

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 1:10-cv-24063-MORENO

MOTOROLA MOBILITY, INC.,

 Plaintiff,

 vs.

MICROSOFT CORPORATION,

 Defendant.

MICROSOFT CORPORATION,

 Counterclaim Plaintiff,

 vs.

MOTOROLA MOBILITY, INC.,

 Counterclaim Defendant.

MICROSOFT CORPORATION’S RESPONSIVE CLAIM CONSTRUCTION BRIEF

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	THE PATENTS AND CLAIM CONSTRUCTIONS	1
A.	6,791,536.....	1
1.	“generating at least one event ...”	1
B.	6,897,853.....	4
1.	“determining whether the input is a stroke based on a first move threshold”	4
2.	“determining whether the input is a tap based on a time threshold”	4
3.	“determining whether the stroke is a hold or a hold and drag”	4
4.	“simulating a right mouse click”.....	5
C.	7,024,214 and 7,493,130.....	6
1.	“synchronization mechanism”	6
2.	“flexible selection rule(s)”	7
3.	“value, from having access to synchronized data”	8
D.	7,383,460.....	8
1.	“the hardware-dependent process”	8
E.	6,897,904.....	10
1.	“program content currently being tuned”	10
F.	5,502,839.....	11
1.	“means for performing processing operations on said virtual input and for generating virtual output”; “means for accepting said virtual output”; “means for converting said virtual output into at least one physical output suitable for use by at least one physical output device”	12
2.	“means for performing processing operations on said one or more picture elements”	13

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
 SUBJECT TO PROTECTIVE ORDER

3.	“means responsive to one of said physical input devices for generating a picture”	13
4.	“means responsive to said one or more processed picture elements for coupling said one or more processed picture elements to one of said physical output devices”	14
5.	“picture element comprising a plurality of device-independent data structures in a predetermined, standard data format, at least one of said data structures comprising a plurality of different data fields each containing information describing said picture element”	15
6.	“virtual output”; “virtual input”	15
7.	“source of virtual input”	16
8.	“picture manager process”; “window manager process”	17
9.	“wherein said virtual output accepting means comprises a picture manager process for controlling said plurality of related picture elements”	18
10.	“wherein said virtual output accepting means further comprises a window manager process for controlling the display of said plurality of related picture elements on said display device”	19
11.	“wherein said virtual output converting means comprises a virtual output manager process responsive to said one or more processed picture elements for coupling said one or more processed picture elements to said at least one physical output device”	20
12.	“wherein said means responsive to one of said physical input devices comprises a virtual input manager process”; “wherein said means responsive to said one or more processed picture elements comprises a virtual output manager process”	20
G.	5,764,899	22
1.	Preamble: “A system for communicating reply data with a communication unit comprising”	22
2.	“a host server, in communication with the communication server”	23
3.	“email”; “e-mail”	24
4.	“forwarding”; “forward” “forwards” “forwarded”	25
5.	“a determination is made ...”	26

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
 SUBJECT TO PROTECTIVE ORDER

H.	5,784,001.....	26
1.	Preamble: “A method ...”; “A data communication receiver ...”.....	26
2.	“referencing a database ...”; “determining whether at least one word included in the alphanumeric message ...”.....	27
3.	“graphic message ... accompanied by ...”.....	28
4.	“programming message”.....	30
5.	“programming means ...”; “storing means ...”.....	32
I.	6,272,333.....	33
1.	“data”.....	33
2.	“controlling a delivery of data”.....	33
3.	“fixed portion of [a/the] wireless communication system”.....	35
4.	“subscriber unit”.....	35
5.	“application registry comprising ...”.....	36
J.	6,408,176.....	37
1.	“extracts ...”; “extracting ...”; “receiving ... after extraction”.....	37
2.	Order of the “extracting” and “converting” operations.....	38
3.	“receiving a request from a user of the communication unit”.....	39
4.	“fixed network equipment”.....	39
5.	“caller-related information”.....	40
K.	6,757,544.....	40
1.	“specific location information of the communication device”.....	40
2.	“general location information ...”.....	41
3.	“determining the location relevant to a user by comparing ...”.....	42
L.	6,983,370.....	44
1.	“messaging session”.....	45

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

2.	“for providing continuity”.....	46
3.	“first / second messaging client”.....	48
III.	CONCLUSION.....	49

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>ACTV, Inc. v. Walt Disney Co.</i> , 346 F.3d 1082 (Fed. Cir. 2003).....	15
<i>Advanced Software Design Corp. v. Fiserv, Inc.</i> , 641 F.3d 1368 (Fed. Cir. 2011).....	34
<i>Athletic Alternatives, Inc. v. Prince Mfg., Inc.</i> , 73 F.3d 1573 (Fed. Cir. 1996).....	9
<i>Atmel Corp. v. Information Storage Devices</i> , 198 F.3d 1374 (Fed. Cir. 1999).....	49
<i>Biovail Labs. Int'l SRL v. Impax Labs., Inc.</i> , 433 F. Supp. 2d 501 (E.D. Pa. 2006).....	37
<i>Blackboard, Inc. v. Desire2Learn</i> , 574 F. 3d 1371 (Fed. Cir. 2009).....	49
<i>Boehringer Ingelheim Vetmedica, Inc. v. Schering-Plough Corp.</i> , 320 F.3d 1339 (Fed. Cir. 2003).....	34
<i>Cobra Int'l, Inc. v. BCNY Int'l, Inc.</i> , Case No. 05-61225-Civ-Marra, 2008 U.S. Dist. LEXIS 48815 (S.D. Fla. June 18, 2008).....	42
<i>Creo Prods., Inc. v. Presstek, Inc.</i> , 305 F.3d 1337 (Fed. Cir. 2002).....	13
<i>Energizer Holdings, Inc. v. International Trade Com'n</i> , 435 F.3d 1366 (Fed. Cir. 2006).....	10
<i>ERBE Elektromedizin GmbH v. Canady Tech. LLC</i> , 629 F.3d 1278 (Fed. Cir. 2010).....	39
<i>Ethicon Endo-Surgery, Inc. v. United States Surgical Corp.</i> , 93 F.3d 1572 (Fed. Cir. 1996).....	15, 37
<i>Fisher-Price, Inc. v. Graco Children's Products, Inc.</i> , 154 Fed.Appx. 903 (Fed. Cir. 2005).....	10

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
 SUBJECT TO PROTECTIVE ORDER

Funai Elec. Co., Ltd. v. Daewoo Elecs. Corp.,
 616 F.3d 1357 (Fed. Cir. 2010).....42

Halliburton Energy Servs. Inc. v. M-I LLC,
 514 F.3d 1244 (Fed. Cir. 2008).....9

Helmsderfer v. Bobrick Washroom Equip., Inc.,
 527 F.3d 1379 (Fed. Cir. 2008).....43

Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.,
 381 F.3d 1111 (Fed. Cir. 2004).....31

Insured Deposits Conduit, LLC v. Index Powered Financial Services, LLC,
 No. 07-22735, 2008 WL 4851571 (S.D. Fla. Feb. 28, 2008) (Ungaro, J.).....34

Laitram Corp. v. Rexnord, Inc.,
 939 F.2d 1533 (Fed. Cir. 1991).....12

Lockheed Martin Corp. v. Space Sys./Loral, Inc.,
 324 F.3d 1308 (Fed. Cir. 2003).....13

Martek Biosciences Corp. v. Nutrinova, Inc.,
 579 F.3d 1363 (Fed. Cir. 2009).....14, 17

Masimo Corp. v. Mallinckrodt Inc.,
 18 Fed. Appx. 852 (Fed. Cir. 2001).....9

Nystrom v. TREX Co.,
 374 F.3d 1105 (Fed. Cir. 2004), *superseded*.....33

O2 Micro Int’l Ltd. v. Beyond Innovation Technology Co.,
 521 F.3d 1351 (Fed. Cir. 2008).....41, 42

Phillips v. AWH Corp.,
 415 F.3d 1303 (Fed. Cir. 2005) (en banc) (overruling *Texas Digital*)..... passim

PSN Illinois, LLC v. Ivoclar Vivadent, Inc.,
 525 F.3d 1159 (Fed. Cir. 2008).....41

Purdue Pharma L.P. v. Endo Pharms. Inc.,
 438 F.3d 1123 (Fed. Cir. 2006).....24, 29, 30

Retractable Techs., Inc. v. Becton, Dickinson and Co.,
 Case No. 2010-1402, 2011 U.S. App. LEXIS 13925 (Fed. Cir. July 8, 2011).....41

Salazar v. Procter & Gamble Co.,
 414 F.3d 1342 (Fed. Cir. 2005).....30

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

Seachange Int'l v. C-Cor Inc.,
413 F.3d 1361,1376 (Fed. Cir. 2005).....22

T.F.H. Publications, Inc. v. Hartz Mountain Corp.,
67 Fed. Appx. 599 (Fed. Cir. 2003).....9

Tehrani v. Hamilton Med., Inc.,
331 F.3d 1355 (Fed. Cir. 2003).....44

Teleflex, Inc. v. Ficosa N. Am. Corp.,
299 F.3d 1313 (Fed. Cir. 2002).....2

TriMed, Inc. v. Stryker Corp.,
514 F.3d 1256 (Fed. Cir. 2008).....18, 19, 20, 21

STATUTES

35 U.S.C. § 112.....44, 49

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

I. INTRODUCTION

In accordance with the Court’s Scheduling Order (D.E. 23) and Order Continuing Trial and Certain Pretrial Dates (D.E. 36), Defendant Microsoft Corporation respectfully submits its responsive claim construction brief for the disputed terms of the seven Microsoft and seven Motorola patents at issue in this suit: Microsoft’s U.S. Patent Nos. 6,791,536; 6,897,853; 7,024,214; 7,493,130; 7,383,460; 6,897,904; and 6,785,901¹; Motorola’s U.S. Patent Nos. 5,502,839; 5,764,899; 5,784,001; 6,272,333; 6,408,176; 6,757,544; and 6,983,370.

II. THE PATENTS AND CLAIM CONSTRUCTIONS

A. 6,791,536

1. “generating at least one event ...”

In its Claim Construction brief (“Motorola Br.”), Motorola impermissibly seeks to rewrite the language of the claims of the ‘536 patent to include a new limitation that is completely different than the claim terms selected by the patentee and examined by the U.S. Patent Office. Specifically, as shown in the chart below, Motorola seeks to limit the term “event” to “down event” and delete the term “representing an activation” from the claim.

Claim Language	Motorola’s Proposed Construction
<i>“generating at least one event representing an activation of the primary switch of the pointing device”</i>	Generating at least one <u>down</u> event representing an activation of the primary switch of the pointing device
<i>“generating at least one event representing an activation of the [primary/secondary] switch of the pointing device”</i>	Generating at least one <u>down</u> event representing an activation of the secondary switch of the pointing device

Clearly, the patentee did not intend to limit the claims in this way when it submitted them to the PTO for examination. The patent presented broader claims, the PTO examined broader claims, and the PTO allowed those broader claims.

¹ There are no disputed claim terms for the ‘901 patent.

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

In an effort to justify adding a limitation to the claims, Motorola refers to various embodiments in the '536 Patent, arguing that "every use of the term 'activate' in the specification relates to generation of a corresponding 'down event.'" Motorola Br. at 84. First, as a matter of law, it is impermissible to use claim construction to read the preferred embodiments into the claim. *Teleflex, Inc. v. Ficosa N. Am. Corp.*, 299 F.3d 1313, 1324, 1326-27 (Fed. Cir. 2002). Second, as a matter of fact, the examples in the specification do not limit the activation to a "down" event as Motorola urges. Instead, each and every one of the references cited clearly indicates that the computer may generate either a down event or "other event" that represents the primary or secondary switch being activated:

Responsive to the computer 201 detecting the stylus being placed down, the computer 201 may begin counting time . . . If the computer 201 detects that the stylus moves prior to the timeout condition occurring (step 302), then in response the computer 201 may generate a standard Microsoft WINDOWS LeftMouseButtonDown event (**or other event that represents the primary switch of the pointing device being activated**)

'536 Patent, Ex. 101 at 5:63-6:12 (emphasis added); *see also, id.* at 6:25-35, 6:38-48, 6:63-7:1, and 7:25-29. Accordingly, it is clear that the specification and the claims contemplated that activation could include events other than "down events."²

In its Brief, Motorola also selectively cites to the prosecution history of the '536 patent, urging that comments made by the patentee in connection with claims 7 and 9 should be used to limit the scope of the claims. (Claims 7 and 9 are not asserted.) The quotes presented by Motorola, however, are misleading because they purposely leave out the Applicant's

² Addressing n. 27 of Motorola's Brief, the '536 patent uses similar broadening language ("or other event") when referring to deactivation events. '536 patent, Ex. 101 at 6:17-23, 6:25-35, 6:49-53, 7:6-9, and 7:30-33.

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

unequivocal statement that the discussion relates to “*the illustrative, non-limiting embodiment in Figure 3 of Applicants’ specification.*” Motorola Br., Ex. 45 at 13 (D.E. 123-20 at 3).

Microsoft believes that the plain and ordinary meaning of the claim is clear and that no construction is necessary. If the Court wishes to make the term more understandable for the jury through claim construction, it should not do so not by limiting the claim, but instead by adding some explanation that is consistent with the specification. Here, Microsoft has proposed that the Court make clear that the activation of the primary switch can be “the signal to select an object” in the case of a primary switch or “the signal to display a context sensitive menu” in the case of the secondary switch. If anything, the portions of the patent and file history cited by Motorola demonstrate that these behaviors are within the broad scope of the asserted claims.

Motorola attempts, once again, to limit the claims to an example of a left click or right click in the introductory portions of the specification and then citing extrinsic dictionary definition to argue that use of the word “click” should be used to limit the claim to a traditional mouse.³ Motorola Br. at 85. Importing this limitation would be improper since the asserted claims are not directed to a “click,” but more broadly directed to “a primary switch and secondary switch responsive to stylus input.” ‘536 Patent, Ex. 101 at Claim 14. Motorola’s reference to unrelated, unasserted claims 2 and 43 of the patent is irrelevant in interpreting Claim 14.

³ The Microsoft Dictionary at issue actually says “*click vb. To press and release a mouse button once without moving the mouse. Clicking is usually performed to select or deselect an item or to activate a program or program feature. See also right click. Compare double-click, drag.*” Motorola Br. Ex. 46 at 102 (D.E. 123-20 at 8).

B. 6,897,853

1. “determining whether the input is a stroke based on a first move threshold”

With respect to the first term at issue in connection with the ‘853 patent, the parties’ fundamental dispute relates to the interpretation of the terms “first move threshold.” Here, Microsoft believes that the plain and ordinary meaning of these claims is clear and, therefore, no construction is necessary. As set forth in Microsoft’s opening brief, Motorola is improperly attempting to add a limitation to the claim. The patent specification explicitly resolves the dispute by teaching that the first move threshold is more than just a “predetermined distance” as Motorola suggests, and explicitly states in explaining step 303 of Figure 3 that it can include other measures based on the movement of the input – such as time, distance, rate, or acceleration, and the like. ‘853 patent, Ex. 201 at 6:3-4. Thus, the explicit language of the patent broadly defines the threshold to include measures based upon the movement of the input.

2. “determining whether the input is a tap based on a time threshold”

With respect to the second term at issue, the dispute centers on whether a “time threshold” must be limited to a “predetermined amount of time,” as Motorola urges. Microsoft believes that the plain and ordinary meaning of these claims is clear and, therefore, no construction is necessary. As set forth in Microsoft’s opening brief, Motorola is improperly attempting to add a limitation to the claim. As with the “move threshold” discussed above, nothing in the patent specification, nor in Figure 3, requires that time threshold be a predetermined amount of time. Indeed, the patent never mentions the word “predetermined.”

3. “determining whether the stroke is a hold or a hold and drag”

In this third limitation, the dispute is directed to the difference between a “hold” and “hold and drag.” Here, the parties agree that if an input exceeds a time threshold it is a hold.

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

The disagreement is whether the input must exceed a second threshold based upon movement, as Microsoft proposes or whether, as Motorola suggests, it must exceed a second predetermined distance. The '853 patent makes clear that move thresholds can be distances, rates, accelerations and the like. '853 patent, Ex. 201 at 6:1-4. Nothing limits them to distance alone. The patent also provides examples of move thresholds that include measurements based upon movement other than just distance, such as a speed of 0.25 inches a second. *Id.* at 6:43-46. Finally, nothing in the patent limits the second move threshold to one that is predetermined. As stated above, the term "predetermined" does not appear in the patent.

4. "simulating a right mouse click"

Microsoft believes that the plain and ordinary meaning of these claims is clear and, therefore, no construction is necessary. To the extent that the Court is inclined to interpret the claim, nothing in the language of claim 11 suggests that a down event and an up event of a right mouse button are necessary to simulate a right mouse click and such limitations should therefore be rejected. The specification is consistent with Microsoft's alternative construction. The portion of the '853 patent describing the functionality related to this term references U.S. Patent No. 6,791,536.⁴ Moreover, because the patent contemplates that the invention would be used with other operating systems, the WINDOWS-specific down and up events cannot be used to limit the claim. '536 patent, Ex. 101 at 7:42-44.

⁴ The '536 patent, in turn, teaches that "[t]o simulate a right click of a mouse . . . the computer may generate a Microsoft WINDOWS RightMouseButtonDown event (*or other event that represents the secondary switch of the pointing device being activated*)." '536 patent, Ex. 101 at 6:38-47 (emphasis added). Although a WINDOWS RightMouseButtonDown event is provided as an exemplary implementation, the patent makes clear that any other event that represents the secondary switch of the pointing device being activated may also simulate a right click of a mouse. *Id.*

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

C. 7,024,214 and 7,493,130

1. “synchronization mechanism”

Motorola’s contention that “synchronization mechanism” needs construction because it is a “technical term” should be rejected. Motorola cites to no evidence to suggest that this term is “technical” and should have anything other than its plain and ordinary meaning.

Motorola seeks to limit “synchronization mechanism” to “a communication channel used for synchronization.” In contrast, Microsoft proposes that if the term “synchronization mechanism” is construed, it should be construed as “a process or technique for synchronization.” Because the channel is one component of a process or technique, the specification uses the word “channel” at various points. However, nowhere does the specification define “synchronization mechanism” as a channel, including at the passages that Motorola cites. For example, Motorola purports to quote col. 2:6-13 of the ‘214 patent, Ex. 301, but in fact quotes only col. 2:6-10, which states:

Current synchronization techniques also typically do not consider security concerns associated with synchronization. For example, the *channel* used for synchronization may have *various* levels of inherent security that guard against eavesdropping. (emphases added).

Had Motorola actually quoted through line 13, as it purported to do, the following would have been included:

For example, physical network connections are very secure, 802.11b networks are somewhat secure, with GSM dialup networks being somewhat less secure, and with GPRS networks being less secure.

Id. at 2:10-13. This portion of the passage which Motorola *omitted* actually supports Microsoft’s proposed construction, as it demonstrates that a single channel can have various (*i.e.*, multiple) levels of inherent security. In other words, a single channel can be associated with different synchronization mechanisms, each having a different level of inherent security. GSM networks

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

are more secure than GPRS networks not because of a difference in physical channel, but because of a difference in the process or technique used for synchronization. As such, and contrary to Motorola's position, a "synchronization mechanism" is not simply a "channel."

Furthermore, Motorola's brief is based on the incorrect premise that a "connection" is the same thing as a "channel." See Motorola Br. at 79 ("the claim language provides that the synchronization mechanism is a connection (i.e., a channel)"). In reality, a "connection" is more than just a channel, as some protocol is required in order to establish a "connection." Different protocols can have different costs and different levels of security. The examples of "connections" cited (WiFi, Bluetooth, GSM, and GPRS) are all processes or techniques for synchronization, rather than simply communication channels. Thus, the passages that Motorola cites actually support *Microsoft's* proposed construction.

2. "flexible selection rule(s)"

Motorola's contention that "flexible selection rules" needs construction because it lacks a readily apparent meaning should be rejected. Motorola cites to no evidence to suggest that this term has any meaning other than its plain and ordinary one.

Motorola cites language from the prosecution history saying that "the rules specify which synchronization mechanisms can be used for synchronizing certain types of data." Motorola Br. at 80. This language specifies one function of the rules, but it does not limit the rules to *only* this function. In fact, Motorola's own brief recognizes that the rules are also used to determine *whether* to synchronize: "flexible rules may be used *to determine whether or not to synchronize a data item* and the particular synchronization mechanism to be used to synchronize the data item." *Id.* at 81 (emphasis added). Its proposed construction, however, is at odds with what Motorola itself recognizes for the rule described and claimed in the '214 and '130 patents, and should thus be rejected.

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

Motorola's suggestion that Microsoft's construction fails to account for the term "flexible" is misplaced. The term "flexible" relates to determining whether, when, and/or how to synchronize. The rules are "flexible" specifically because by consulting a set of rules to make decisions along all these dimensions, the invention synchronizes "in a flexible manner." '214 patent, Ex. 301 at claim 1. It is Motorola's construction, which makes the rules a rigid mapping of data types to synchronization mechanisms, that fails to account for the flexibility that is the spirit of the invention.

3. **"value, from having access to synchronized data"**

Motorola's brief misstates Microsoft's proposed construction. Microsoft's proposed construction of this phrase is "value associated with obtaining synchronized data," not "importance to the user associated with obtaining synchronized data." *Compare* Motorola Br. at 81 *with* Defendant Microsoft Corporation's Disclosure of Proposed Claim Constructions (Ex. 802) at 5. It is thus difficult to respond to Motorola's brief, as it was apparently based on a faulty premise. Microsoft's position was laid out in its opening brief, and nothing in Motorola's brief justifies its improper substitution of "data item" for "data," nor its improper addition of the limitation that "value" is always measured with respect to the user. Microsoft hereby reserves the right to respond if Motorola amends its brief to respond to Microsoft's actual proposed construction, rather than the incorrect construction that Motorola addressed in its brief.

D. **7,383,460**

1. **"the hardware-dependent process"**

Motorola asserts that this term is indefinite because there are two equally viable constructions: "a hardware-dependent process" or "the hardware-dependent interface." Even if Motorola's assertion is correct, it has conceded that its indefiniteness argument should fail because the claim element simply presents a choice between two discrete constructions.

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

Moreover, these two constructions are not equally viable: the claim language and specification plainly support Microsoft's construction. Finally, the Federal Circuit has addressed analogous claim language on several occasions and has not found those claims indefinite.

"[C]laims are not indefinite merely because they present a difficult task of claim construction." *Halliburton Energy Servs. Inc. v. M-I LLC*, 514 F.3d 1244, 1249 (Fed. Cir. 2008). The fact that Motorola has narrowed the possible meanings of this term to two well-defined phrases means that the claim is not "insoluble," but rather – at most – a difficult task in deciding between these alternatives. The Court is now obliged to choose one.⁵ For example, in *Athletic Alternatives, Inc. v. Prince Mfg., Inc.*, 73 F.3d 1573 (Fed. Cir. 1996), the Federal Circuit was "left with two equally plausible meanings of Claim 1," and stated "[w]e must therefore pursue the interpretive process to state which of the two meanings is correct." *Id.* at 1581.⁶

In any event, the two constructions are not "equally plausible." Motorola purports to analyze the intrinsic record to conclude that "interface" and "process" must be different because unlike an interface, a process "connotes an activity or routine." But the very claim at issue recites that "the hardware-independent interface is a kernel mode routine," showing that Motorola's distinction between "interface" and "process" is artificial. *See* Ex. 501 at claim 7.

Finally, the Federal Circuit has addressed directly analogous situations on at least three occasions. In *Masimo Corp. v. Mallinckrodt Inc.*, 18 Fed. Appx. 852, 856 (Fed. Cir. 2001), the Court construed "an adaptive filter" to mean the same thing as "said adaptive canceler." In

⁵ And because Motorola failed to propose its alternative construction, Microsoft's proposal must prevail.

⁶ In fact, well-settled canons of construction assume that Courts must choose between multiple viable constructions for claim terms. *See, e.g., T.F.H. Publications, Inc. v. Hartz Mountain Corp.*, 67 Fed. Appx. 599, 603 (Fed. Cir. 2003) ("where claims are amenable to more than one claim construction, courts should not adopt a construction that would render a claim invalid.")

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

Energizer Holdings, Inc. v. International Trade Com'n, 435 F.3d 1366, 1370-1371 (Fed. Cir. 2006) the Court held that the term “an anode gel comprised of zinc” provided antecedent basis for and meant the same thing as “said zinc anode.” In *Fisher-Price, Inc. v. Graco Children’s Products, Inc.*, 154 Fed.Appx. 903, 909 (Fed. Cir. 2005), the Court held that “upper seating surface” provided antecedent basis for and meant the same thing as “said seating area.” *Id.* at 909.

E. 6,897,904

1. “program content currently being tuned”

Motorola’s proposed construction of the term “program content currently being tuned” to mean “live program content” is based on the fundamentally flawed premise that the term excludes program content that is displayed from the hard drive. There is, however, no support for this exclusion. Claim 19 is directed to displaying the “*program content*” that the tuner is currently receiving. The ‘904 Patent describes at least three types of “program content” that can be received by the tuner: (1) “stored content” which is stored by the content provider; (2) “live content” which is defined as “content that was not previously stored by the content provider”; and (3) “content stored at other locations” (*i.e.*, stored content that is stored by an entity other than the content provider). ‘904 Patent, Ex. 601 at Fig. 1; 2:32-42. Therefore, in the context of claim 19, it is irrelevant whether the program content is being displayed from the hard drive or from the tuner. Indeed, there is no requirement that the program content currently being received by the tuner cannot be displayed using the hard drive. *See, e.g., id.* at Fig. 4; 5:18-36. All the claim requires is that the program content—the stored content, live content, or content stored at other locations—currently being received by the tuner is displayed. Accordingly, Motorola’s proposed construction is too restrictive and therefore improper.

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

F. 5,502,839

Motorola's arguments should be dismissed outright because Motorola analyzes incorrect Microsoft claim constructions, fails to construe the claim terms actually in dispute, and proposes construing new claim terms

Throughout its opening brief, Motorola misstates Microsoft's proposed claim constructions for the '839 patent. On June 3, 2011, the parties exchanged their final proposed claim constructions. *See Ex. 802, Defendant Microsoft Corporation's Disclosure of Proposed Claim Constructions.* Despite this, Motorola persists in its opening brief in referencing and citing to incorrect Microsoft constructions that do not represent Microsoft's actual claim construction positions. Therefore, to the extent Motorola fails to analyze Microsoft's actual proposed claim constructions, Motorola's arguments should be dismissed outright, as they go to constructions that Microsoft has not proposed, and thus are not at issue in this case.

In addition to arguing incorrect claim constructions, Motorola further burdens the Court in only proposing partial constructions for several claim terms for the '839 patent. Inexplicably, despite Microsoft's good faith negotiations with Motorola to reach an agreement on the claim terms to be construed, Motorola unilaterally proposes construing different terms for the first time in its opening brief. Further, Motorola even acknowledges the additional burden its position will place on the Court, stating in one instance that if the Court proceeds to construe the full term as agreed by the parties, then the Court would, in effect, need to create its own construction for Motorola. *See Motorola Br. at 70.*⁷ Therefore, because Motorola fails to construe the terms that

⁷ While failing to provide a claim construction if § 112, ¶6 applies, Motorola states that "Microsoft contends that § 112, ¶6 applies; Motorola contends that it does not. ... If, however, § 112, ¶6 *does* apply, ... the Court would need to decide those issues." (Motorola Br. at 70)

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CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

are actually in dispute and instead construes new terms, the Court should reject Motorola's constructions for these claim terms.

1. **“means for performing processing operations on said virtual input and for generating virtual output”; “means for accepting said virtual output”; “means for converting said virtual output into at least one physical output suitable for use by at least one physical output device”**

Motorola's arguments for these terms should be dismissed outright, as Motorola argues the incorrect Microsoft claim constructions. Furthermore, although the parties agree that the Console, Picture, and Output Managers are the structures that correspond to these means-plus-function limitations, Motorola's proposed constructions fail to limit these Managers to their definitions in the '839 specification. Instead, Motorola urges constructions for these Managers that could encompass any theoretical structures that are capable or providing the claimed functions, rather than pointing to a single, discrete structure as Microsoft does. *See Laitram Corp. v. Rexnord, Inc.*, 939 F.2d 1533, 1536 (Fed. Cir. 1991) (“section 112(6) rules out the possibility that any and every means which performs the function specified in the claim literally satisfies that limitation”) (citation omitted). Moreover, as described subsequently in section 6, Motorola's proposed construction for virtual output is incorrect, thus Motorola's proposed constructions that for terms that contain “virtual output” are also necessarily incorrect. Finally, Motorola's proposed construction for “converting said virtual output” is incorrect because it impermissibly broadens the claim by removing the antecedent basis limitation from “virtual output” such that “converting *said* virtual output” (emphasis added) becomes simply “converting virtual output”, and thus could encompass converting *any* virtual output.

Continued from previous page
(emphasis in original). However, the only issue for the Court to decide upon finding that § 112, ¶6 applies is to accept Microsoft's proposed claim construction.

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

2. **“means for performing processing operations on said one or more picture elements”**

Motorola’s arguments for this term should be dismissed outright, as Motorola argues the incorrect Microsoft claim construction. Motorola incorrectly states in its opening brief “[t]he parties agree ... that the claimed function is ‘performing processing operations on one or more picture elements.’” Motorola Br. at 74. In reality, Microsoft’s proposed construction is “performing processing operations on *said* one or more picture elements.” See Ex. 802 (emphasis added). By omitting “said,” Motorola’s proposed construction impermissibly removes limitations that arise from the previous use of “one or more picture elements,” thus improperly broadening the scope of these elements.⁸

3. **“means responsive to one of said physical input devices for generating a picture”**

Motorola proposes construing the function of this means-plus-function term as “generating a picture comprising one or more picture elements responsive to a user’s interaction with a physical input device.” Motorola Br. at 72. This violates a basic tenet of claim construction which states that “[t]he function of a means-plus-function limitation . . . must come from the claim language itself.” *Creo Prods., Inc. v. Presstek, Inc.*, 305 F.3d 1337, 1344 (Fed. Cir. 2002). In spite of this, there is no reference in the claim language to Motorola’s proposed “user’s interaction with a physical input device,” and Motorola does not even attempt to explain where its proposed function comes from. By contrast, Motorola’s analysis of this term’s function actually supports Microsoft’s proposed construction of “generating a picture from the

⁸ See *Lockheed Martin Corp. v. Space Sys./Loral, Inc.*, 324 F.3d 1308, (Fed. Cir. 2003) (“In identifying the function of a means-plus-function claim, a claimed function may not be improperly narrowed or limited beyond the scope of the claim language. Conversely, neither may the function be improperly broadened by ignoring the clear limitations contained in the claim language.”) (internal citation omitted).

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

input from a physical input device.” Specifically, Motorola argues “the ‘839 patent teaches that an Input Manager process sends inputs captured from a physical input device to the Console Manager, which in turn creates a picture.” Motorola Br. at 73. Motorola thus admits that the Input and Console Managers perform the function of generating a picture from the input from a physical input device, which is Microsoft’s proposed construction.

4. **“means responsive to said one or more processed picture elements for coupling said one or more processed picture elements to one of said physical output devices”**

Motorola proposes construing the function of this means-plus-function term as “coupling said one or more processed picture elements to a physical output device.” In support, Motorola states “[a]s discussed above, the ‘839 patent describes throughout the specification Output Manager processes and their function of coupling of processed picture elements to a physical output device.” Motorola Br. at 75. However, contrary to Motorola’s assertion, this is the first instance where Motorola even mentions the coupling function in its brief. Moreover, Motorola’s proposed construction simply incorporates the term “coupling,” without acknowledging that the term has a special meaning in the ‘839 patent.⁹ See *Martek Biosciences Corp. v. Nutrinova, Inc.*, 579 F.3d 1363, 1380 (Fed. Cir. 2009) (“When a patentee explicitly defines a claim term in the patent specification, the patentee’s definition controls.”)

⁹ The ‘839 patent specification states “Which process initializes the manager becomes tightly coupled to it; *i.e.*, they can exchange messages via PID’s rather than by name.” ‘839 patent, Ex. 801 at 19:59-61; *see also id.* at 23:51-54 (“A Window Manager is tightly *coupled* to its creator (a Console Manager), Picture Manager, and Output Manager; *i.e. they communicate with each other* using process identifiers (PID’s)”) (emphasis added).

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

5. **“picture element comprising a plurality of device-independent data structures in a predetermined, standard data format, at least one of said data structures comprising a plurality of different data fields each containing information describing said picture element”**

Motorola’s construction for this terms should be dismissed outright, as Motorola fails to propose a construction for the term, instead proposing construing only “picture element.” Motorola Br. at 62. Further, Motorola’s proposed construction reads limitations, including “device-independent data structures,” “predetermined, standard data format,” and “plurality of different data fields each containing information describing said picture element,” completely out of the claim. A claim construction cannot read a limitation out of a claim. *Ethicon Endo-Surgery, Inc. v. United States Surgical Corp.*, 93 F.3d 1572, 1582-83 (Fed. Cir. 1996) (the patentee “need not have included [the specific] limitation in its claim,” but “[h]aving done so, it must live with the language it chose.”).

6. **“virtual output”; “virtual input”**

Motorola argues in its brief that “the claim language itself requires that ‘virtual input’ comprise ‘one or more picture elements.’” Motorola Br. at 61. For support, Motorola cites to claim 9, which states in part “a source of virtual input, said virtual input comprising one or more picture elements.” ‘839 patent, Ex. 801 at 225:46-47. However, if “virtual input” is construed to “mean[] one or more picture elements generated from user input,” as Motorola urges, then the relevant portion of the claim would read “a source of [one or more picture elements generated from user input], said [one or more picture elements generated from user input] comprising one or more picture elements.” Motorola’s proposed construction is nonsensical when read in light of the claim term. *See ACTV, Inc. v. Walt Disney Co.*, 346 F.3d 1082, 1088 (Fed. Cir. 2003) (“While certain terms may be at the center of the claim construction debate, the context of the surrounding words of the claim also must be considered in determining the ordinary and

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

customary meaning of those terms.”). Motorola’s proposed construction should be rejected on this basis alone.

As additional purported evidence for its proposed construction, Motorola argues that “the patent’s description [states] that all user input is stored as pictures comprised of picture elements.” Motorola Br. at 61. However, this statement does not provide any support for Motorola’s proposed construction for “*virtual input*,” as it addresses “*user input*.” Furthermore, the sections of the ‘839 specification Motorola cites to as support for this proposition do not even discuss “*virtual input*”.¹⁰

7. “source of virtual input”

Motorola urges a “source of virtual input” be construed to be a “process which generates one or more picture elements from user input.” Motorola cites examples in support of its construction, but the examples eliminate a key component from the ‘839 patent: the physical input device which generates virtual input device. Motorola states “[t]he ‘839 patent provides several examples of sources of virtual input. In one example, user input captured by a physical input device (e.g., mouse or keyboard) is translated into virtual data by an Input Manager process.” Motorola Br. at 60. Motorola also cites to two other examples from the ‘839, but Motorola takes these examples out of context. First, Motorola states “an application – or a process by which it requests input data – is a source of virtual input when it requests input from a user and accesses the services of the Human Interface (e.g., the Console Manager) to create a

¹⁰ See, e.g., *id.* at 14:3-7 (stating “all input from a user to the Human Interface is stored as pictures”); 17:29-30 (“A picture is logically composed of device-independent ‘elements’”); 30:52-55 (“The picture is the fundamental building block in the Human Interface. It consists of a list of zero or more ‘picture elements’, each of which is a device-independent abstraction of a displayable object (line, text, etc.).”). Likewise, Motorola’s statement that “the patent expressly teaches that ‘[a]ll output from the Human Interface to a user is via pictures,’” (Motorola Br. at 61), is completely unrelated to virtual output.

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

picture and picture elements.” Motorola Br. at 60. But this example does not describe a source of virtual input or creating picture elements as Motorola contends. Rather, it describes how the Human Interface can process virtual input upon receiving the virtual input, and use this to create pictures or windows, as opposed to picture *elements*. ‘839 patent, Ex. 801 at 27:7-28:17.

Second, Motorola argues “the patent states that a method of virtual input is to ‘query the current state of a virtual input device (e.g., the current cursor position).” Motorola Br. at 60. But this is not an example of a source of virtual input even by Motorola’s own proposed construction - Motorola conveniently fails to quote the opening phrase of the sentence which states “[a] *third method of input, which doesn’t directly involve the user*, is to query the current state of a virtual input device ...” ‘839 patent, Ex. 801 at 28:6-8 (emphasis added). Thus, this section can not support Motorola’s proposed construction because it explicitly excludes “user input,” which is required by Motorola’s proposed construction.

8. **“picture manager process”; “window manager process”**

Motorola’s arguments for these terms should be dismissed outright, as Motorola argues the incorrect Microsoft claim constructions. Furthermore, Motorola’s proposed constructions ignore that the patentee explicitly defined the term “process.” See *Martek Biosciences Corp. v. Nutrinova, Inc.*, 579 F.3d 1363, 1380 (Fed. Cir. 2009) (“When a patentee explicitly defines a claim term in the patent specification, the patentee’s definition controls.”). Motorola attempts to argue in its brief that the patentee did not intend to limit “process” to its explicit definition in the specification,¹¹ but rather that “the patent uses the term ‘process’ more broadly, consistent with its plain meaning.” Motorola Br. at 67. As support for its position, Motorola states that “a

¹¹ The ‘839 specification states “A ‘process,’ as used within the present invention, is defined as a self-contained package of data and executable procedures which operate on that data, comparable to a ‘task’ in other known systems”. ‘839 patent, Ex. 801, at 5:20-23.

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

‘context process’ is described at column 5, lines 47-65 as a process that communicates messages to or from processes in other contexts.” *Id.* at 67. But contrary to Motorola’s argument, this is not a “broad” and “plain meaning” use of the word “process,” but rather a description of a “context process,” and it even encompasses “process” in the description. Furthermore, Motorola inaccurately argues “Microsoft adds the requirement that the window manager process maps a picture to virtual pixels, but that mapping is not explicitly defined in the ‘839 patent.” Motorola Br. at 67. However, contrary to Motorola’s assertion, and as noted in Microsoft’s opening brief, this is explicitly defined in the ‘839 specification.¹²

9. **“wherein said virtual output accepting means comprises a picture manager process for controlling said plurality of related picture elements”**

Motorola attempts to argue that § 112 ¶ 6 does not apply to this term because it is not a means-plus-function limitation in spite of the obvious use of “means” in the claim element.¹³ As support for its argument, Motorola confusingly states that “A claim element that does not use the word ‘means’ is presumptively *not* written in ‘means-plus-function’ format.” (Motorola Br. at 68) (emphasis in original). But contrary to Motorola’s assertion, the claim element at issue here uses the word “means,” thus Motorola’s arguments directed to claim elements that do not use the word “means” are inappropriate and irrelevant in this instance.

Furthermore, Motorola’s argument that this term is not a means-plus-function term contradicts Motorola’s prior arguments. Claim 9 provides the antecedent basis for the “said

¹² A Window Manager . . . maps a given picture (or portion thereof) to a rectangular area of a given size on the given screen Window Managers deal strictly in virtual pixels and have no knowledge about the physical characteristics of the screen to which they are writing. Consequently, a window’s size and location are specified in virtual pixels...” ‘839 patent, Ex. 801 at 22:54-57; 24:7-11.

¹³ *TriMed, Inc. v. Stryker Corp.*, 514 F.3d 1256, 1259 (Fed. Cir. 2008) (“Use of the word ‘means’ in claim language creates a presumption that § 112 ¶ 6 applies.”).

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

virtual output accepting means.” Despite agreeing that “means for accepting said virtual output” in claim 9 is a means-plus-function limitation,¹⁴ Motorola urges, without providing any explanation for its change of posture, that the very same “virtual output accepting means” is not a means-plus-function limitation in claim 10.

10. **“wherein said virtual output accepting means further comprises a window manager process for controlling the display of said plurality of related picture elements on said display device”**

Motorola’s construction for this term should be dismissed outright, as Motorola fails to propose a construction for the term, instead proposing “that the only term requiring construction is ‘window manager process.’” Motorola Br. at 70. Furthermore, as with the previous term, Motorola attempts to argue that § 112 ¶ 6 does not apply to this term because it is not a means-plus-function limitation, in spite of the obvious use of “means” in the claim element.¹⁵ Similar to the previous term, Motorola argues that “said virtual output accepting means” is not a means-plus-function limitation, despite agreeing that the very same “means for accepting said virtual output” in claim 9 is a means-plus-function limitation.¹⁶

¹⁴ “The parties agree that the ‘means for accepting said virtual output’ is a means-plus-function claim limitation” Motorola Br. at 64.

¹⁵ *TriMed*, 514 F.3d at 1259 (“the word ‘means’ in claim language creates a presumption that § 112 ¶ 6 applies.”).

¹⁶ “The parties agree that the ‘means for accepting said virtual output’ is a means-plus-function claim limitation.” Motorola Br. at 64.

11. **“wherein said virtual output converting means comprises a virtual output manager process responsive to said one or more processed picture elements for coupling said one or more processed picture elements to said at least one physical output device”**

Motorola attempts to argue that § 112 ¶ 6 does not apply in this instance because it is not a means-plus-function limitation, in spite of the obvious use of “means” in the claim limitation.¹⁷ Similar to the previous terms, Motorola urges that “said virtual output accepting means” is not a means-plus-function limitation, despite agreeing the very same “means for accepting said virtual output” in claim 9 is a means-plus-function limitation.¹⁸

Furthermore, Motorola argues this term is not a means-plus-function limitation because “the term ‘virtual output manager process’ read in light of the specification connotes definite structure to be understood by those of skill in the art.” Motorola Br. at 71. But Motorola’s argument is irrelevant—determining if a limitation is to be construed as a means-plus-function depends on whether “the *claim* recites sufficient structure for performing the described functions in their entirety,” *TriMed*, 514 F.3d at 1259 (emphasis added), not whether the “*specification* connotes definite structure,” (Motorola Br. at 71 (emphasis added)), as Motorola contends.

12. **“wherein said means responsive to one of said physical input devices comprises a virtual input manager process”; “wherein said means responsive to said one or more processed picture elements comprises a virtual output manager process”**

Motorola attempts to argue that § 112 ¶ 6 does not apply in these instances because they are not means-plus-function limitations, in spite of the obvious use of “means” in the claim

¹⁷ *TriMed*, 514 F.3d at 1259 (“the word ‘means’ in claim language creates a presumption that § 112 ¶ 6 applies.”).

¹⁸ “The parties agree that the ‘means for accepting said virtual output’ is a means-plus-function claim limitation.” Motorola Br. at 64.

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

elements.¹⁹ Similar to the previous terms, Motorola urges that “means responsive to one of said physical input devices” is not a means-plus-function limitation, despite agreeing the same “means responsive to one of said physical input devices for generating a picture” in claim 15 is a means-plus-function limitation.²⁰ Likewise, Motorola urges that “said means responsive to one or more processed picture elements” is not a means-plus-function limitation, despite agreeing the same “means responsive to said one or more processed picture elements” in claim 15 is a means-plus-function limitation.²¹ Furthermore, Motorola argues that these terms are not means-plus-function limitations because “the term ‘virtual input manager process’ recites sufficient, definite structure that can be understood by those of skill in the art in light of the specification” and “the term ‘virtual output manager process’ read in light of the specification recites sufficient, definite structure that would be understood by one of skill in the art.” Motorola Br. at 76. But Motorola’s arguments are irrelevant—determining whether a limitation containing the word “means” is to be construed in accordance with § 112 ¶ 6 depends on whether “the *claim* recites sufficient structure for performing the described functions in their entirety,” *TriMed*, 514 F.3d at 1259 (emphasis added), not whether the “structure [] can be understood by those of skill in the art in light of the *specification*”, or [whether] the “*specification* recites sufficient, definite structure” (Motorola Br. at 76-77) (emphasis added), as Motorola contends. Moreover, it is unclear how Motorola can attempt to argue that “virtual input manager process” or “virtual output manager process” could be understood in light of the specification when both parties agree that not only do the terms

¹⁹ *TriMed*, 514 F.3d at 1259 (“the word ‘means’ in claim language creates a presumption that § 112 ¶ 6 applies.”).

²⁰ “The parties agree that the ‘means responsive to one of said physical input devices for generating a picture’ is a means-plus-function claim limitation” Motorola Br. at 72.

²¹ “The parties agree that the ‘means responsive to said one or more processed picture elements’ is a means-plus-function claim limitation.” Motorola Br. at 75.

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

“virtual input” and “virtual output” need to be construed, but the parties also disagree as to the meaning of the term “process.”

G. 5,764,899

1. Preamble: “A system for communicating reply data with a communication unit comprising”

A preamble, such as this one, that provides antecedent basis for subsequent claim limitations is limiting. *See Seachange Int’l v. C-Cor Inc.*, 413 F.3d 1361,1376 (Fed. Cir. 2005). “*The communication unit*” in the claim relies on the antecedent “*a communication unit*” in the preamble, so this preamble is limiting. “*The Reply data*” in the claim, which refers to the preamble, is a second instance of the preamble providing antecedent basis in this claim.

Contrary to Motorola’s argument, the preamble also adds context and is not merely duplicative of the limitations in the body of the claim. As shown in Microsoft’s Claim Construction Brief (“Microsoft Br.”) (D.E. 124), the preamble adds the limitation that the reply data must be communicated with the communication unit. Microsoft’s definition for the preamble is supported by the claim language and specification. *See Microsoft Br.* at 35-36. This means that the non-optimized reply is communicated (the reply data, as described in the preamble) in addition to the optimized reply (received by the data transfer manager in the body of the claim) in the claimed invention. Motorola’s argument that the preamble does not provide additional meaning to the claim is based on its choice to ignore the clear definition in claim 1 of “reply data” as the “reply email of the communication unit” and the preamble’s limitation that the reply data is “communicated with the communication unit.” The preamble is limiting, and Microsoft’s construction of the preamble is correct.

2. “a host server, in communication with the communication server”

The parties exchanged disputed terms and Motorola did not identify “a host server” as a disputed term.²² The entire disputed phrase requires active communication between the two servers (“in communication with”), not merely the ability to communicate. Motorola’s construction of only the “host server” concedes the need for active communication between the elements by not contesting this claim language. This makes the inclusion of the host server’s mere ability to “exchange data” a confusing surplus. Alternately, Motorola’s attempted construction of only the host server and its ability to communicate in response to a dispute over the longer phrase is an inappropriate attempt to read out a limitation of the claims – the active transmission of data.

Also, the experts disagree about what is meant by “post office functionality.” *See* Ex. 907, Rebuttal Expert Report of Dr. Martin E. Kaliski, Ph.D. Regarding the Validity of U.S. Patent No. 5,764,899 at para. 85. This shows that Motorola has introduced a term that does not clarify the definition and about which two persons of at least ordinary skill in the art disagree. This will lead to the experts arguing to the jury over the meaning of a term that is not in the claims if Motorola’s construction is adopted. It also improperly limits the claims to a single embodiment. *See Philips*, 415 F.3d at 1323.

²² *See* Ex. 1117, Agreement to “make simultaneous exchange of proposed constructions” on May 6, 2011 [Docket No. 49] (Apr. 10, 2011); *see also* Ex. 906, Motorola’s Updated Proposed Claim Constructions for the Patents-in-Suit, dated June 3, 2011, for the ‘899 Patent (listing Microsoft’s proposed term as “a host server, in communication with the communication server” and providing a definition for that term on p. 5).

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

Further, Motorola distinguished the language in the patent that discusses the servers as programs on a single device before the PTO to obtain allowance of this patent. Microsoft Br. at 39-40. Motorola cannot recover that subject matter now.²³

3. “email”; “e-mail”

Motorola does not identify anything that is incorrect about Microsoft’s construction. An appropriate construction does not need to be simple, it needs to be correct. As Microsoft has shown in its Opening Brief, its construction is correct. In contrast, Motorola’s proposed construction “electronic mail” does not add any definition to the term.

Motorola hopes to avoid construction of this term because a definition would clarify what is needed to prove infringement. If an email sent from the communication unit contains text and a header with certain information, the replica reply email must contain the same text and header with certain information. (The replica reply is a replica of the reply email as defined at the end of Claim 1.) If the term “email” is only the text that is transmitted, the proof necessary for infringement is different than that required if email is text plus transmission information. But the jury needs to know what email is to one of ordinary skill in the art in the context of this patent to evaluate infringement and invalidity.²⁴ Email is a term that has a specific technical meaning in this patent, just as Motorola explained to the PTO during prosecution. *See* Microsoft Br. at 40-42. Motorola now hopes to avoid that technical meaning so that it can incorrectly argue to the jury that it only needs to show that the same text is transmitted.

²³ *See Purdue Pharma L.P. v. Endo Pharms. Inc.*, 438 F.3d 1123, 1136 (Fed. Cir. 2006) (“[A] patentee may limit the meaning of a claim term by making a clear and unmistakable disavowal of scope during prosecution.”).

²⁴ *See Philips*, 415 F.3d at 1313 (explaining that the words of the claim are given “the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention” and that the person of ordinary skill is deemed to read the claim term in the context of the claim in which it appears and in the context of the entire patent, including the specification).

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

The experts in this case disagree about what is meant by email, so the Court's construction of the term will clarify and simplify issues at trial. In fact, Motorola's expert gives several different definitions for email. In discussing a prior art reference, Motorola's expert defines email as "something that can be sent, replied to, forwarded, that has a body, that has some kind of address on it." Ex. 908, Kaliski Dep. Tr. at 243-244. He also acknowledged that email has text and a header. *Id.* at 205:10-12. He also says that "the reply email constructed on the client access server from the SmartReply command is a replica reply. It contains the original email text and the text added when replying to the original email."²⁵ This indicates a different standard for his infringement analysis where only the text of the email matters, since replica reply is defined in the claim as a replica of the reply email. The Court should define the meaning of email to one of ordinary skill in the art as applied in this patent so that the jury can determine non-infringement and invalidity.

4. "forwarding"; "forward" "forwards" "forwarded"

Motorola's construction uses the disputed phrase in its construction and provides absolutely no guidance to a jury.

As discussed in the section describing the host server in communication with the communication server, the prosecution history makes clear that the patentees disclaimed the use of their invention on anything less than separate processing devices. *See also* Microsoft Br. at 39-40.

²⁵ *See* Ex. 910, First Supplemental Expert Report of Dr. Martin E. Kaliski, Ph.D. Regarding Whether Certain Claims of U.S. Patent No. 5,764,899 Are Infringed by Defendant Microsoft Corporation, p. 6 of Exhibit B (arguing that the undisputed phrase "replica reply" has a specific meaning where the replica reply, which is an email, is shown to be a replica by proving transmission of the same *text* only.)

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

5. “a determination is made ...”

Motorola is no longer asserting claim 14 of the ‘899 patent.²⁶

H. 5,784,001

Motorola’s claim constructions ignore or revise the prosecution history of the ‘001 patent and attempt to recover subject matter disclaimed during prosecution. This is one reason for Motorola’s repeated entreaty that the Court should not construe terms, but leave the jury to give terms a meaning divorced from the history of statements that the patentees made to the PTO. This is contrary to the instructions of the Federal Circuit, which says that “[w]e cannot look at the ordinary meaning of the term . . . in a vacuum. Rather, we must look at the ordinary meaning in the context of the written description and the prosecution history.” *Phillips*, 415 F.3d at 1313 (citing and quoting *Medrad, Inc. v. MRI Devices Corp.*, 401 F.3d 1313, 1319 (Fed. Cir. 2005)).

Preliminarily, the ‘001 patent has no example that receives “Call Bob at Home” and replaces “Home” with a house while displaying the other portions of the message as Motorola suggests. Even if there were such an example, it would be subject matter that Motorola clearly disclaimed in the prosecution history and not part of the claimed invention, as discussed below.

1. Preamble: “A method ...”; “A data communication receiver ...”

While the ‘001 patent uses the phrase “data communication receiver,” it does not discuss or enable a non-mobile device. A pager is the only example of a data communication receiver described in the ‘001 patent.

²⁶ See Ex. 909, email from Spencer to Kelly of 7/27 confirming that Motorola is no longer asserting claim 14. Since the term “a determination is made whether to forward the optimized reply or the replica reply” appears only in claim 14, there is no reason for the Court to construe this term. Should Motorola re-assert this claim at some point as it claims that it may, Microsoft reserves the right to seek construction of this term and to dispute why Motorola’s construction is not accurate, based especially on the explicit language in the specification requiring the determination to be based on the parameters of the target device as indicated by 12:9-28.

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

Although data ports may be used for programming in the section Motorola cites, that does not mean that the device was not mobile. A mobile device can still have data ports. In fact, 3:8-10 is referring to Figure 1, which clearly shows antenna 105. See '001 patent, Ex. 1001 at 2:20 (identifying antenna 105). Motorola's own expert says that antennas are an important part of the hardware of the '001 patent. Ex. 1005, Kaliski Opening Report for '001 patent at ¶33.

Also, Motorola limits its initially broad definition, "a device for receiving data communications," to devices operating "within a networked communication system." Motorola Br. at 37. But Motorola lacks support in the patent for limiting the device to use of a networked communication system, which includes non-mobile computers connected to a wired computer network. The patent's description of the data communication receiver as having an antenna (2:18-20), however, supports Microsoft's contention that it is a mobile device.

2. **"referencing a database ..."; "determining whether at least one word included in the alphanumeric message ..."**

Motorola argues that this term does not need construction because reliance on a layperson's understanding of "alphanumeric" might allow ignorance of the prosecution history.

The portion of the specification Motorola points to (3:51-58) says that "#07Tom?" *includes* alphanumeric characters and an image associated with the code #07 may be presented *as well as* any additional alphanumeric or numeric characters included in the message. It does not say that alphanumeric characters include "# and" ?". '001 patent, Ex. 1001 at 3:51-58. The characters "Tom" are alphanumeric, so the patent is being specific in its use of the term. In this very example Motorola points to, the #07 is a code within a message that includes alphanumeric characters. '001 patent, Ex. 1001 at 3:56. Nothing Motorola has cited shows that "alphanumeric" includes more than letters and numbers. When "alphanumeric" is used in the claims, however, it refers to the entire message.

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

Also, as shown in Microsoft's Brief, the prosecution history limits "alphanumeric" key words to words which contain only number and alphabet characters. It also excludes codes because the patentees altered the claims from requiring codes to key words and used this change to distinguish the invention over prior art. *See* Ex. 1003 at MS-MOTO_SDFLA_00000017247-258, especially 00000017253. Notably, Motorola did not engage with this prosecution history in its explanation to the Court of why this term should not be construed.

3. "graphic message ... accompanied by ..."

Motorola only shows the *codes*, not key words, replaced with images in the '001 patent where the message is partially displayed with the image. As discussed in Microsoft's Brief, and in the preceding term, codes were disclaimed and key words are required in the claimed invention, even though the patent's specification covers examples using codes. For example, #07 is explicitly described as a code in 3:56, so it is not a key word. It is part of a disclaimed embodiment. Motorola is attempting to recapture *replacing codes* and apply this to *accompanying messages including key words* as required by the claims. Microsoft's definition does not cover the disclaimed embodiments showing replacement of code words because the claimed invention does not cover them. That makes it the correct one.

When Motorola does discuss *accompanying key words*, it points to the embodiment showing accompaniment of the entire alphanumeric message with a supplemental graphic, as required by Microsoft's construction. While the claims do not include the words "supplemental" or "entire," they do include the words "accompanied by *the* alphanumeric message."

The claims do not suggest that only a portion of the alphanumeric message received is displayed as Motorola suggests. Specifically, the claims have no difference between the alphanumeric message received and the alphanumeric message displayed.

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

Motorola's construction improperly covers disclaimed embodiments. Microsoft's does not. The prosecution history is even more explicit than Motorola admits; Motorola made a clear disavowal of displaying less than the entire message with a graphic supplement.²⁷ Ex. 1003, MS-MOTO_SDFLA_00000017254-255. First, the applicants clearly stated that the changed Claim 1 "calls for determining whether any word of *a received alphanumeric message* matches a key word included in a database.... When the message includes a word that matches a key word, the corresponding image is displayed *as a graphic message along with the alphanumeric message.*" Ex. 1003, MS-MOTO_SDFLA_00000017253 (emphasis added). The entire alphanumeric message is received and the entire alphanumeric message is displayed.

Second, Motorola not only told the PTO that its invention was different from Gaskill and Miyashita because of the use of code words, but also because of the accompaniment of the entire message with the supplemental image.²⁸ Although Motorola is admitting that code words are not part of the claimed invention, that is not the only reason that it distinguished the claimed invention. The display of the entire original message with an accompanying or supplemental

²⁷ See *Purdue Pharma L.P. v. Endo Pharms. Inc.*, 438 F.3d 1123, 1136 (Fed. Cir. 2006) ("[A] patentee may limit the meaning of a claim term by making a clear and unmistakable disavowal of scope during prosecution.").

²⁸ Ex. 1003, MS-MOTO_SDFLA_00000017253 (discussing two things not found in Gaskill – determining whether key words match and "the step of presenting, when the word matches a key word, a graphic message corresponding to the key word *as well as the original alphanumeric message received* by the data communication receiver." (emphasis added)), Ex. 1003, MS-MOTO_SDFLA_00000017254 (mirroring two things not found in Gaskill in context of Gaskill, Miyashita, and Lipp) and Ex. 1003, MS-MOTO_SDFLA_00000017255 (defining two issues in Amended Claims 6 and 7, which depend from Claim 1 as sending key word as part of alphanumeric message and "[a]t the same time, *the alphanumeric message itself is presented along with any graphic message* so that the meaning of the graphic message is clarified when read by a user having the appropriate language skills." (emphasis added)).

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

image was also argued to the PTO in order to obtain allowance of the claims. Motorola has clearly disclaimed the display of less than the entire alphanumeric message.²⁹

Third, the portion of Reed that the examiner cited does not make clear what message was transmitted and whether only a portion of that message is displayed as Motorola contends. Ex. 1006, Reed Reference, MS-MOTO-SDFLA_00000016870 - 16887. It shows only that a message and a graphical representation are displayed, but it does not make clear what message was transmitted to prompt that display. Even if it were clear, it is the statements of disavowal that *Motorola* made to the PTO while describing its own invention that form the basis for the prosecution history estoppel – not the examiner’s understanding. See *Purdue Pharma.*, 438 F.3d at 1136. In *Salazar v. Procter & Gamble Co.*, 414 F.3d 1342, 1347 (Fed. Cir. 2005), the Federal Circuit stated that the examiner’s statement and the applicant’s silence to those statements did not create a clear disavowal of claim scope. Motorola cannot use the examiner’s statements regarding Reed to alter the clear disavowal of claim scope made by its own statements to the PTO.

4. “programming message”

There are several sub-issues on which the parties disagree within this short term. First, the claims require both a programming message and an alphanumeric message. They are separate messages. Just because they can both be provided to the receiver over-the-air does not change that there are two separate messages. Motorola’s attempt to read out the distinctness of

²⁹ See *Purdue Pharma L.P. v. Endo Pharms. Inc.*, 438 F.3d 1123, 1136 (Fed. Cir. 2006) (“[A] patentee may limit the meaning of a claim term by making a clear and unmistakable disavowal of scope during prosecution.”).

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

the messages is improper.³⁰ As described in Microsoft's Brief, the patent specification explains that these messages are also treated differently upon receipt.

Second, nothing that Motorola cited says that the actual programming message creates or modifies a relationship. Instead, it shows that the data from the programming message is *used by a program* to create or modify a message. This portion of Motorola's definition is unsupported.

Third, Motorola acknowledges that the patent describes three different manners of programming: over-the-air, controls, and a data port. Motorola also admits that over-the-air messages require a programming word. Microsoft would agree to a compromise that clarifies that the programming word is necessary when the programming is over-the-air like this:

A message, received by the receiver separately from the alphanumeric message, that includes a key word, an image associated with the key word, and, when programming is accomplished over-the-air, a predetermined word indicative of programming information.

Fourth, the programming word is predetermined and stored as described in 3:11-12 for use in comparison when a programming message is received. '001 patent, Ex. 1001 at 6:1-4.

Fifth, as shown in Microsoft's Brief, the "image data" is used in the claim to display the image. This means that when "image data" is transmitted as part of the programming message it must be the actual data that is used to display an image, not merely a pointer to the data in some other location that is used to display the image. Microsoft's understanding of image data as the data used to display the image is grounded in the patent and claims.

³⁰ See *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1119 (Fed. Cir. 2004) (rejecting a construction that reads out a limitation because all claim terms are presumed to have meaning in a claim.).

5. “programming means ...”; “storing means ...”

Motorola argues that there is sufficient structure for the longer term, but this is not true because the longer term includes the shorter term, which Motorola agrees is means-plus-function. If there is not sufficient structure for the “storing means,” there is not sufficient structure for the programming means, which include the “storing means.”

Motorola’s treatment of the “programming means...” in claim 4 is a paradox. First, Motorola contends that only “programming the database” is the recited function and the rest of the function should be ignored. This incorrectly reads out limitations that are in the claim. Next, Motorola includes the entire function in the phrase to argue that there is sufficient structure.

The latter position that the entire phrase is part of the “programming means,” is the correct one. The “programming means...” includes the phrase “further comprising,” indicating that the subsequent portions are part of the programming means. The problem is that the claim does not specify the whole structure needed to perform the recited function, which includes the storing means, even when the entire phrase is included. (Even Motorola’s allegation for why there is sufficient structure substitutes “a computer for storing data in a memory” into the phrase.) Therefore, the means-plus-function presumption has not been rebutted.

The problem is not that Motorola has only pointed to a flowchart to show structure for a means-plus-function term, but that even the flowchart Motorola points to does not tell one of ordinary skill in the art how to determine that the programming message includes the programming word as required as part of the recited function. At best, box 355 in Fig. 13, which is not part of Motorola’s construction, tells one of ordinary skill *to determine* whether the programming message includes a programming word, but it does not tell that person *how* to do so. Motorola knows this, so it glosses over the requirement and says that the rest of the steps must occur after a determination is made, but the determination is not part of the claim. This is

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

erroneous. The claim requires a determination, and the failure to specifically point out structure for the claimed invention when the phrase is in means-plus-function form, is fatal. This phrase, and thus the claim, is indefinite.

I. 6,272,333

1. “data”

The logic behind Motorola’s construction is that “data” has a broad dictionary definition, and the specification and prosecution history allegedly “do not disclaim” that broad definition. *See* Motorola Br. at 9–10. This approach to claim construction has been rejected by the Federal Circuit sitting en banc. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1319–24 (Fed. Cir. 2005) (en banc) (overruling *Texas Digital*).³¹ Microsoft’s proposed construction, by way of contrast, is based on the claims, the specification, the prosecution history, and the cited prior art — all of which repeatedly draw a distinction between “data,” “application,” and “software update.” *See* Microsoft Br. at 57–58.

2. “controlling a delivery of data”

Motorola has waived the argument that “controlling a delivery of data” is not a limitation. The parties agreed to exchange claim constructions on May 6, *see* Ex. 1117, ¶ 9, and Motorola never asserted — as it does now — that “controlling a delivery of data” is not a limitation and therefore does not require construction, *see* Exs. 1118–19.

Motorola’s argument is also wrong on the law. Numerous cases hold that a preamble is a limitation when it provides antecedent basis; is underscored as important in the specification; or was relied upon during prosecution to distinguish the prior art — all factors present here. *See*

³¹ An instructive case showing the impact of *Phillips* is *Nystrom v. TREX Co.*, 374 F.3d 1105, 1110–13 (Fed. Cir. 2004) (construing claim broadly, before *Phillips*), *superseded and withdrawn by* 424 F.3d 1136, 1142–46 (Fed. Cir. 2005) (construing the same claim narrowly, after *Phillips*).

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

Microsoft's Br. at 59 n.8 (citing cases). Furthermore, the cases cited by Motorola support Microsoft's position, not Motorola's. *See* Motorola's Br. at 8 n.4. The first case confirms that the preamble can impose limitations on the *environment* of the alleged infringement, in which case the patentee *must* prove that the accused product is used in an *environment* that satisfies all the limitations required by the preamble — exactly Microsoft's point. *See Advanced Software Design Corp. v. Fiserv, Inc.*, 641 F.3d 1368, 1374 (Fed. Cir. 2011) (“[T]he claims at issue in this case contain preambles that define the environment in which an accused infringer *must* act [An accused infringer] would infringe the method of claim 1 . . . *only* by [taking actions] in accordance with steps described in the preamble.”). The second case also supports Microsoft,³² and the third case shows how dramatically different the facts would need to be for Motorola's argument to be correct.³³

In the alternative, Motorola argues that “controlling a delivery of data” means “managing whether and when data is delivered.” But Motorola never explains how it came up with that phrase, which cannot be found anywhere in Motorola's cited evidence. Microsoft's proposed construction, by way of contrast, is directly supported by the specification, the arguments *repeatedly* made during prosecution to distinguish *all* the claims from the prior art, and the testimony of Motorola's own inventor. *See* Microsoft Br. at 58–60 & n.9.

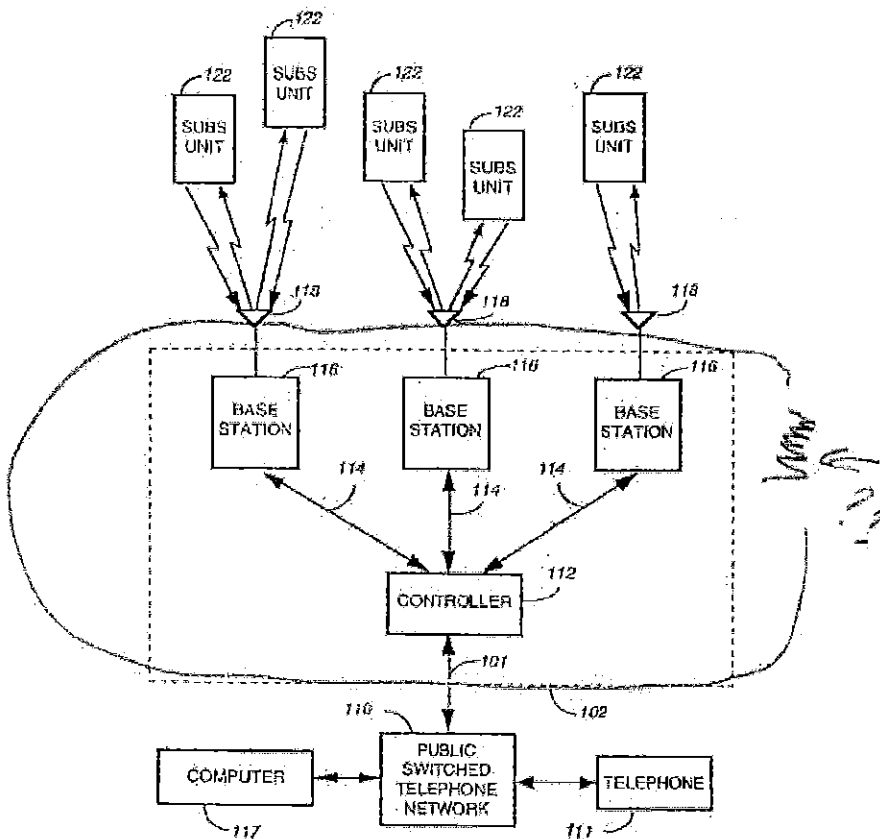
³² In *Boehringer Ingelheim Vetmedica, Inc. v. Schering-Plough Corp.*, 320 F.3d 1339, 1345 (Fed. Cir. 2003), the Federal Circuit agreed that the preamble was a limitation because it recited “the essence of the invention” — exactly the situation in this case.

³³ In *Insured Deposits Conduit, LLC v. Index Powered Financial Services, LLC*, No. 07-22735, 2008 WL 4851571, at *3–*5 (S.D. Fla. Feb. 28, 2008) (Ungaro, J.), this Court held that a preamble was not a limitation because it did not provide antecedent basis, it would be redundant to limitations in the body of the claim, and the specification confirmed it was not a required element of the invention — precisely the *opposite* of the facts in this case.

3. “fixed portion of [a/the] wireless communication system”

Motorola’s own expert agrees with Microsoft’s construction for “fixed portion.”

When asked to circle the “fixed portion,” he drew a circle that excluded the subscriber units (at the top) and the telephones and computers that originate data messages (at the bottom). See Ex. 1122 (Kaliski Dep. Ex. 29); Ex. 1120 at 421:9–422:4. This drawing



(which is reprinted here) directly refutes Motorola’s argument that there is “no basis for defining the claimed ‘fixed portion’ to exclude computers that originate data messages,” see Motorola Br. at 11. Microsoft’s proposed construction merely states in words what Motorola’s own expert has shown with his drawing, and that construction is supported by the specification, the cited prior art, and the testimony of Motorola’s own inventor, see Microsoft Br. at 60–61.

4. “subscriber unit”

Motorola points to the *preferred embodiment* to argue that a “subscriber unit” must be *portable*. But 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.” *Phillips*, 415 F.3d at 1323 (emphasis added). Nothing in the intrinsic evidence

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

requires a “subscriber unit” to be *portable*, and Motorola’s own inventor emphasized that a “subscriber unit” need *not* be portable. *See* Microsoft Br. at 61.³⁴

5. “application registry comprising ...”

Motorola’s proposed construction attempts to replace “currently accessible” with “immediately available for use” — a phrase found nowhere in the patent.³⁵ The goal of Motorola’s construction is to *exclude* “applications that can be downloaded over the air.” But both the specification and the prosecution history show that the proper construction for “currently accessible” *includes* “applications that can be downloaded over the air.” *See* Microsoft Br. at 62. Furthermore, Motorola’s own expert believes that the narrower phrase used in Motorola’s proposed construction — “immediately available for use” — *includes* “applications that can be downloaded over the air,” *see* Ex. 1120 at 425:19–22, which supports Microsoft’s position that the broader phrase actually used in the claims — “currently accessible” — also includes “applications that can be downloaded over the air.” Indeed, the word “accessible” just means “*capable* of being *reached*.” *See* Ex. 1110, at 11. It does not mean that the application has already been installed and is ready for use, as suggested by Motorola’s proposed construction.

³⁴ Motorola argues that the inclusion of the word “portable” in Microsoft’s proposed construction for “fixed portion” suggests that *all* subscriber units *must* be “portable.” *See* Motorola Br. at 10, 11. To the contrary, a “subscriber unit” *may* be “portable,” but nothing *requires* a “subscriber unit” to be “portable.” To emphasize this point, Microsoft does not oppose dropping “portable” from its construction for “fixed portion,” such that the revised construction would be: “the stationary portion of the wireless communication system that includes base stations and a controller that controls the base stations, as distinct from the *portion* that includes subscriber units, or the public network portion that includes telephones or computers that originate data messages.”

³⁵ A text-searchable version of the ‘333 Patent is available online at <<http://patft1.uspto.gov/netacgi/nph-Parser?patentnumber=6272333>>.

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

J. 6,408,176

1. “extracts ...”; “extracting ...”; “receiving ... after extraction”

These phrases should be interpreted in their entirety as the scope of these phrases “has a meaning distinct from the sum of [their] component parts.” *Biovail Labs. Int’l SRL v. Impax Labs., Inc.*, 433 F. Supp. 2d 501, 506 (E.D. Pa. 2006).³⁶ Motorola’s request to separately construe the terms “extracts” and “caller-related information,” instead of these entire phrases, fails to consider the meaning of these terms in the context of the claims and will confuse the jury.³⁷

Motorola argues that Microsoft’s proposed construction is “nonsensical” because it requires the “extraction” operation “to produce caller-related information in voice format.” *See* D.E. 123 at p. 16. Motorola’s confusion stems from its overly-broad interpretation of “extracts.”³⁸ A proper interpretation of “extracts” includes a “removal” of the “caller-related information” from the remainder of the voice mail (in voice format) so that the “caller-related information” can be used to initiate a communication. *See* D.E. 124, Ex. 1301 at 2:35-39, 5:66-6:2.³⁹

³⁶ *See also Ethicon Endo-Surgery, Inc. v. U.S. Surgical Corp.*, 93 F.3d 1572, 1577 (Fed. Cir. 1996) (narrowly interpreting the term “connected to” in view of the entire phrase of “connected to said longitudinal slots”).

³⁷ Motorola argues that Microsoft’s proposed construction “raises questions” as to what comprises the “group of items” and “specific criteria” in Microsoft’s proposed construction. *See* D.E. 123 at 16. In the context of the claims, the “group of items” is clearly the stored voice mail and the “specific criteria” is criteria used to identify the “caller-related information.” Motorola’s concerns highlight the pitfalls of construing claim terms out of context.

³⁸ Microsoft does not agree that “extracts” simply means “selects,” as stated by Motorola. *See* D.E. 123 at 15. Indeed, Microsoft continues to believe that its own proposed construction for “extracts” should be adopted.

³⁹ Motorola also argues that Microsoft’s proposed construction is improper since the words “remove” and “criteria” do not appear in the specification. *See* D.E. 123 at 16. However, these

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2. Order of the “extracting” and “converting” operations

Microsoft’s proposed construction should be adopted as the logic and grammar of the claims require that the “extracting” operation precede the “converting” operation. Claim 1 states that a converter device “extracts caller-related information” and “converts *the* caller-related information.” (emphasis added.) Notably, the “caller-related information” is created by the “extracting” operation and is later used by the “converting” operation. Similarly, claim 11 explicitly states that the “caller-related information ... result[s] from a ... conversion *after* extraction from stored voice mail.” (emphasis added.) In claim 8, the “extracting” operation must precede the “converting” operation because the “extracting” operation operates on voice mail (voice format input and output) and the “converting” operation converts “caller-related information” from voice format (input) to alpha-numeric string (output). Since the “extracting” operation cannot take the “conversion” output as an input, it must come first.⁴⁰

Tellingly, Motorola fails to identify any embodiment in the specification where the “converting” operation precedes the “extracting” operation. *See* D.E. 123 at 18. Instead, Motorola argues that these steps may occur “simultaneously” in “real-time.” *Id.*; *see also* D.E. 124, Ex. 1301 at 3:66-4:2. However, Motorola reads the specification out of context, as the phrase “real-time,” as used in the specification, actually means that the “extracting” and

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words are merely used to describe the plain and ordinary meaning of “extract.” *See* D.E. 124, Exs. 1303 & 1304.

⁴⁰ Motorola also argues that the inventors “could have” written the claims to more clearly claim the order of the “extracting” and “converting” operations. *See* D.E. 123 at 17-18. Motorola also points out sections in the specification (but not the claims) where Motorola indicated an order of steps. *Id.* at 19. These arguments are irrelevant as they have nothing to do with the actual language in the asserted claims.

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

“converting” steps can occur without receiving a request from a communication unit, and not that these steps can occur “simultaneously.” *See* D.E. 124, Ex. 1301 at 4:2-5.

Lastly, Motorola cites to an undated document that purportedly relates to the “IBM Via Voice” speech engine referenced in the ‘176 Patent to argue that the “converting” operation may precede the “extracting” operation. *See* D.E. 123 at 18-19 & Ex. 53. However, Motorola identifies the wrong operation as the “extraction” operation in this document. Instead, Motorola should have identified the “best match” operation as the “extracting operation” (*i.e.*, best matching phone number). To that end, this document actually supports Microsoft’s proposed construction as the “best match” is selected and removed (“extracted”) in voice format, converted to text, and separately stored in “SM_WORD structures.”⁴¹

3. **“receiving a request from a user of the communication unit”**

Motorola’s “claim differentiation” argument should be overruled in view of the clear prosecution disclaimer for this claim limitation. *See ERBE Elektromedizin GmbH v. Canady Tech. LLC*, 629 F.3d 1278, 1286-87 (Fed. Cir. 2010) (rejecting “claim differentiation” arguments when the patentee had “unambiguously disclaimed” subject matter). As set forth in Microsoft’s opening brief, Motorola clearly made statements during prosecution that disclaim the scope of “receiving a request from a user” in claim 11 and clearly aver that the proper meaning of this limitation is “receiving a request from a user of the communication unit.” *See* D.E. 124 at 66-67.

4. **“fixed network equipment”**

Microsoft’s proposed construction should be adopted because it describes the functions of the vague FNE term in a way that will help the jury understand this term’s role in claim 1. In

⁴¹ *See* D.E. 123, Ex. 53 at 96: “When the engine finds the best match for a spoken word ... [*i.e.*, extracting a phone number], the decoded word [*i.e.*, converted word] ... [is] stored in an array of SM_Word structures....”

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

contrast, Motorola's proposed construction merely identifies the FNE as a "component" of a "communication system infrastructure," which only increases the vagueness of this term.

5. "caller-related information"

Motorola's attempt to broaden the claims to capture "stored audio messages" should be rejected. The term "stored audio message" is never used in the specification and only appears during prosecution in relation to quotes from the Agraharam prior art reference. *See* D.E. 123, Ex. 11 at MOTM-24063-0001460. In addition, Microsoft agrees that the prosecution history disclaims "caller-related information" from encompassing data such as ANI or caller ID and believes that its proposed construction is narrowly tailored to exclude such extraneous information.

K. 6,757,544

1. "specific location information of the communication device"

Microsoft's proposed construction should be adopted because every embodiment in the '544 patent discloses that the "specific location information" is "input by the user." *See* D.E. 124, Ex. 1201 at 4:60-61, 7:55-8:6, 10:16-19, 11:5-8. Tellingly, the only portions of the specification that Motorola has cited to regarding "automatic position determination technology" are in the background section of the '544 patent, which is not an embodiment of the invention, and where such technology is criticized for being inefficient and inadequate. *See* D.E. 123 at pp. 50-51; D.E. 124, Ex. 1201 at 1:32-33, 1:36-39.⁴² This is not surprising, as the very purpose of the invention in the '544 patent is to compensate for the inaccuracies of "automatic position determination technologies" such as GPS. *See* D.E. 124, Ex. 1201 at 1:34-41. Thus, Microsoft's

⁴² *See* MANUAL OF PATENT EXAMINING PROCEDURE § 608.01(c) (8th ed. 2010) (explaining that the "Background" section of a patent describes (1) the field of the invention; and (2) relevant prior art).

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

proposed construction should be adopted because the claims must be “tether[ed] ... to what the specification[] indicate[s] the inventor[s] actually invented.” *Retractable Techs., Inc. v. Becton, Dickinson and Co.*, Case No. 2010-1402, 2011 U.S. App. LEXIS 13925, at *21 (Fed. Cir. July 8, 2011) (construing “body” to be limited to a “one-piece structure” because all embodiments in the specification were one-piece structures). To hold otherwise would “allow the claim language to become divorced from what the specification conveys is the invention.” *Id.* at *36.

Furthermore, Motorola’s argument regarding now-cancelled claim 26 actually supports Microsoft’s argument that “automatic position determination technology” is outside the scope of claims 1 and 3. *See* D.E. 123 at p. 50.⁴³ When claims are cancelled during prosecution without deleting the supporting disclosure in the specification, the “cancelled claims may provide ‘probative evidence’ that an embodiment is not within the scope of an asserted claim.” *PSN Illinois, LLC v. Ivoclar Vivadent, Inc.*, 525 F.3d 1159, 1166 (Fed. Cir. 2008). Here, Motorola has not deleted the specification sections that describe “automatic position determination technology,” indicating that this technology is outside the scope of claims 1 and 3.

Lastly, since there is a fundamental dispute which cannot be resolved by the plain meaning of the claims, this claim term must be construed. *O2 Micro Int’l Ltd. v. Beyond Innovation Technology Co.*, 521 F.3d 1351, 1361 (Fed. Cir. 2008).

2. **“general location information ...”**

Motorola accuses Microsoft of both reading limitations out of the claims and reading limitations into the claims from the specification. *See* D.E. 123 at 49-50. Motorola’s convoluted

⁴³ Motorola’s argument with regards to cancelled claim 26 amounts to a “claim differentiation” argument, which should fail as dependent claim 26 was originally dependent on original claim 1 which was also cancelled and is not at issue in this case. *See* D.E. 123, Ex. 27. Claim 1 in the ‘544 patent today was originally claim 18.

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

argument ignores how Microsoft has simply looked to the specification “to define a term already in a claim limitation,” which is different than reading limitations into/from a claim. *See Cobra Int’l, Inc. v. BCNY Int’l, Inc.*, Case No. 05-61225-Civ-Marra, 2008 U.S. Dist. LEXIS 48815, at *6 (S.D. Fla. June 18, 2008) (citing *Renishaw PLC v. Marposs Societa’ Per Azioni*, 158 F.3d 1243, 1248 (Fed. Cir. 1988)). Microsoft’s proposed construction should be adopted because it defines this limitation consistently with two preferred embodiments (Examples A and B) in the ‘544 patent. *See* D.E. 124 at 70-71.⁴⁴ In contrast, Motorola’s proposed construction excludes the embodiment in Example B, where the “general location” is Sunil’s precise location (i.e., a single point), because a “general area of a location relevant to the user” cannot be a single point. *See* D.E. 124, Ex. 1201 at 10:59-63.

Furthermore, since there is a fundamental dispute which cannot be resolved by the plain meaning of the claims, this claim term must be construed. *O2 Micro Int’l Ltd.*, 521 F.3d at 1361.

3. **“determining the location relevant to a user by comparing ...”**

Microsoft agrees that this claim limitation is “best illustrated” by Example A. *See* D.E. 123 at 51. In Example A, where Bob is searching for nearby ATMs, this limitation corresponds to block 330 of Fig. 2, entitled “compare user specified location information with set of location parameters.” *See* D.E. 124, Ex. 1201 at 10:16-23. This comparison, where Bob’s “specific location information” (intersection at “Ohio and State”) is matched to a list of location parameters, results in the identification of Bob’s specific location at block 335 of Fig. 2, which is

⁴⁴ *See Funai Elec. Co., Ltd. v. Daewoo Elecs. Corp.*, 616 F.3d 1357, 1371 (Fed. Cir. 2010) (“A claim construction that excludes a preferred embodiment is rarely, if ever, correct”).

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

entitled “determine *location relevant to user*.” *Id.* at 8:25-32, 10:16-23 (emphasis added).⁴⁵

Microsoft’s proposed construction closely tracks Example A and Fig. 2 and should be adopted.

Motorola argues that Microsoft’s proposed construction improperly limits claims 1 and 3 to determining the location of the communication device. *See* D.E. 123 at 52. However, “[i]t is often the case that different claims are directed to and cover different disclosed embodiments. The patentee chooses the language and accordingly the scope of his claims.” *Helmsderfer v. Bobrick Washroom Equip., Inc.*, 527 F.3d 1379, 1383 (Fed. Cir. 2008). Motorola chose to draft claims 1 and 3 to recite “specific location information *of the communication device*,” which is why claims 1 and 3 should be limited to determining the location *of the communication device*.⁴⁶

Motorola also argues that since the specification states that “matching” is only “one embodiment of the invention,” that “comparing” should not be equated with “matching.” *See* D.E. 123 at 52-53. However, Motorola fails to point out any embodiment where a “comparing” operation is described either explicitly or implicitly as anything other than a “matching” operation. *See* D.E. 124, Ex. 1201 at 8:27-29, 10:16-23, 11:8-10.⁴⁷ Similarly, Motorola argues that since the term “matching” is used in other limitations, that this forecloses using the terms

⁴⁵ Motorola improperly interprets block 350 of Fig. 3 to correspond to this limitation. *See* D.E. 123 at p. 52; D.E. 124 at 10:26-28. However, block 350 cannot correspond to this limitation because block 350 is only reached after the “location relevant to the user” has already been determined at block 335. *Id.* at 10:16-26.

⁴⁶ In contrast, claims 9 and 10 recite “specific location information *from the communication device*,” which could include information about locations other than the location of the device. This is described in Example B, where Sunil inputs the “specific location information” pertaining to O’Hare airport. *See* D.E. 124, Ex. 1201 at 11:5-8.

⁴⁷ Motorola argues that the “comparing” step, which is performed when searching for airports or ATMs, is not a “matching” step. *See* D.E. 123 at 53. However, as described above, this “comparing” step, which is illustrated at block 350 of Fig. 3, is not the same “comparing” step recited in this claim limitation.

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

“matching” and “comparing” interchangeably. *See* D.E. 123 at 53. However, Motorola’s argument lacks legal authority and ignores the fact that the term “matching” is used in the specification to describe this same claim limitation. *See* D.E. 124, Ex. 1201 at 8:25-32; *see also Tehrani v. Hamilton Med., Inc.*, 331 F.3d 1355, 1361 (Fed. Cir. 2003) (finding that the terms “representing” and “indicative of,” as used in different claims, were interchangeable in view of the intrinsic evidence).

L. 6,983,370

Seeking to add clarity to vague and overly broad claims, Motorola’s proposed claim constructions improperly add limitations that simply do not appear in the language of the claims or the patent itself. Motorola initially states that the “Eaton ‘370 Patent relates to instant messaging (“IM”) systems.” The inventors of the ‘370 patent, however, did not limit their invention to IM communication systems or to IM messaging sessions. Rather, the inventors explained that their invention is directed to “substantially real time communication” that included IM, chat, email and gaming messages. Ex. 1401 at 4:35-46. To assert that the “messaging communication system” referenced in the claims was somehow limited to IM communication systems is disingenuous.

As written, the claims require a server, two clients, “continuity” between the clients, and the transfer of client data from one client to another. *See*, asserted claims 1 and 50, the only remaining asserted independent claims.

Motorola’s suggestion that the specification and preferred embodiments limit the invention to an IM communication system and/or the continuation of an IM messaging session only validates Microsoft’s argument that these claims are invalid under 35 U.S.C. § 112 as

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

indefinite and as claiming a subject matter beyond the scope disclosed and enabled by the patent's specification. Clearly, the asserted claims include no such limitations.

The concepts that are included in the claims, connecting messaging clients to a messaging server and transferring client data between them, were described as the known prior art in the patent itself. Ex. 1401 at 1:13-3:37. Motorola's expert on the '370 patent, Mr. Joel Williams, confirmed this, Ex. 1411, Transcript of Deposition of Mr. Joel R. Williams, dated 7/29/2011, at 223:13-17, and the examiner took official notice of this fact during prosecution. *See*, Ex. 1403 at 20; Ex. 1405, 4:35-56. The "continuity" invention must be something more, but the patent fails to define "continuity" or its required elements.

1. "messaging session"

Although Motorola has now chosen to drop every claim that explicitly requires establishing a "messaging session," Motorola's proposed construction of "continuity" still necessitates the construction of "messaging session" by the Court. Motorola explains why it disagrees with Microsoft's proposed construction but failed to explain the basis for its own proposed construction or define the word "session."

This key term has a meaning to those of skill in the art: Microsoft Computer Dictionary defines it as "the time during which two computers maintain a connection." Ex. 1406 at 405. Newton's Telecom Dictionary similarly defines it as "an active communication, measured from beginning to end, between devices or applications over a network. . . ." Ex. 1407 at 617. Within the '370 patent, the term was further defined in the specification and during the prosecution before the patent office. *See*, Microsoft Br. at 74-76. Microsoft's proposed construction takes each of these elements into account.

Ignoring the patent's description of a "messaging session" as a "substantially real time communication" that includes IM, chat, email and gaming messages (Ex. 1401 at 4:35-46),

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

Motorola argues that “session refers to real time messaging.” *See*, Motorola Br. at 23.

Motorola’s expert, however, disagreed with this definition. He stated that, in his opinion, a “messaging session” is not a real-time communication but is made up of separate real-time communications that can span over any period of time. Ex. 1411 at 238:24-240:4; 244:7-14. His definition has no basis within the patent but clearly demonstrates Motorola’s illogical effort to re-define a “real-time” session within the ‘370 patent. In order to avoid prior art email, both Motorola and its expert seek to define a “session” as including separate and distinct communications that occur over an extended period of time but are communicated to others in a real-time mechanism, such as IM. Such a construction for “messaging session” has no basis in the art nor in the ‘370 patent.

2. “for providing continuity”

The parties agree that “continuity” is the essence of the ‘370 patent invention. The definition of that term, however, is a moving target. The patent provides a description of the prior art at the time, which included the ability of messaging clients to access, maintain, and update client data (e.g., presence data or user preferences such as a Buddy Lists) and session data (e.g., session history). Ex. 1401 at 1:58-2:53. The patent also stated that prior art messaging services supported the access of a single account from different messaging clients and the simultaneous login of different messaging clients on the same account. *Id.* at 2:65-3:7. None of these elements define “continuity.”

With respect to “continuity,” the patent explains that prior art messaging systems included the idea of “continuity of user preferences”:

Some messaging service providers **maintain the same user preference settings** such as screen names, buddy list groups, electronic mailboxes, and parental control settings **regardless of which device is used to access the service.** By having this capability the service providers are providing continuity of user

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

preferences from device to device, which simplifies the use of multiple devices in the messaging system.

Id. at 2:7-13 (emphasis added). The patent then explains that what is lacking in the prior art is “messaging session continuity.” *Id.* at 3:30-31.

If “user preference continuity” is any indication, it is logical that “messaging session continuity” or the “continuity” invention must involve service providers maintaining the same messaging session, regardless of which device is used to access the service. This suggests that a “messaging session” is itself something that is active, maintained, and continued uninterrupted, regardless of which device is used to access the service, or, as the patent states, “transferred seamlessly.”

Motorola suggests that the definition of “continuity” should be “allowing an account user to continue at least one messaging session on different messaging clients.” This definition is itself as vague and overly broad as the ‘370 patent. If the Court adopts Motorola’s construction, it must then construe what it means to “continue” a “messaging session,” including whether the “session” is “maintained” by the service provider such that the same session can be transferred and continued and, if so, how this maintenance and transfer is to be accomplished.

Further, Motorola’s construction defines continuity as applying to “an account user.” As Motorola’s expert admits, such a construction excludes a preferred embodiment of the patent that describes “continuity” as the transfer of a messaging session with a customer from one customer service agent to another (between two account users). Ex. 1401 at 25:38-51; Ex. 1411 at 233:18-22; 234:4-8; 235:13-25.

Motorola’s construction also excludes the embodiment where an account user repeatedly logs into his account from the same device, such as if a user were to log into his account from work on his laptop, go home for the day, and log into his account from home on the same laptop.

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

Motorola's expert believes this is "continuity," but such a scenario is excluded by the requirement of "different messaging clients" in Motorola's proposed construction. Ex. 1411 at 231:7-232:1.

Although not offered to opine on claim construction issues, Motorola's expert did opine on his understanding of the invention itself, and his definition of "continuity" is simply the transfer of user preferences and/or client data between messaging clients, concepts he admitted were in the prior art. *See*, Ex. 1411 at 202:3-10; 205:3-15; 211:19-24; 213:20-214:1; 215:8-11; 222:4-9; 223:13-17. Specifically, he stated that the patent is about "the ability to move these things from one client to the other," referring to the transfer of a Buddy List and presence data. *Id.* at 223:13-224:1. He repeatedly expressed his belief that "continuity" is the transfer of data from one client to another and confirmed that "continuity" can be achieved by the ability to update a Buddy List on one device and have that change transfer when a user logs in from a second device and accesses his/her Buddy List. *Id.* at 224:15-225:3; 226:21-25; 227:17-228:1; 228:17-22. He also separately confirmed that these concepts were all part of the prior art. *See, id.* at 202:3-10; 205:3-15; 211:19-24; 213:20-214:1; 215:8-11; 222:4-9; 223:13-17.

The fact that Motorola and its expert have divergent definitions of the "continuity" invention clearly establishes that the term is undefined by the patent and indefinite.

3. "first / second messaging client"

As noted in Microsoft's Brief, Microsoft's proposed construction for these terms is consistent with the claim language, the patent specification, and extrinsic definitions. Motorola's proposed construction, while consistent with the intrinsic evidence, is incomplete. The patentees clearly intended for the "first messaging client" and the "second messaging client" to be operated by the same or by different users, and Microsoft's proposed definition accurately reflects this. Ex. 1401 at 25:40-49; *see also, id.* at 5:18-19; 24:46-52; and 25:12-18.

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

It is Microsoft's contention that claim 50 includes "means-plus-function" limitations that require construction as a matter of law according to the requirements of 35 U.S.C. § 112 ¶6. Both parties' proposed constructions for "first messaging client" and a "second messaging client" simply point to software operating on a computer and are insufficient to identify the specific structure that performs the claimed functions.

Motorola argues that one of skill in the art was familiar with "messaging clients" and, therefore, no further disclosure was required. However, the Federal Circuit has been clear: patentees cannot avoid providing specificity as to the required structure simply because someone of ordinary skill in the art would be able to devise a means to perform the claimed function. *Blackboard, Inc. v. Desire2Learn*, 574 F.3d 1371, 1385 (Fed. Cir. 2009); *Atmel Corp. v. Information Storage Devices*, 198 F.3d 1374, 1380 (Fed. Cir. 1999). And, as previously noted, Motorola's argument that one skilled in the art would have been familiar with a messaging client capable of performing these functions undermines the argument that the "continuity" invention was, in fact, a novel invention. If one skilled in the art knew how to program messaging clients to perform these functions in a messaging system "for providing continuity," the '370 Patent is merely directed to the admitted prior art.

III. CONCLUSION

For the foregoing reasons, Microsoft respectfully requests that its constructions be adopted.

CONTAINS CONFIDENTIAL BUSINESS INFORMATION
SUBJECT TO PROTECTIVE ORDER

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of August 2011, I filed the foregoing document by hand with the Clerk of the Court pursuant to Local Rule 5.4 of the Southern District of Florida, and caused the same to be served in the manner indicated below on all counsel of record on the below Service List.



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