they disagree about what structure in the specification corresponds to the recited functions.

FN12. This is consistent with *AT & T*, 63 F.Supp.2d at 608-609.

The various claimed functions generally relate to processing the calls in some manner. Plaintiff contends that the structure that performs these functions is the processing unit 92 or alternatively the central processing unit 251, or processors PR1 through PRn. *See*, Lucantoni Decl. at para. 10-12. The defendants agree with part of plaintiff's position-that the processing unit 92 is a structure that performs the recited function. However, citing to *Harris Corp. v. Ericsson Inc.*, 414 F.3d 1241, 1253 (Fed.Cir.2005), the defendants argue that a processor means plus function limitation also requires specific algorithms that perform the recited function. Since the specification does not disclose the required algorithms, the defendants argue that claim 42 of the '309 patent, claim 19 of the '551 patent and claim 18 of the '547 are indefinite under 35 s. 112. The parties have not fully briefed the s. 112 issue. Therefore, this Court will not make any ruling on the indefiniteness issue at this time. This should not be construed as a rejection of defendants' indefiniteness position.

Rather, this Court is simply ruling on what disclosed structures perform the recited functions. The parties agree that the processing unit 92 performs the recited functions FN13 and the Court adopts that construction. For the reasons discussed above with respect to the "qualification structure" limitation, the Court rejects the alternative structures proposed by plaintiff.

FN13. Prior to the claim construction briefing, the defendants took the position that the disclosed structure included memory 98. ( *See* Ex. 1 at p. 1 to Simmons Decl.) However, defendants did not brief that issue. Nevertheless, the Court considered whether to include memory 92 and excluded it from the corresponding structure. Although the processor 92 undoubtedly uses the memory in performing the recited functions, it is the processor 92 that actually performs those functions.

#### **D. "Switching structure"-'863:43, '762:32**

The parties agree that the term "switching structure" refers to a device including hardware and associated software that can switch or route telephone calls or signals from one location or connection to another. This is the definition that was adopted in *AT & T*. 63 F.Supp.2d at 583. However, the defendants propose additional language that would further define a "switching structure" to be distinct from a "call distributor."

In support of their position, the defendants point out that independent claim 27 of the '863 patent refers to the "switching structure" and its dependent claim 43 separately refers to "a plurality of call distributors." The defendants argue that the terms separate recitation requires that they be interpreted as distinct. Moreover, the defendants point out that the specification of the '863 patent describes automated call distributors 50 separately from the switch 21. In response, the plaintiff argues that a call distributor is simply one type of switch. In support of their position, they cite to two extrinsic sources, (Exhs. 32 & 33 to Byrnes Decl.)

Although there are situations in which the separate recitation of two claim elements require that the elements be distinct ( *see e.g.*, *Gaus v. Conair Corp.*, 363 F.3d 1284, 1288 (Fed.Cir.2004)), that is not the case here. Dependent claim 43 is merely narrowing independent claim 27 and providing further detail about the first element, the interface structure. That arrangement does not imply that the fourth element, the "switching structure" cannot be satisfied by a call distributor.FN14 Therefore, this Court defines a "switching structure" to refer to a device including hardware and associated software that can switch or route telephone calls or signals from one location or connection to another. Since the '863 and ' 762 patent have the same specification, the same definition applies to both claims in dispute.

FN14. This is true regardless of whether the first element explicitly requires a call distributor. *See*, claim 43.

### **E. "*Products carrying key numbers for participation*" -'863:192**

In one embodiment, the '863 patent describes how participation in a game show may involve the purchase of a particular product that carries a key number. ('863 patent at 17:19-23.) A caller must enter the key number in order to participate in the game. *Id.* at 17:45-52. Claim 192 of the '863 patent contains the disputed phrase, "products carrying key numbers for participation." Both parties agree that the phrase refers to "physical items sold or exchanged in a commercial setting which carry a number allowing participation in a system." However, both parties have their own additional language that they propose including in the definition.

The plaintiff argues that the term "system" at the end of the phrase should be modified to state "service or system" because the jury may incorrectly believe that the term "system" by itself refers to the telephone network. The defendants argue that the word "service" does not appear in the claims or the cited portions of the specification. However, the defendants do not argue that the key numbers allow participation to the telephone network, and plaintiff's proposal appears reasonably directed at preventing jury confusion. Therefore, this Court will adopt the "or service" language.

The defendants argue that the Court's construction should also define "key number" to mean "a number that is accounted, i.e., incremented or decremented based on use." The defendants cite to a passage in the '863 patent that states:

If the caller has identified a proper key number, the process proceeds and the key number is accounted, i.e., incremented or decremented to the limit of use if any. *Id.* at 17:54-56

The defendants also argue that a portion of the prosecution history of the ' 863 patent supports their position. Specifically, the patentee stated that a pending claim contained "key numbers" rather than "participation numbers." (Ex 47 at p. 45 to Simmons Decl.) However, this Court finds neither the specification nor the file history support defendants' interpretation.

First, the defendants are merely relying on the fact that one embodiment increments or decrements a key number, but the specification does not suggest that a key number must be incremented or decremented. In fact, the cited passage uses the term "if any" suggesting that some key numbers may allow participation with no limit on use. In that case, there would be no reason to increment or decrement the key number. Second, the cited portion of the file history merely indicates that the claim used the term "key number" not "participation number." There is no explanation of how these phrases might be different. Thus, this portion

of the prosecution history does not help define "key number."

Based on the foregoing, this Court's adopts plaintiff's definition of "products carrying key numbers for participation."

#### **F. "Negative file data"-'707:129**

Claim 129 of the '707 patent contains the phrase, "a data base for storing unacceptable numbers as negative file data." The parties have differing interpretations of "negative file data." The plaintiff argues that "negative file data" means "data that indicates a caller's status as being of concern or undesirable." In contrast, the defendants argue that it means "ineligibility data on callers that exist in a file prior to a call.

The term "negative data file" does not actually appear in the specification. Instead, the term "negative list" is used. The relevant portion of the specification states:

The second operation involves consulting a so-called negative list to assure that the identification card and customer's number have not been canceled, as for example in case of credit cards that have been lost or stolen. Detailed structure for such tests is described in the parent case from which this case continues and may be incorporated in the qualification unit. ('707 patent at 11:31-37.)

The parent patent includes a similar description of the "negative list" and adds that "the structure of table 122 may include a negative list of unacceptable cards and customer's numbers," ('968 patent at 10:39-41, 11:7-9.)

Both parties' definitions suffer from some problems. The plaintiff omits the term "file" when that language is plainly called for by the claim itself. Plaintiff also uses the term "of concern." The specification states that the purpose of the negative list is to assure that identification cards and customer numbers have not been cancelled. There is no indication that the list was meant to include those identifications or numbers that were merely of concern. Moreover, the phrase "of concern" is vague and would not help the jury. The defendants' definition is also flawed because it states that the file must exist prior to the call. There is no basis for that limitation in the specification.

As a result, this Court defines a "negative file data" to mean "a file containing a list of invalid numbers that are used to compare against numbers associated with specific callers."

#### **G. "Record structure including memory and control means"-'707:24, 129, '863:43, '762:32**

Several claims in dispute contain an element that begins with the phrase "record structure including memory and control means." The parties disagree on two sets of issues. First, they disagree on whether the term "record structure" in claim 32 of the '762 patent has the same meaning as it does for the other claims. Second, the parties disagree about what structure that corresponds to the memory and control means.

##### **1. "Record structure"-'762:32**

In the context of the disputed claims of the '707 and '863 patents, the parties agree that the term record structure means "computer hardware and software required to receive data signals, update a file, and store information" the same definition provided by *AT & T*, 63 F.Supp.2d at 603. Plaintiff argues that this definition is equally applicable to claim 32 of the '762 patent. In response, the defendants argue that the

record structure limitation in claim 32 does not mention "data signals" or "updating files."

Therefore, the defendants have proposed a different definition for claim 32, "computer hardware and software required to receive and store information." However, a review of claim 32 shows that "record structure" includes a memory and control means to "receive and store data." Thus, the limitation mentions data and storing that data, presumably in files. Based on the foregoing, the Court adopts the same definition for all the disputed claims. The term "record structure" refers to "computer hardware and software required to receive data signals, update a file, and store information."

## **2. "Control means"-'707:24, 129, '863:43, '762:32**

The phrase "control means" is expressed in means plus function language and the parties agree that it is governed by s. 112 para. 6. Thus, to construe this limitation, the claimed function must be identified and the corresponding structure(s) that perform the identified function must be ascertained. *Omega Engineering*, 334 F.3d at 1321. The parties identify the same function for each claim. However, they disagree on what structures correspond to the identified functions.

Both parties agree that that the processing unit 92 and memory 98 are corresponding structures. However, plaintiff argues that there are also two alternative corresponding structures, PR1-PRn and central processing unit 251 (See, *Lucantoni Decl.* at para. 6-9.) For the same reason discussed above with respect to the construction of "qualification structure", this Court rejects plaintiff's analysis.

Defendants argue that the correct structures also include both the qualification unit 93 and buffer 97. First, the defendants point out that each processor "includes memory cells for each of the callers' individual data." ('707 patent at 5:18-20.) Defendants reason that since the disclosed memory includes both the memory 98 and buffer 97 ( *id.*, Figure 4), that the buffer must be part of the control and memory means. However, this incorrectly characterizes the specification. None of the cited portions of the specification refer to the buffer 97 as memory.FN15 Although a buffer is often a type of memory, the specification depicts and describes those structures separately. Therefore, the buffer is not disclosed as part of the "control means."

FN15. The Court is aware that a buffer is typically memory.

Second, the defendants argue that qualification unit 93 is disclosed as the control means structure because the qualification unit participates in "controlling access" and receiving and storing data provided by individual callers. Those facts do not show that the qualification unit 93 is a structure that performs the recited functions. Here, depending on the claim, the agreed upon function is some form of "accessing and storing" or "receiving and storing" data. Defendants have merely cited to evidence that shows that the qualification unit 93 participates in activities related to the recited functions. It does not perform the recited functions itself or in combination with other structures.

Based on the foregoing, this Court finds that the structure corresponding to the "memory means" is processing unit 92 and memory 98.

## **VI. TERMS WITHIN THE DUAL CALL MODE PATENTS**

### **A. "Said calls"-'984:4**

The term "said calls" appears in both the body of claim 1 of the '984 patent and its dependent claim, claim 4. The term "said" in "said calls" indicates that the term is referring back to "calls" introduced earlier in the claim. In this case, the earlier reference (i.e., the antecedent basis) is found in the preamble of claim 1. The preamble states:

A telephone call processing system for receiving *calls* from a multitude of terminals in different call modes including an '800' call mode and a '900' call mode ... (emphasis added).

The parties dispute how the term "said calls" should be construed. Plaintiff argues that no construction is necessary or that "said calls" should simply be defined to mean "the calls."

Defendants' proposed definition simply repeats language from the antecedent basis found in the preamble. In response, the plaintiff argues that the *AT & T* court has previously ruled that the preamble of claim 1 is not a limitation. 63 F.Supp.2d 638-639; ( *see also*, Exhibits 30 and 31 to Byrnes Decl.) However, that ruling was on a different issue-whether recitation of " '900' call mode" in the preamble is a limitation on the claim such that the second call mode called out in the third limitation must be a 900 call mode.

The plaintiff also argues that defendants are improperly trying to limit "said calls" to only calls in an "800" and "900" call mode. However, that characterization is not consistent with the definition advanced by the defendants. The preamble refers to calls from a multitude of terminals *including* an "800" call mode and a "900" call mode. The term "including" does not limit the phrase in the way plaintiff suggests.

Since the defendants' definition is the straight forward consequence of using "said" to modify "calls", this Court adopts the defendants' proposal and defines "said calls" in claim 4 of the '984 patent to refer to the calls from a multitude of terminals in different call modes including an "800" call mode and a "900" call mode.

#### **B. "*Qualifying/qualified*"-'984:4, '252:6, '120:34**

The Dual Call Mode Patent specification describes a system that accepts different types of calls (e.g. "800" calls, "900" calls and regular toll calls), but limits some of those types (e.g. "800" calls or repeat calls). The parties disagree about what the term "qualifying/qualified" means in the Dual Call Mode Patents.

Plaintiff argues that the definition this Court previously adopted in *Verizon* was correct: "determining whether a call meets one or more conditions or requirements." 326 F.Supp.2d at 1072-1073. The defendants ask the Court to adopt the definition that it previously rejected in *Verizon*: "to determine whether a caller is entitled to proceed or whether the call is aborted." *Id.*

In *Verizon*, this Court rejected both parties' proposals.FN16 Citing to *Texas Digital Systems, Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1202 (Fed.Cir.2002), this Court crafted its own definition based on Webster's Dictionary definition of "qualified." The defendants criticize the *Verizon* decision by pointing out that the Federal Circuit rejected the emphasis *Texas Digital* put on dictionaries when construing claims. *Phillips*, 415 F.3d at 1319-1322. Although this Court may still consider dictionaries, *Phillips* placed a heavier emphasis on using the specification, and the defendants argue that the Dual Call Mode Patents' specification weighs in favor of their definition. In view of *Phillips*, this Court will revisit the meaning of "qualifying/qualified" anew.

FN16. In *Verizon*, the plaintiff argued that qualifying means "assessing or determining whether a caller is entitled to access or use one or more operations of a format."

Defendants raise two arguments in favor of interpreting qualifying to require a determination of whether a call is allowed to proceed or is aborted. First, they argue that the specification repeatedly touts aborting unqualified calls as an advantage of the invention. Defendants overstate what the specification actually says. The cited passages show that the specification actually touts limiting certain types (e.g. "800" and "900") of calls to the system. ( *See e.g.* '984 patent at 2:11-17.) The defendants also argue that the Dual Call Mode Patents always describe that unqualified calls are aborted. ( *See e.g.* id. at Figure 2, 7:37-40 and 8:25-28.) To the extent the system describes what happens to unqualified calls, the defendants are correct.

In response, the plaintiff argues that the defendants' definition impermissibly imports limitations from the embodiments. They also point out that the claims do not discuss what happens to unqualified calls.

Every time a call is qualified in the specification, it is permitted to proceed. *See e.g.* id. at Figure 2. Moreover, the goal of the Dual Call Mode Patent is to limit the number of particular types of incoming calls. Id. at 2:14-16. Thus, the first part of defendants' definition is consistent with all the embodiments and announced goal of the patents. Qualifying a call refers to determining whether a call is entitled to proceed.

However, the defendants' definition also seeks to define what happens to unqualified calls. The defendants argue that such calls are aborted. The claims at issue do not have limitations directed at unqualified calls. Adopting the additional language defendants seek would improperly add such limitations. This Court declines to do so and construes "qualifying/qualified" to mean "determining whether a call is entitled to proceed."

### **C. "Qualification means/qualifying means"-'984:4, '252:6, '120:34**

The phrase "qualification means/qualifying means" is expressed in means plus function language and the parties agree that it is governed by s. 112 para. 6. Thus, to construe this limitation, the claimed function must be identified and the corresponding structure(s) that perform the identified function must be ascertained. *Omega Engineering*, 334 F.3d at 1321. The parties agree that the recited function in the different claims is some variation of qualifying calls. However, the parties disagree on what structures correspond to the identified functions.

The parties agree that 800 ARU (audio response unit) 18, control unit 28 and free-call memory 32 are among the corresponding structures. In *AT & T*, the court identified those structures and "the required software to perform the function of qualifying callers." 63 F.Supp.2d at 637-638; *see also, Verizon*, 326 F.Supp.2d 1074. The defendants ask this Court for a more precise definition by replacing the "software to perform the function of qualifying callers" with the algorithmic structure of steps 54-60. In response, the plaintiff argues that these steps are not clearly linked to the recited qualification function. Therefore, they should not be included in the claim construction.

The defendants argue that the qualification/qualifying means falls under *WMS Gaming*. In that case, the Federal Circuit held that when the disclosed structure in a means-plus-function claim is a computer, or microprocessor, programmed to carry out an algorithm, the disclosed structure is not the general purpose computer, but rather the special purpose computer programmed to perform the disclosed algorithm. *WMS*



Gaming, 184 F.3d at 1349. Here, the disclosed structure is not a general purpose computer. Rather they are specific structures-the ARU, control unit and free call memory. Therefore, this Court does not apply the rule in *WMS Gaming* and does not include any disclosed algorithms whether clearly linked to the recited function or not. Thus, the corresponding structures are the 800 ARU (audio response unit) 18, control unit 28 and free-call memory 32.

**D. "To avoid prompting certain callers with a certain previously provided cue or cues"-'120:67**

The term "to avoid prompting certain callers with a certain previously provided cue or cues" appears in claim 67 of the '120 patent. It is part of a larger element that states:

Utilizing, for qualified callers, the identification signals that indicate the telephone numbers *to avoid prompting certain callers with a certain previously provided cue or cues*; (emphasis added).

The parties offer differing definitions.

**Plaintiff's Proposal**

to prevent the callers from receiving one or more specific prompts that the callers previously received.

**Defendants' Proposal**

using the identification signals that indicate the telephone numbers to prevent the callers from receiving one or more specific prompts that the callers previously received.

Both definitions merely reflect the ordinary reading of the claim language. However, the defendants' definition also incorporates limitations from the term that precedes the disputed language, "identification signals that indicate the telephone numbers." In the interest of accuracy, this Court will adopt defendants' proposed language but tie it to the entire element.FN17

FN17. The Court's decision does not rely on the defendants' citation to Verizon, 326 F.Supp2d at 1083-1084 which interpreted related but different claim language. Defendants' citations to the file history were not on point either.

Therefore, this Court construes the phrase "utilizing, for qualified callers, the identification signals that indicate the telephone numbers to avoid prompting certain callers with a certain previously provided cue or cues" in claim 67 of the '120 patent to mean "using the identification signals that indicate the telephone numbers to prevent qualified callers from receiving one or more specific prompts that the callers previously received."

**VII. TERMS WITHIN THE CONDITIONAL INTERFACE PATENTS**

**A. "Conditionally interfacing"-'150:11, '285:71**

The Conditional Interface Patent specification describes how a switch SW may impose conditions to determine the acceptability of a call to interface with a specific operating format. '150 patent at 2:57-61. The term "conditionally interfacing" appears in two disputed claims of the Conditional Interface Patents, claim 11 of the '150 patent and claim 71 of the '285 patent.

In *AT & T*, the court interpreted this term to mean "connecting a call to the selected format once any conditions associated with that format have been satisfied." 63 F.Supp.2d at 634. The plaintiff states that this

definition is substantially correct, but asks this Court to clarify the definition by adding the phrase "or allowing a caller to interface with the selected format." The defendants object to this addition because they believe the language would change the scope of the claim so that it would cover a situation where a caller that is already interacting with a format is conditionally allowed to further interact with that format. The original definition appears to only cover the original connection between a caller and an interface.

This Court agrees with defendants' concern. The passages plaintiff cites from the specification do not show that conditional interfacing relates to allowing further interaction. Therefore, plaintiff's proposal should not be adopted to support that interpretation. Plaintiff argues that the change merely clarifies that callers interact with the format. However, the original definition adequately addresses that concern. Obviously, when a caller is connected to a selected format, it begins interaction with that format. Therefore, this Court adopts the *AT & T* definition.

#### **B. "Call data signal(s)"-'150:11, '285:71**

The Conditional Interface Patent specification describes how a call receiver unit CU can identify incoming calls by using "call data." ('150 patent at 3:63-65.) The specification states that call data may include "digital signal representative of the called number[,] the calling number (terminal number) and the terminal equipment." *Id.* at 3:65-68.

Although the parties agree that all three of items listed above define what the claims mean by "call data", they disagree over whether "call data" requires all three items or whether it can be satisfied by merely one of the three items. In other words, plaintiff asks that the Court define "call data signals" to mean "signals identifying the called number, the calling number, *and/or* an equipment type designation" (emphasis added). But defendants ask that the "and/or" be replaced with simply an "and." FN18 The specification and claims show that the term "call data" is used to refer to a subset of the three types of data. In some case, call data refers to just the called number and the equipment. ('150 patent 8 :23-27.) Later, the specification uses the term "call data" to refer to the calling number and called number. ('150 patent 12 :47-52.) The claims of the various patents also use call data in a manner that is inconsistent with defendants' proposal. ( *See e.g.* claim 10 of ' 150 patent; claim 19 of ' 285 patent; claim 96 of the ' 707 patent.) As a result, this Court defines "call data signal[s]" to refer to signals identifying the called number, the calling number, and/or an equipment type designation." FN19

FN18. The parties in *AT & T* agreed that "call data signals" refers to called numbers, calling numbers, *and* equipment signals ." 63 F.Supp.2d at 632 (emphasis added). However, the use of "and" or "or" does not appear to have been an issue.

FN19. Some claims specifically require that the "call data signal" provide one or more of the three signals. This construction does not eliminate any additional limitations that are found in those claims.

### **VIII. TERMS WITHIN THE LOTTERY PATENTS**

#### **A. "Ticket/ticket or card"-'156:11; '135:9**

The '156 and '135 patents are both entitled "Telephonic-Interface Lottery System." The common Lottery Patent specification describes a system that allows callers to dial a pay-to-call telephone number found on a

lottery ticket and receive one more chance to play the lottery. ('156 patent at 2:36-52.) The specification repeatedly and consistently uses the term "lottery ticket" and the only described embodiment is a lottery system. ( *See*, '156 patent at Abstract, Figs. 2, 3, 7, and 9, 2:30-52, 4:9-18, 6:10-13, 7:35-45, 10:1-4, 10:20-11:6.) However, the disputed claims simply use the term "ticket" alone.

This leads to the inevitable question of whether the claims are somehow limited to lotteries. Specifically, the parties dispute whether the terms "ticket" and "ticket or card" carry such a limitation. Citing to various dictionaries, the plaintiff defines "ticket" to mean a "written or printed item indicating that its holder has paid for or is entitled to a specified service, right, or consideration." In response, defendants argue that plaintiff's definition is divorced from the Lottery Patent specification. The defendants define "ticket" to mean "a token representing entitlement to participate in a game-of-chance."

The plaintiff argues that defendants' definition improperly imports limitations from the specification. Moreover, the plaintiff points out that the specification characterizes the disclosed embodiment as merely "illustrative" or "representative" of the invention. ('156 patent at 3:37-47.) The specification also states that the physical communication systems, data formats, and operating structures may be embodied in a wide variety of forms some of which are quite different from that disclosed. *Id.* According to plaintiff these passages show that the claims should not be limited the lottery embodiment.

Finally, the plaintiff points out that "preambles of certain claims refer to a "game of chance" ('156 claims 1-9) while others ( *e.g.*, 156 claim 11 and 135 claim 9) specify no such use." Plaintiff argues that it would be improper to import this limitation in claims where the phrase is not present.

The Federal Circuit has made it clear that "[e]ven when the specification describes only a single 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.'" *Liebel-Flarsheim Co. et al., v. Medrad, Inc.*, 358 F.3d 898, 906 (Fed.Cir.2004) (citation omitted); see also *Phillips*, 415 F.3d at 1323 ("[the Federal Circuit has] expressly rejected the contention that if a patent describes only a single embodiment, the claims of the patent must be construed as being limited to that embodiment.").

Of course there is also a line of cases that narrowly construe claims based on the specification. In *Liebel-Flarsheim*, the Federal Circuit reviewed a number of these cases and explained what additional reasons dictated a narrow claim construction beyond the mere fact that the specification disclosed only a single embodiment or a particular structure. Those reasons include: (1) a statement made during the file history distinguishing prior, (2) the presence of an express limiting definition of language in the specification, and (3) the specification, claim, or prosecution history made clear that the invention was limited to a particular structure. *Id.* at 907-908.

Here, the defendants have pointed to the "character of the invention" and cited to numerous passages in the specification to show that the term ticket must be limited to lotteries or other games of chance. However, these passages merely show that the only disclosed embodiment refers to lottery tickets. That showing is insufficient to justify defendants' definition. Accordingly, this Court defines "ticket" to refer to "a written or printed item indicating that its holder has paid for or is entitled to a specified service, right, or consideration."

## IX. %2C968 PATENT

**A. "Comparing said answer data from said callers and analyzing said answer data"-'968:7**

Claim 7 is dependent on claim 1. Claim 1 is a process claim and the disputed language is found in the sixth limitation which states:

comparing said answer data from said callers and analyzing said answer data with said external data in combination to isolate a select subset of said callers.

Parsing this limitation reveals two steps: (1) comparing said answer data from said callers, and (2) analyzing said answer data with said external data in combination to isolate a select subset of said callers. The parties selected an awkward phrase to construe because the disputed language corresponds to step (1) and only part of step (2).

Nevertheless, the plaintiff asks the Court to find that the disputed phrase has its plain meaning. The defendants ask the Court to define the term to mean "comparing the answer data from one caller to the answer data from other callers, distinct from dealing with each caller's data on an individual basis."

Plaintiff argues that defendants' definition improperly imports limitations from particular embodiments into the claim. The plaintiff says that the specification actually discusses "both comparing a caller's answer data to that of other callers, and also comparing such data to external data." (Plaintiff's Reply at pp. 14-15 citing to '968 patent at 8:26-35, 13:29-46.) However, the latter feature corresponds to step (2) above. Certainly, the language corresponding to step (1) above does not cover this feature as well.

In fact, a straightforward reading of the language of step (1)-"comparing said answer data from said callers" persuades the Court that the defendants' definition is correct. The Court need not consider any of the defendants' other arguments.FN20 However, the Court will only construe step (1) because it is this language that conveys the definition that defendants seek. Thus, the Court construes "comparing said answer data from said callers" to refer to "comparing the answer data from one caller to the answer data from other callers, distinct from dealing with each caller's data on an individual basis."

FN20. The Court does not rely on the portions of the file history cited by defendants. Those statements do not define the disputed language. Moreover, plaintiff's position in an earlier litigation is not one of the sources that Courts may use to construe a claim and defendants have not argued that this statements amount to binding admissions. Therefore, this Court does not rely on those arguments either.

**B. "Sequence signals/sequence data"-'968:7**

The disputed language is found in the independent claim, claim 1. The third element of claim 1 states:

providing *sequence signals* representative of *sequence data* indicating the time sequence of a call with reference to each of the calls from other callers (emphasis added).

The parties' proposed definitions contain only minor differences. The plaintiff defines the "sequence signals/sequence data" within the claim to mean "signals/data that indicate the sequence or order in which callers call the system, which is distinct from a time/date stamp."

The defendants propose two definitions: (1) "sequence signals means signals that indicate the order of receipt of each call with reference to each of the calls from other callers, which is distinct from a time/date stamp", and (2) "sequence data means data that indicate the order of receipt of each call with reference to each of the calls from other callers, which is distinct from a time/date stamp."

The only substantive difference between the parties' definition is that the plaintiff's definition discusses a sequence in the context of when the caller makes a call while the defendants' definition is discusses when the system receives a call. Since the signals are assigned by the system, defendants argue that their definition logically references the order of receipt of the calls. Plaintiff does not challenge this characterization. As a result, this Court adopts the defendants' definitions in full.

### ***C. "Initiating files"-'968:7***

The parties disagree about what the term "initiating files" means. Plaintiff argues that the term means "creating files for the first time." Defendants ask the Court to add two additional phrases to further define the term. First, the defendants' definition requires "initiating files" to occur "in cases where the callers are unknown to the system." Second, the defendants also argue that "initiating files" must result from "receiving identification from a caller." FN21

FN21. The defendants also ask that the Court add a phrase that distinguishes "initiating files" from "updating files for callers who are already known to the system." This phrase is redundant because it merely restates defendants' other positions in the negative.

In both cases, the defendants have taken statements from the prosecution history of related patents and incorporated those statements into their definition. Defendants cite to the '023 reexam to show that "initiating files" require that the callers be unknown. In distinguishing the Yoshizawa reference, the plaintiff stated that "[t]o initiate a file is to create a file for the first time in cases where a caller is unknown to the system." (Ex. 55 to Simmons Decl.) In distinguishing, the De Bruyn reference, the plaintiff made a similar statement: "De Bruyn discloses relying on subscriber records. Initiating a file is for a caller for when the system has no existing records." (Ex. 56 to Simmons Decl.) The prosecution history of a related patent is relevant to an understanding of the scope of a common term. *Microsoft Corp. v. Multi-Tech Sys., Inc.*, 357 F.3d 1340, 1349-50 (Fed.Cir.2004). Here, '023 patent claims priority from '968 patent and the patentee was making statements about a common term, "initiating files." Therefore, these statements are relevant to this Court's understanding of the term.

In fashioning a definition, this Court cannot simply combine all the statements a patentee makes even when those statements accurately describe the language in dispute. To do so would only result in jury confusion. Moreover, the applicant's statements distinguishing the Yoshizawa and De Bruyn references are directed toward the same concept. For example, describing a caller as unknown is merely another way of explaining that the system does not have existing records. This Court will use these statements in construing the disputed language, but in a manner that does not merely repeat the same concept.

As for defendants' second request, it relies on a statement made during the file history of another related application, 08/191,868. In an information disclosure statement, the patentee distinguished the DeBruyn reference by stating:

In a sense, it may be considered that the computer "initiates a file;" however, in fact the telephone system (in-house) has the capability of providing the subscriber's telephone number, which serves as a basis for the file. Accordingly, the operation is distinct from the operation of receiving identification from a caller as a basis for initiating a file.

Although the term "initiates a file" is discussed, it is unclear what claim language the patentee is using to distinguish the DeBruyn reference. For example, this passage could be admitting that DeBruyn initiates a files, but distinguishing it on the grounds that the claim requires "receiving identification from a caller as a basis for initiating a file." Standing alone, this statement is ambiguous and the Court will not rely on it to construe the disputed language.

Based on the foregoing, this Court defines "initiating files" to refer to "creating a file for the first time when the system has no existing records for a caller."

## X. %2C415 PATENT

### A. "*Determine the acceptability of said call*"-'415:29

The '415 patent is one of plaintiff's Account Control patents. In general, the Account Control specification describes a telephonic interface system and related processes in a variety of different game formats or programs. ('415 patent at 1:64-67.) As part of the interface, the specification describes how "after approval of a caller ... calls are accepted." Id. at 1-5.

The disputed phrase is "determine the acceptability of said call ." The phrase is found in independent claim 20 of the '415 patent. The second step of that claims states:

testing said associated telephone number signals with respect to stored data to *determine the acceptability of said call* from one of said remote terminal apparatus (emphasis added) ...

The parties agree that this language requires determining whether the call satisfies specific criteria. However, they disagree on the consequence of such a determination. The plaintiff's definition states that the determination is made "to allow access to *a format*." In contrast, defendants' definition states that the determination is made "to allow access to *the system*."

The specification uses variations of the term "accept" to refer to whether a caller is permitted to access the system. Id. at 2:1-5 (approval of a caller results in acceptance); Id. at 4:12-23 ("unacceptable" call are declined); Id. at 4:57-60. Although the specification also discusses different formats or applications, those passages do not use any variation of the term "accept" to describe connecting a user to a format. *See e.g.* id . at 2:7-9. Therefore, this Court finds that accepting a call relates to allowing access to the "system" and not a "format."

Defendants' definition also states that "unacceptable calls are terminated or not answered." However, the claim does address what happens to calls that are "unacceptable." The claim only addresses determining the acceptability of calls and that is all the Court needs to construe. To do otherwise, would improperly import limitations from the specification into the claim.

Based on the foregoing, the Court defines "determine the acceptability of said call" to mean "determine if criteria are satisfied to allow access to the system."

**XI. "Cue [cueing]"-'120:67 and '415:29**

Finally, the plaintiff briefed the term cue or cueing. However, the defendants appear to have inadvertently omitted their argument on this issue. In *AT & T*, the court construed "caller cues" to mean: questions or prompts which are given to a caller. 63 F.Supp.2d at 640. This Court sees no reason why that definition is not equally suitable to "cue" or "cueing" here. Therefore, this Court defines a cue to be mean "a question or prompt which is given to a caller." There is no need to further define cuing.

**IT IS SO ORDERED.**

C.D.Cal.,2008.

In re Katz Interactive Call Processing Patent Litigation

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