
**United States Court of Appeals
for the Federal Circuit**

SMARTMETRIC INC.,

Plaintiff-Appellant,

v.

AMERICAN EXPRESS COMPANY,

Defendant-Appellee.

**Appeal From The United States District Court
For The Central District of California
In Case No. 10-CV-9371, Judge Jacqueline H. Nguyen**

SMARTMETRIC INC.,

Plaintiff-Appellant,

v.

MASTERCARD INTERNATIONAL INCORPORATED,

Defendant-Appellee,

and

VISA INC.,

Defendant-Appellee.

**Appeal From The United States District Court
For The Central District of California
In Case No. 10-CV-1864, Judge Jacqueline H. Nguyen**

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Not applicable.

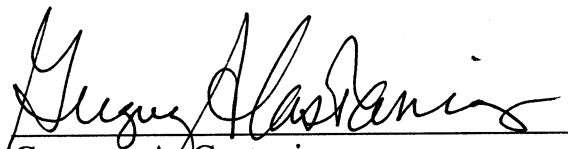
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Not applicable.

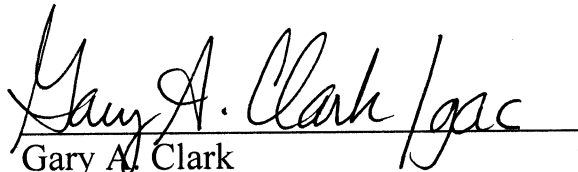
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TABLE OF ABBREVIATIONS

Parties

SmartMetric	Plaintiff-Appellant SmartMetric Inc. (both appeals)
American Express	Defendant-Appellee American Express Company (appeal no. 2011-1473)
MasterCard	Defendant-Appellee MasterCard International Incorporated (appeal no. 2011-1497)
Visa	Defendant-Appellee Visa Inc. (appeal no. 2011-1497)
Defendants	American Express, MasterCard, and Visa, collectively

Patent-in-Suit

'464 patent	U.S. Patent No. 6,792,464 (A27-40)
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Defined Terms

A___	Joint Appendix page(s)
Court	United States Court of Appeals for the Federal Circuit
district court	United States District Court for the Central District of California, the Honorable Judge Jacqueline H. Nguyen presiding
IAP	Internet Access Provider
ISP	Internet Service Provider
SMBr. ___	SmartMetric's brief
USPTO	United States Patent and Trademark Office

All emphasis in this brief is added unless otherwise indicated.

STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5:

(a) There have been no previous appeals in these consolidated cases.

(b) On August 29, 2011, SmartMetric sued MasterCard and Visa, again alleging infringement of the '464 patent. That action is docketed in the U.S.

District Court for the Central District of California as *SmartMetric Inc. v.*

MasterCard Int'l Inc., No. CV 11-7126. By that court's October 3, 2011 order, all proceedings in that case are stayed pending resolution of appeal number 2011-1497 in this Court.

JURISDICTIONAL STATEMENT

The jurisdictional statement appearing in SmartMetric's opening brief is complete and correct.

COUNTER-STATEMENT OF THE ISSUES

In the context of the '464 patent, which purported to solve internet access problems unique to the era of dial-up internet connection, the claim-construction issues presented for review are as follows:

1. Did the district court correctly construe the claim term requiring triggering of the application program upon "insertion of said data card into said data card reader" in claims 1 and 14 as "the data card is physically inserted into a recess of the data card reader," when the claims, specification, and prosecution history all compel that construction of the "triggering" limitation?

2. Did the district court correctly construe the claim term "plurality of network service providers" in claims 1 and 14 as "a plurality of entities that provide a gateway to a public general-purpose network such as the internet," when the patented invention sought only to remedy problems of access to the internet?

If the Court answers "yes" to either of the first two issues, the district court's judgments should be affirmed, because either claim term independently supports the judgments in full. If the Court answers *both* these issues in the negative, and thus vacates the judgments and remands these cases for further proceedings,

Defendants respectfully request that the Court construe the remaining three claim terms at issue in these cases. The following three issues concern these additional claim terms.

3. Did the district court err in construing the claim term “access number” in claims 1 and 14 as “a number that indicates a designated or selected network service provider” as opposed to “a dialable telephone number,” when any person of ordinary skill in the art in the year 2000 would have understood the term “access number” to refer to a number that can be dialed via a telephone, and when the patented invention sought to remove as a factor the cost difference between local and long-distance phone calls?

4. Did the district court err in construing the claim term “use said information to gain access to one of the plurality of network service providers” in claims 1 and 14 as “information from a data card is used to obtain entry to a network service provider,” when the phrase “obtain entry” removes the permission-seeking attribute of the phrase “gain access,” and when the construction fails to specify that the information is stored on a data card’s microchip?

5. Did the district court err in declining to construe the language “said application program is immediately triggered upon insertion of said data card into said data card reader” in claim 1 (and similar language in claim 14), when the

parties disagreed about, and when the issue of infringement may turn on, whether the adverb “immediately” carries its ordinary meaning of “without any intervening events” or whether, contrary to its plain meaning, it allows for “a short time” to pass between the trigger and the launch?

COUNTER-STATEMENT OF THE CASE

A. Preliminary Statement

These claim-construction appeals are about an inventor trying to expand the scope of the claimed invention. The ’464 patent covers technologies that simplify dial-up internet access. SmartMetric, however, is asking this Court to expand the patent’s reach so that it would also capture technologies implicated in the purchase of goods or services using credit or debit cards. But purchase transactions have nothing to do with dial-up internet access. This Court, therefore, should reject SmartMetric’s attempt to obtain, in effect, a new patent under the guise of claim construction.

The scope of the ’464 patent is clear. In the claimed systems and methods, internet users relying on dial-up internet could record on a data card’s microchip access and login information for their ISP. These data cards (all the size of a familiar credit card) are small enough to reside in a wallet, handily providing the necessary information while traveling. As part of both the systems and methods claimed by the ’464 patent, these data cards must be physically inserted into a

recess of a data card reader connected to a computer wherever a user wishes to access the internet. The data card reader in turn, without any intervening events, triggers an application program. Once triggered, this application program must dial a telephone number corresponding to the ISP and use information stored on the data card's microchip (*e.g.*, login name and password) to establish permission for the user to access the ISP as a gateway to a public general-purpose network, such as the internet. The user may then communicate with that network in the same way the user would be able to do so from a home computer.

But that is not at all how SmartMetric construes the '464 patent.

SmartMetric wants the patent to cover Defendants' accused systems, which are not implicated in the dial-up internet setup. Instead of providing a gateway to the internet or any other public general-purpose network, the accused systems use contactless data cards to support credit or debit card purchase transactions. These contactless data cards do not require physical insertion into a data card reader to trigger the system or to retrieve information from the microchip in the data cards. Nor is that information used to gain access to a network—the network connection is pre-established between the merchant and its transaction processor(s). And the accused systems frequently require additional intervening events—for example, presenting the data card to a cashier—before the system launches the corresponding application.

To try to squeeze the accused systems into the claims of the '464 patent is the proverbial exercise consisting of square pegs and round holes. This Court should thus affirm the district court's judgments of non-infringement.

B. Procedural History

SmartMetric filed this patent-infringement lawsuit against MasterCard and Visa on March 15, 2010, alleging that the companies' "satellite broadcasting services" infringe the '464 patent. (A362-65.) As the result of several motions to dismiss for failure to state a claim, SmartMetric filed the First Amended Complaint followed by the Second Amended Complaint, on July 27, 2010, removing references to "satellite broadcasting services" and substituting allegations that defendants' "contactless systems . . . infringe at least claims 1 and 14 of the '464 patent." (A19-22, 519-27.) On December 7, 2010, SmartMetric filed a virtually identical patent-infringement complaint against American Express in the same court. (A328-35.)

After all parties in SmartMetric's lawsuit against MasterCard and Visa had "stipulate[d] to limiting claim construction to arguments based on intrinsic evidence only" (A888), the district court on December 21, 2010 set the claim-construction briefing and hearing schedule (A24), subsequently consolidating for claim construction SmartMetric's two patent-infringement cases (A14).

Defendants sought SmartMetric's cooperation in determining whether the district

court's limit of five claim terms was adequate and, if so, which claim terms the court should construe. (A194.) SmartMetric repeatedly declined to suggest any claim terms for construction, so Defendants were left to select the claim terms without SmartMetric's input. (A203.)

After a one-day hearing, the district court issued its claim-construction order on May 18, 2011. (A41-59.) The court adopted Defendants' proposed construction on two out of five selected claim terms, SmartMetric's construction on two more, and left one claim term without construction. (*Id.*)

Unable to prove infringement in light of the district court's claim construction, SmartMetric agreed to stipulated judgments of non-infringement. (A5-11.) The district court entered such judgments on June 20, 2011 (the American Express lawsuit) and June 30, 2011 (the MasterCard/Visa lawsuit), and SmartMetric appealed each to this Court on June 30, 2011 and July 1, 2011, respectively. (A1-4, 16, 25.) On August 31, 2011, this Court consolidated the two appeals.

COUNTER-STATEMENT OF FACTS

Entitled "System for Automatic Connection to a Network," the '464 patent "relates to a computer system that allows a user to automatically connect to a network service provider, and more particularly, to a system and method which allows a user to automatically connect to a network service provider by using a

data card (*i.e.*, a ‘smart card’).” (A35 col. 1:14-18.) The patent, issued in 2004 based on a 2000 filing, sought to streamline internet access in the dial-up era. (A27-40.)

A. Internet Access Issues In Late 1990s And Early 2000s

In the late 1990s and early 2000s, most individual internet users relied on dial-up internet access provided by IAPs and ISPs—for example, American Online (AOL) and Net Zero.¹ (A164.) Unlike the continuous internet access typical of today’s DSL and cable modem services, the dial-up internet access involved several steps before a user could reach the internet. A user first had to select a provider, login information (username and password), and a phone number. (A35 col. 2:5-17.) The user then, through the computer’s modem, dialed the selected phone number to connect to the provider whenever the user wanted to access the internet. (*Id.*) The phone number was typically a local number, which allowed the user to avoid long-distance charges. (*Id.* col. 2:14-24.) Only after the phone connection was established and the provider authenticated the user’s login and password information (*i.e.*, if the provider recognized the user as someone who had registered with the provider to receive internet access) did the provider grant the

¹ Both terms mean internet *access*, but the term “ISP” may signal additional internet services. For purposes of these appeals, where the sole issue is about access, the terms are identical and used interchangeably. In its brief, SmartMetric misquotes the ’464 patent’s specification as referring to “an Intranet Service Provider (ISP).” (SMBr. 17.) The correct quote, of course, is “Internet Service Provider (ISP).” (A36 col. 4:29-30.)

user access to the internet. (*Id.* col. 2:11-14; A38 col. 8:7-20.) The provider, in other words, served as a gateway to the internet.

To streamline this multi-step process requiring a user to recall several pieces of information, many ISP-based users opted to have their computer software remember the phone number, login, and password information. (A165.) But that information remained on their home computers. When traveling, users still had to remember the phone number and account information to access the internet on another computer, or had to borrow someone else's internet access information. (A35 col. 2:29-32; A165.) Exacerbating the problem, because the pre-selected phone number was typically a local number based on users' home location, traveling users had to choose another phone number or incur long-distance charges whenever they traveled outside the area covered by the pre-selected local telephone number. (A35 col. 2:18-32; A165.) Too frequently, the easiest solution was to do without internet access during travel. (A165.)

ISPs also offered internet access services to businesses. (A35 col. 2:5-8.) Some businesses went a step further and allowed their employees to connect to the business's internet access using a local area network, or intranet, through a proxy server. (A36 col. 4:31-33.) The proxy server—in essence a network service provider—served as a gateway *to* the internet *from* the business's intranet. As

convenient as this setup was, it was impossible to use while traveling, when users no longer had a connection to the business's intranet. (A165.)

B. The '464 Patent's Solution

1. Subject Matter and Specification

The '464 patent sought to simplify internet access from any computer using a user's own ISP. (A35 col. 2:39-46.) This required giving users a convenient method for carrying their access information with them as they traveled, and providing a means for conveniently recalling this information whenever they wanted to access the internet. (A35 col. 2:18-22.)

The '464 patent teaches a workaround to the above problems. Users can store all necessary information on a data card. (A35 col. 1:32-33.) A data card, also termed a "smart card," "is approximately the size of a credit card and stores electronic data on a microchip" instead of a magnetic strip. (*Id.* col. 1:18-19, 33-37.) The data card can communicate in one of two ways, depending on the card. A "contact" data card has "a microchip on one side of the card" and communicates when that microchip "makes contact with an electrical connector contained within the smart card reader." (*Id.* col. 1:45-50.) A "contactless" data card, on the other hand, communicates with a data card reader by transmitting information between an antenna embedded within the card and the reader's antenna. (*Id.* col. 1:51-56.) As its name implies, a contactless card "allows information to be exchanged

without physical contact” with the data card reader; the data card only needs to be “passed near” the data card reader. (*Id.* col. 1:56-58, 9:28-33.) However information is communicated between the data card and the reader, the information is “contained in a smart card microchip.” (*Id.* col. 1:41-42.)

With each user’s internet access information (the provider, telephone number, and login information) stored on a smart card, all that the users need to do is find the right card reader and application program and they can access the internet using their own ISP as if sitting at a home computer. (*Id.* col. 2:39-46.)

The ’464 patent’s specification discloses five embodiments. (A35 col. 2:51 (“According to one embodiment of the present invention, there is disclosed a computer system”); A36 col. 4:60 (“According to another aspect of the present invention, there is disclosed a method”); A37 col. 5:14 (“In another embodiment of the present invention, an online advertisement system”); *id.* col. 5:29 (“In another embodiment of the present invention, a data card”); *id.* col. 5:39 (“In another embodiment of the present invention, a method”).)

2. Claims

The ’464 patent issued with 25 claims, divided roughly equally between computer system and method claims for the use of a data card to simplify internet access. Claim 1 recites:

A computer system for all[o]wing a user to
automatically access one of a plurality of net[wo]rk

service providers which require information specific to the user and/or the network service provider to be accessed the computer system comprising:

a data card which contains the information specific to the user and/or the network service provider to be accessed;

a data card reader adapted to access at least part of the information contained on the data card when the data card is in communication therewith;

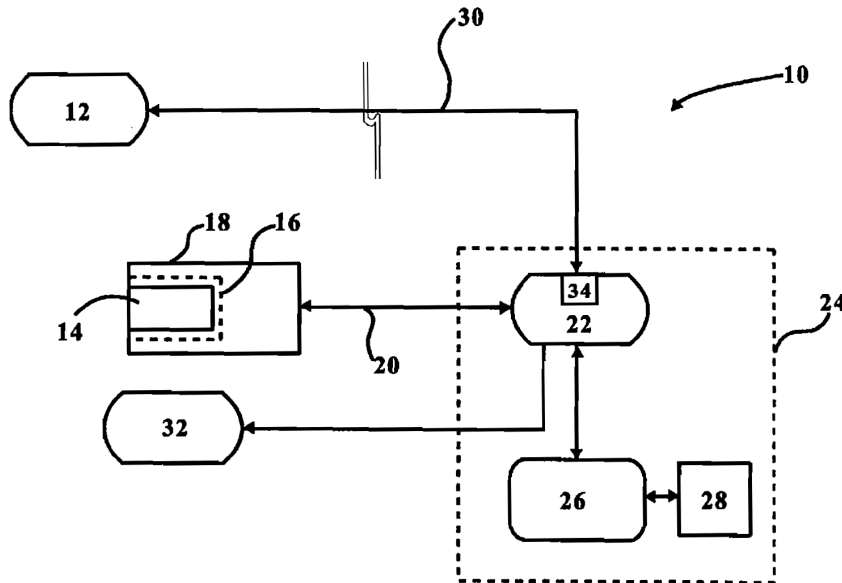
a data processor in communication with the data card reader and adapted to be connected to a network;
and

an application program resident on the data processor, said application program being configured to automatically retrieve at least part of the information contained on the data card when the data card is in communication with said data card reader and to use said information to gain access to one of the plurality of network service providers via the network by using one of a default access number indicating a designated network service provider and a local access number from a database containing a list of access numbers or the plurality of network service providers along with corresponding location information for each access number in the list,

wherein said application program is immediately triggered upon insertion of said data card into said data card reader.

(A39 col. 10: 18-47.) The only other independent claim—claim 14—recites a method corresponding to claim 1's computer system and contains the same or analogous limitations. (A40 col. 11:32-50.) The remaining 23 claims are dependent from claims 1 and 14 and describe their variations. (A39 col. 10:48 to A40 col. 12:49.)

Figure 3 of the '464 patent, reproduced below, depicts a system and method that corresponds to claims 1 and 14. It shows that a data card 14 is inserted into recess 16 of card reader 18. Card reader 18 is connected to computer 24 that uses modem 34 to dial up to, and connect through, ISP 12 to the internet. (A37 col. 6:58 to A38 col. 7:31.)



3. Prosecution History

The patent-in-suit derives from Australian Patent Application No. AU 17394/99, filed on February 18, 1999 by Colin Hendrick, describing a method and system for connecting to the internet through an ISP. (A35 col. 1:4-10.) On February 18, 2000, Mr. Hendrick filed PCT International Application No. PCT/US00/04250 based on the Australian application. (*Id.*) On February 15, 2011, he filed U.S. Patent Application No. 09/784,851 as a continuation of the

PCT International application. (*Id.*; A27.) The U.S. application issued as the '464 patent on September 1, 2004. (A27.)

Mr. Hendrick cancelled four original claims (14, 27-29) during prosecution of the U.S. application. Significantly, one of them, original claim 28, recited a “data card” with “memory . . . for storing an application program which is *immediately triggered . . . when said data card is in communication with a data card reader.*” (A267.) He cancelled original claim 29 via a preliminary amendment (A222) and the remaining three following prior-art rejections by the USPTO’s patent examiner (A227-29, 236, 239). The '464 patent was allowed to issue only after Mr. Hendrick had made these cancellations. (A232, 240.)

C. SmartMetric’s Lawsuits

When SmartMetric sued MasterCard and Visa on March 15, 2010, it alleged that the companies are infringing the '464 patent “by selling, offering to sell and using satellite broadcasting services.” (A362 ¶ 1.) Pointing to SmartMetric’s complete failure to identify any allegedly infringing products and services, defendants moved to dismiss. (A20, 389.) Offering no defense, SmartMetric filed the First Amended Complaint and alleged that MasterCard and Visa are infringing the '464 patent “by selling, offering to sell and using contactless card systems.” (A403 ¶ 1.) MasterCard and Visa again moved to dismiss, arguing that, despite substituting “contactless card systems” in place of the mysterious “satellite

broadcasting services” that neither defendant provides, SmartMetric still failed to allege facts showing plausible infringement. (A436-37.) The district court agreed and dismissed the lawsuit without prejudice. (A511-18.)

SmartMetric amended once more, this time specifying that MasterCard’s PayPass and Visa’s Paywave “contactless card systems” infringe at least claims 1 and 14 of the ’464 patent when the systems “use data cards that, when passed near to a reader, establish connection to a network.” (A519-20 ¶ 1.) After the district court had determined that this Second Amended Complaint satisfied the minimum pleading standards (A581-86), SmartMetric filed a virtually identical complaint against American Express and alleged the same infringement theory by the company’s ExpressPay contactless data card system (A328 ¶ 1).

D. Claim Construction

In the lawsuit against MasterCard and Visa, all parties agreed to proceed with claim construction and “stipulate[d] to limiting claim construction to arguments based on intrinsic evidence only.” (A888.) SmartMetric sued American Express a week later. (A328.) After ordering simultaneous briefing and setting the claim-construction hearing for March 11, 2011 (A24), the district court consolidated SmartMetric’s two cases for claim construction (A14).

In preparation for the claim-construction briefing and hearing, the parties were supposed to cooperate in determining whether the district court’s limit of five

claim terms was adequate, and to select the terms to be construed. (A194.) To that end, Defendants repeatedly asked SmartMetric to clarify which patent claims were being asserted. (*Id.*) SmartMetric refused, only offering a vague “claims 1 and 14 are in play.” (A196.) Other attempts at clarifying proved equally futile. (A198-99, 201.) On January 12, 2011, well ahead of the February 4 deadline for the parties’ opening briefs on claim construction, Defendants emailed SmartMetric five claim terms and proposed construction, requesting the courtesy of any counter-proposal by January 19. (A203.) SmartMetric did not respond. On January 20, counsel for Visa contacted SmartMetric and was informed only then that Defendants would learn SmartMetric’s position no later than SmartMetric’s filing of its opening brief. (A163.) SmartMetric, in fact, did not share its proposed constructions before filing its opening claim-construction brief.

After conducting a one-day hearing on claim construction, the district court adopted Defendants’ construction of two terms, SmartMetric’s construction of two terms, and left one term without construction. (A41-59.) The following table summarizes the parties’ positions and emphasizes the district court’s construction:

Disputed Term	SmartMetric’s Proposed Construction	Defendants’ Proposed Construction
“insertion of said data card into said data card reader”	“to place into action with a data card reader, as with a contactless data card” or “to place a data card into a recess of a data card reader, as with a contact data card”	“the data card is physically inserted into a recess of the data card reader”
“plurality of network service providers”	“more than one entity that provides services that are accessible/reachable over any network, public, or private”	“a plurality of entities that provide a gateway to a public general-purpose network such as the internet”
“access number”	“a number that indicates a designated or selected network service provider”	“a dialable telephone number”
“use said information to gain access to one of the plurality of network service providers”	“information from a data card is used to obtain entry to a network service provider”	“information obtained from the microchip on the data card is used to establish permission or right to use one of the plurality of network service providers”
“said application program is immediately triggered upon insertion of said data card into said data card reader” (claim 1) “immediately triggering said application program upon insertion of said data card into said data card reader” (claim 14)	“the application is launched in a short time after a data card is placed into action with a data card reader, as with a contactless data card, or in a short time after a data card is placed into a receiving recess of a data card reader, as with a contact data card”	“the application program is notified, without any intervening events, as a result of physically inserting the data card into a recess of the data card reader”

Unable to prove infringement on the basis of the district court’s construction of the terms “insertion of said data card into said data card reader” or “plurality of network service providers,” or both, SmartMetric agreed to stipulations of non-infringement so that it could immediately appeal. (A5-11.) The stipulation in the case against MasterCard and Visa also expressly reserved the companies’ right to “argu[e] or assert[] error with respect to the Court’s construction of the [remaining three terms], whether as alternate grounds for affirming the judgment of non-infringement or otherwise.” (A10 ¶ 6.) The district court entered the corresponding stipulated judgments. (A1-4.)

SUMMARY OF ARGUMENT

Relying solely on intrinsic evidence, as the parties had stipulated for purposes of claim construction, the district court correctly construed two out of five disputed terms in the ’464 patent and entered stipulated judgments based on *either or both* of these terms. Because either term alone fully supports affirmance, SmartMetric must convince this Court that the district court erred in construing *both* terms. This SmartMetric cannot do, not even for one of the terms. In the event that this Court disagrees, vacates the judgments, and remands these cases, Defendants respectfully request that the Court construe the remaining three disputed claim terms and adopt Defendants’ proposed construction.

I. The intrinsic evidence compels the district court’s construction of the claim term “insertion of said data card into said data card reader” as “the data card is physically inserted into a recess of the data card reader.” This construction comports with the applicable ordinary meaning of the phrase “insert into” in the context of a physical item, which means to introduce something into the body of that item. This construction, by requiring physical insertion of the data card in order to trigger the system’s application, also contrasts meaningfully with another claim term—“in communication with”—that clearly allows communication with the data card reader with or without physical contact. By distinguishing between “insertion into” and “in communication with,” the district court correctly recognized that different claim terms must mean different things. And the ’464 patent’s prosecution history supports this very distinction between the terms “insertion into” and “in communication with.” Lastly, the district court’s construction comports with the patent’s specification and drawings, all teaching that “insertion of said data card into said data card reader” refers to physically inserting the data card into a recess of the data card reader.

SmartMetric’s arguments cannot overcome this straightforward construction. Indeed, SmartMetric abandons its district-court theory on appeal and presents a brand new argument that the term “insertion of said data card into said data card reader” means insertion of the data card not into the data card reader, but into an

electromagnetic field created by the data card reader (*e.g.*, a radio frequency identification, or “RFID,” field). But SmartMetric has waived this meritless argument by not even presenting it to the district court in the first instance. Another fatal flaw with this argument is that it relies on extra-record extrinsic evidence, in blatant contravention of the parties’ agreement not to use extrinsic evidence during claim construction and the appellate rules that prohibit the use of extra-record evidence. Defendants did and continue to object to SmartMetric’s designation of this evidence for inclusion in the parties’ joint appendix and to its use in SmartMetric’s opening brief. Even if considered, however, that extrinsic evidence is of no help to SmartMetric because none of it construes the term “insertion,” in any form. Lastly, SmartMetric’s entire argument about the “RFID field” attempts to construe a sixth claim term—“data card reader”—that is not at issue, that clearly exceeds the district court’s limit of five claim terms, and that Defendants never had the opportunity to address in the district court.

II. The intrinsic evidence also fully supports the district court’s construction of the term “plurality of network service providers” as “a plurality of entities that provide a gateway to a public general-purpose network such as the internet.” Throughout the patent’s claims and specification, the phrase “network service providers” refers to a gateway between the user and the network to which service is provided. The ’464 patent’s specification further teaches that the

provided gateway is to a public general-purpose network, such as the internet. All of this is consistent with the problem that the patentee sought to solve, which was to streamline *internet* access while traveling.

For its response, SmartMetric again relies on impermissible extra-record extrinsic evidence in the form of unrelated patents. Here, too, Defendants object to the inclusion of this evidence in the parties' joint appendix and to SmartMetric's use of this evidence in its brief. Even if considered, however, this evidence does not support SmartMetric's argument because it speaks only to an isolated noun "network," and not to the far more complex disputed term "network service provider." SmartMetric's remaining arguments fare no better because they either (a) rely on a selective reading or rearranging of the words "network," "service," and "provider," instead of construing the patentee's carefully-chosen phrase "network service provider"; (b) misstate other portions of the '464 patent's claims and specification; or (c) fail to take into account the clearly stated purpose of the entire invention as improving access to *the internet* while traveling.

III. If SmartMetric demonstrates reversible error in the district court's construction of *both* of the above terms, Defendants respectfully request that this Court construe the remaining three terms at issue before remanding these cases. Construing them now will promote judicial efficiency by eliminating a possible need for a separate appeal.

1. The claim term “access number” means “a dialable telephone number.” This construction is consistent with how a person of ordinary skill would have understood the term in 2000; with other uses of the term in the ’464 patent in combination with modifier “local” (as opposed to long-distance); and with one of the goals of the patented invention—to remedy difficulties caused by the need to dial a phone number to access the internet. The district court’s erroneous construction of the term “access number” as “a number that indicates a designated or selected network service provider” relies entirely on a misreading of one sentence in the patent’s specification that does not even speak to the term “access number.”

2. The claim term “use said information to gain access to one of the plurality of network service providers” means “information obtained from the microchip on the data card is used to establish permission or right to use one of the plurality of network service providers.” The construction gives meaning to two critical elements of the term. It underscores the permission-seeking aspect of the phrase “gain access” (reading it as “establish permission”) based on the user’s need to present login information (username and password), and it recognizes that, by definition in the ’464 patent, a microchip is the only place on the data card capable of storing user information. The district court’s construction, on the other hand, removes the permission element of “gain access” and replaces it with a much

broader “obtain entry.” The district court’s construction also fails to recognize that a data card has no place, other than the microchip, for storing user information.

3. This Court should construe the terms that include the phrases “immediately triggered upon” and “immediately triggering” in claims 1 and 14, respectively, as meaning that “the application program is notified, without any intervening events, as a result of physically inserting the data card into a recess of the data card reader.” The plain meaning of the word “immediately” in the claims, and the teachings of the patent’s specification and drawings, establish the absence of any intervening events between the “insertion” and the “triggering.”

SmartMetric’s proposed construction (recall that the district did not construe this term) impermissibly sought to replace the term “immediately” with a temporal limitation “in a short time.” That limitation is not only contrary to SmartMetric’s own dictionary definition of the adverb “immediately,” but also introduces a vague term instead of facilitating precision, which is the reason to engage in claim construction in the first place.

ARGUMENT

I. STANDARD OF REVIEW AND LEGAL FRAMEWORK GOVERNING CLAIM CONSTRUCTION

This Court reviews district courts’ claim constructions, an issue of law, *de novo*. See, e.g., *C.R. Bard, Inc. v. U.S. Surgical Corp.*, 388 F.3d 858, 861 (Fed. Cir. 2004).

Claim construction begins with “the words of the claims themselves to define the scope of the patented invention.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (en banc) (quoting *Vitronics Corp. v. Conceptonic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996) (ellipsis omitted)). The words of a claim generally carry “their ordinary and customary meaning,” which “is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention.” *Id.* at 1312-13 (internal quotation omitted). But such a person does not read claim terms in a vacuum. Rather, that person “is deemed to read the claim term . . . in the context of the entire patent, including the specification” and “the prosecution history.” *Id.* at 1313 (internal quotation omitted). Together, these three categories—the claims themselves, the patent’s specification, and its prosecution history—comprise the patent’s intrinsic record, “the primary source for determining claim meaning.” *Bard*, 388 F.3d at 861.

Claim terms vary in complexity. “In some cases, the ordinary meaning of claim language as understood by a person of skill in the art may be readily apparent even to lay judges, and claim construction in such cases involves little more than the application of the widely accepted meaning of commonly understood words.” *Phillips*, 415 F.3d at 1314. Others will require a full examination of all intrinsic evidence in the record. In all instances, however, “the interpretation to be given a term can only be determined and confirmed with a full

understanding of what the inventors actually invented and intended to envelop with the claim.” *Renishaw PLC v. Marposs Societa’ per Azioni*, 158 F.3d 1243, 1250 (Fed. Cir. 1998). “The construction that stays true to the claim language and most naturally aligns with the patent’s description of the invention will be, in the end, the correct construction.” *Id.*

II. THE DISTRICT COURT CORRECTLY CONSTRUED THE TERM “INSERTION OF SAID DATA CARD INTO SAID DATA CARD READER” AS REQUIRING PHYSICAL INSERTION

Claims 1 and 14 recite the claim language “insertion of said data card into said data card reader.” (A39 col. 10:46-47; A40 col. 11:50.) The intrinsic evidence requires that this term be construed as “the data card is physically inserted into a recess of the data card reader.” SmartMetric’s contrary interpretation fails because it (1) relies on a new theory not previously raised before the district court; (2) relies on impermissible extrinsic evidence; and (3) is contrary to the intrinsic evidence and relies on arguments properly rejected by the district court.

A. The District Court’s Construction Is Compelled By The Intrinsic Evidence

Courts must construe claims to give meaning to every word in a claim limitation, eliminating surplusage by ensuring that different words carry different meanings. *See Cat Tech LLC v. Tubemaster, Inc.*, 528 F.3d 871, 885 (Fed. Cir. 2008); *Applied Med. Res. Corp. v. U.S. Surgical Corp.*, 448 F.3d 1324, 1333 n.3

(Fed. Cir. 2006). Courts also must be careful not to read an express claim limitation out of a claim. *Texas Instruments Inc. v. U.S. Int’l Trade Comm’n*, 988 F.2d 1165, 1171 (Fed. Cir. 1993).

With these principles of claim construction in mind, four reasons confirm the correctness of the district court’s construction of “insertion of said data card into said data card reader.” *First*, the complete phrase is “insertion . . . into said data card reader.” In this context, involving a physical item such as a data card reader, “insertion into” has a well-known ordinary and customary meaning of putting or introducing something into the body of something else. To dispense with the requirement of physical insertion would impermissibly read the “insertion into” limitation out of claims 1 and 14. *See id.*

Second, the claim limitation “insertion into,” describing the triggering mechanism for the system’s application program, appears alongside another limitation—“in communication with”—that describes exchange of information between the data card and the reader. (A39 col. 10:29-36; A40 col. 11:36-41.) Different limitations must mean different things. *See Applied Med.*, 448 F.3d at 1333 n.3. Here, as dependent claims 5-7 and 18-20 show, the data card may be “in communication with” the data card reader with or without physical contact. (A39-40 col. 10:60 to 11:12, col. 12:13-31.) In contrast, the patentee chose not to expand the *triggering* limitation, and limited it to “insertion of said data card into

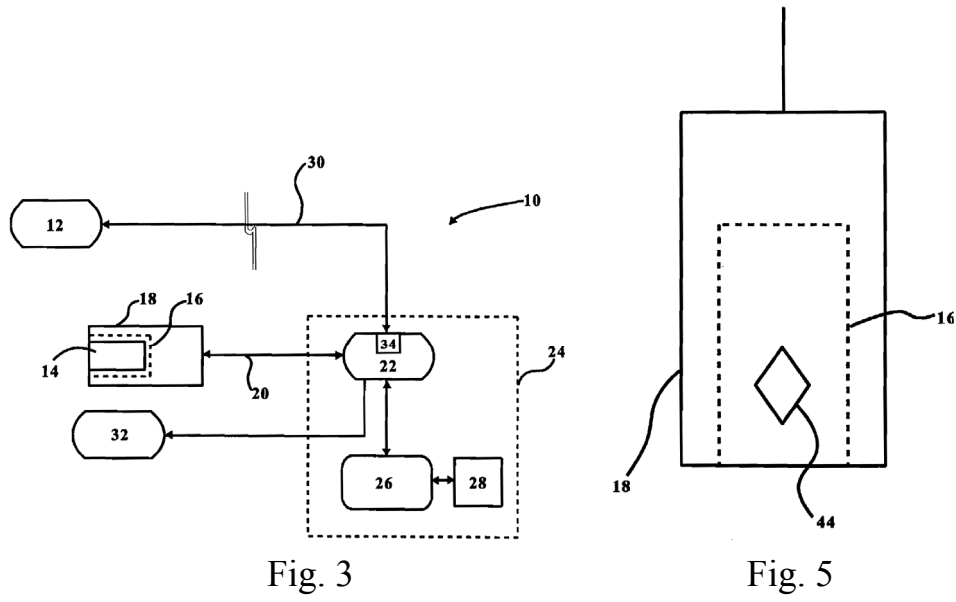
said data card reader.” In selecting two different terms, the patentee is presumed to have selected the phrase “insertion into” to mean something other than the all-encompassing contact/contactless meaning of “in communication with.” Consistent with its ordinary meaning, “insertion into” must mean physical insertion to trigger the system’s application.

Third, the distinction between “in communication with” and “insertion into” comports with the ’464 patent’s prosecution history. The patentee originally included claim 28, describing the use of a data card to access one of a plurality of network service providers. (A267.) Under that claim, application triggering occurred when “said data card is in communication with a data card reader.” (*Id.*) In other words, the “insertion into” limitation did not appear in original claim 28. But the patent examiner rejected original claim 28 as anticipated by prior art, while allowing what would become claims 1 and 14, both of which required “insertion into” the data card reader to trigger the application. (A227-28.) The patentee cancelled original claim 28 and pursued only the claims requiring “insertion into” to trigger the application. (A232-40.) The patentee and the USPTO thus understood that “insertion into” is different from “in communication with,” that the difference between the two lies in the physical connection requirement, and that the difference is significant enough to warrant allowance of triggering by the former but rejection of triggering by the latter. The patentee must be held to that

understanding. *See Schriber-Schroth Co. v. Cleveland Trust Co.*, 311 U.S. 211, 220-21 (1940) (explaining that claim construction cannot resurrect claims cancelled or rejected during the patent’s prosecution history); *Southwall Techs., Inc. v. Cardinal IG Co.*, 54 F.3d 1570, 1576 (Fed. Cir. 1995) (“The prosecution history limits the interpretation of claim terms so as to exclude any interpretation that was disclaimed during prosecution.”).

Finally, the ’464 patent’s specification confirms the district court’s construction. The specification repeatedly teaches that “insertion into” means that the data card is physically inserted into a recess of the data card reader. (A36 col. 3:36-41 (“the data card is inserted into a recess”); A37 col. 6:64-67 (describing figure 3, below, as “data card . . . located within recess . . . that is within a data card reader”); A38 col. 7:43-48 (describing figure 5, below, as “the smart card reader . . . with the recess” and “the smart card . . . inserted into recess”); col. 7:52-59 (explaining that the data card reader detects a data card placed into its “recess 16,” and is thus “within the smart card reader,” when the data card’s contact connector “makes physical contact with electrical connector 44”).) Figures 3 and 5 of the ’464 patent, reproduced below, unmistakably show that a data card 14 is physically inserted into the data card’s recess 16 (indicated by the dashed lines in both figures). Figure 3 shows “an embodiment of the computer system in

accordance with the present invention,” and figure 5 shows the data card reader 18 of figure 3 in more detail. (A37 col. 5:51-57.)



The '464 patent's specification also shows that the patentee knew how to describe a process that did not require a physical insertion. The specification teaches a contactless data card that operates when it “is *passed near* the smart card reader.” (A39 col.9:28-33.) But the phrase “passed near” appears nowhere in the claims. Nor can SmartMetric graft onto a claim something that appears only in the specification. *See Johnson & Johnston Assocs. Inc. v. R.E. Serv. Co.*, 285 F.3d 1046, 1054 (Fed. Cir. 2002) (en banc) (explaining that, even when a subject matter is disclosed, it belongs to the public unless actually *claimed*). The specification thus confirms the district court's construction.

In sum, the intrinsic evidence requires that the term “insertion of said data card into said data card reader” in claims 1 and 14 be construed as “the data card is

physically inserted into a recess of the data card reader,” just as the district court construed these claim terms.

B. SmartMetric Waived Its Argument For An Alternative Construction By Failing To Present, Let Alone Argue In Favor Of, That Construction At The District Court

An appeal is not an opportunity to present a new theory. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (“It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.”). “No matter how independent an appellate court’s review of an issue may be, it is still no more than that—a review.” *Sage Prods., Inc. v. Devon Indus., Inc.*, 126 F.3d 1420, 1426 (Fed. Cir. 1997). Parties are thus limited to claim-construction theories they presented to the district court. Without even acknowledging this well-established principle of appellate review, SmartMetric changes course on appeal in a way that supports dismissal of its entire argument as waived.

Before the district court, SmartMetric argued that the term “insertion of said data card into said data card reader” does not require physical insertion and instead means “to place into action with a data card reader, as with a contactless data card” or “to place a data card into a recess of a data card reader, as with a contact data card.” (A48; *see also* A328 (SmartMetric’s allegations against American Express); A519 (same for MasterCard and Visa).) The district court rejected SmartMetric’s proposed construction. (A48.)

On appeal, SmartMetric abandons its failed construction and offers a brand-new argument that “insertion into” means, among other things, “insertion of a contactless data card into the electromagnetic field formed by a data card reader,” such as “an RFID field.” (SMBr. 2, 8.) This is the first mention since SmartMetric has commenced these cases of electromagnetic fields in general, or an RFID field in particular. Only in a different patent-infringement lawsuit against MasterCard and Visa, filed while these appeals had already been pending, does SmartMetric contend that the accused systems “may also access a network by insertion of such a card into an RFID field formed by a contactless card reader.” *SmartMetric Inc. v. MasterCard Int’l Inc.*, No. CV 11-7126, Complaint at 1, 5 (C.D. Cal. Aug. 29, 2011). Allegations in that lawsuit, however, are irrelevant for purposes of these appeals.

SmartMetric may not “show error in a trial court’s overlooking an argument” without “first present[ing] that argument to the trial court.” *Sage Products*, 126 F.3d at 1426. The RFID argument is thus waived. Moreover, SmartMetric has not defended its proposed construction that failed at the district court. Especially without such an argument, the district court’s construction should be affirmed.

C. Defendants Object To The Portions Of SmartMetric's Argument That Rely On Extra-Record Extrinsic Evidence In Violation Of Appellate Rules And Parties' Agreement

To argue that “insertion of said data card into said data card reader” means an insertion into the reader’s RFID field (which is not a physical insertion into the reader’s recess depicted in the ’464 patent’s specification and diagrams), SmartMetric relies on impermissible extrinsic evidence in the form of several patents that are not in the record on appeal. (SMBr. 13-14.) Pursuant to Federal Circuit Rule 27(e), Defendants object to SmartMetric’s designation of this extra-record evidence for inclusion in the parties’ joint appendix and to SmartMetric’s reliance on this extra-record evidence in its brief.

For one thing, appellate rules prohibit SmartMetric from relying on extra-record evidence. SmartMetric first purported to designate these patents for inclusion in the parties’ joint appendix on August 5, 2011, when it served the proposed appendix designations on Defendants. (*See* Defendants-Appellees’ Lodging, Dec. 5, 2011, Ex. A, Aug. 5, 2011 email from E. Talley to J. Melnik and G. Clark.) Citing the applicable appellate rules, which strictly limit “the record on appeal” and the parties’ appendix to “(1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk,” counsel for Visa objected on behalf of all Defendants to the inclusion of several extra-record patents. (*Id.* Ex. B,

Aug 19, 2011 letter from G. Castanias to P. Bright (quoting and citing Federal Rules of Appellate Procedure 10(a) and 30(a)(1), and this Court’s Rule 30(a)(2)).) Under these Rules, SmartMetric may not designate, nor rely in its brief on, patents that were not filed as exhibits in the district court. Instead of removing the improper materials as Defendants had requested, SmartMetric relied on them in its opening brief. For this reason alone, the Court should disregard portions of SmartMetric’s brief that rely on the extra-record patents.

For another thing, the parties’ agreement independently prohibits SmartMetric’s attempt to add extra-record extrinsic evidence to these appeals. The Rule 26(f) Joint Report that the parties submitted to the district court reads, “the parties stipulate to limiting claim construction to arguments based on intrinsic evidence only.” (A888.) The parties confirmed this agreement orally during the December 21, 2010 scheduling conference with the court. (A301.) And SmartMetric acknowledged this agreement in its claim-construction briefing, at the claim-construction hearing, and even in its opening brief in these appeals. (A67, 734:5-7; SMBr. 4.) SmartMetric should be held to that agreement and representations. Otherwise, the Court would be inviting mischief, where a litigant can enter into one, presumably beneficial, agreement at the district court stage, only to abandon the agreement when convenient to do so on appeal.

SmartMetric tries to get around appellate rules and the parties' agreement by arguing that this Court should take judicial notice of the extrinsic evidence. But the judicial notice device is not a way around the parties' agreement, not an excuse for failing to introduce evidence at the district court, and does not allow SmartMetric free rein to introduce new evidence on appeal. *See Singleton*, 428 U.S. at 120. Even under the test that courts use to determine whether to take judicial notice, this evidence cannot be introduced because Defendants do not have an adequate opportunity to develop their own extrinsic record (nor should they have to, given the parties' agreement not to rely on extrinsic evidence). *See Group One Ltd. v. Hallmark Cards, Inc.*, 407 F.3d 1297, 1306 (Fed. Cir. 2005) (recognizing that the taking of judicial notice must not lead to unfairness or prejudice to the other side); *contra* SMBr. 15 (trivializing this issue by asserting that "[t]aking judicial notice of these patents will not prejudice Appellees, who can address them in their forthcoming brief," as though the universe of potentially useful extrinsic evidence were limited to one side responding to the other side's extrinsic evidence, without an opportunity to conduct its own discovery).

The judicial notice device is improper here for the additional reason that SmartMetric deploys it to establish a contested fact in these proceedings, which it of course may not do. SmartMetric wants the Court to take judicial notice not only of the patents' *existence* but also of their "show[ing] that those skilled in the art of

the '464 patent use the words 'insertion into' . . . to refer to insertion of a contactless data card into the RFID or electromagnetic field of a contactless data card reader.” (SMBr. 14.) This Court cannot resolve a contested issue by taking judicial notice of one side of that issue. *See In re Khan*, 441 F.3d 977, 990-91 (Fed. Cir. 2006) (declining to take judicial notice “because a finding either way can ‘reasonably be questioned’”).

Defendants thus respectfully request that this Court disregard SmartMetric’s impermissible extra-record extrinsic evidence.

D. Even If Considered On The Merits, SmartMetric’s Construction Fails Because It Seeks To Broaden The '464 Patent Beyond The Claimed Scope

Even if this Court considers SmartMetric’s new RFID theory on the merits (and it should not), the theory fails for several additional reasons. *First*, the new theory actually construes the claim term “data card reader” (A39 col. 10:46-47; *see also* SMBr. 12), which is not among the five claim terms that the parties had designated for claim construction. To even begin applying this theory, SmartMetric needs to define a new claim term—“data card reader”—as encompassing a reader’s RFID field. But that is outside the scope of the parties’ claim construction. The district court had limited the parties to five terms, and Defendants worked diligently to engage SmartMetric in selecting the five terms that the district court should construe. (A194, 196, 198-99, 201, 203-04.)

SmartMetric flatly refused to cooperate, effectively ceding term selection to Defendants. In fact, even though SmartMetric said very little, it did say, “[l]et us adhere to the [district court’s] limit of five terms for claim construction.” (A196.) Now is much too late for SmartMetric to inject a sixth term simply because it did not like the overall result in the district court.

Second, SmartMetric’s proposed extrinsic evidence, in addition to being “less significant than the intrinsic record in determining ‘the legally operative meaning of claim language,’” *Phillips*, 415 F.3d at 1317, does not actually support SmartMetric’s new theory. The impermissibly cited Bowers patent (SMBr. 14) does not use any form of the word “insert.” Instead, it merely describes a security tag (for example, on a t-shirt one buys at a store) that “*moves into or passes through* the detection zone.” (*Id.*) The phrases “moves into” or “passes through” are different from “insertion into,” and thus do not prove that “insertion of said data card into said data card reader” includes “passing through” an RFID field created by the reader. Indeed, those phrases show that “insert into” cannot bear the meaning that SmartMetric tries to ascribe to it. Moreover, the Bowers patent specifies “detection zone,” which is different from the specification in the ’464 patent that teaches only a recess into which a data card is to be inserted. The ’464 patent might have contained similar claim terms and specifications, but it does not.

The similarly impermissible Gallagher patent (SMBr. 14) likewise does not mention the word “insert” in any form, instead describing a tag “placed into the field.” “Placed into” is not “inserted into,” and “the field” is not “said data card reader.” Here again, the patentee could have written the ’464 patent to specify an electromagnetic field created by the data card reader and could have used the term “*placement* of said data card into the *electromagnetic field* of said data card reader.” Of course, that is not what the ’464 patent says. And, in any event, the ’464 patent’s prosecution history shows that such a claim would not have been allowed. *See* pages 26-27, *supra*. Accordingly, the Gallagher patent also does not support SmartMetric’s brand-new theory.

Even worse, SmartMetric’s argument based on the two impermissibly cited, extrinsic patents does not square with SmartMetric’s position in this litigation. SmartMetric now argues that “[t]hese patents show that those skilled in the art of the ’464 patent use the words ‘insertion into’, which appear in claims 1 and 14 of the ’464 patent, to refer to insertion of a contactless data card into the RFID or electromagnetic field of a contactless data card reader.” (SMBr. 14 (emphasis removed).) If that were so, then SmartMetric at the very least had to explain (but failed) why it had waited even to mention the RFID theory until approximately a year and a half after commencing this litigation on March 15, 2010—and until over a decade after filing for the ’464 patent. If the RFID theory is something that as

early as the year 2000 a person of ordinary skill in the art would have understood by reading the phrase “insertion into,” SmartMetric failed to explain why, as the sole inventor’s own entity, it remained silent about this theory throughout the district court stage of this litigation, belatedly springing it only on this Court in support of *reversal*.

Finally, SmartMetric’s remaining extrinsic evidence—dictionary definitions, which are likewise improper in light of the parties’ agreement not to rely on extrinsic evidence—also does not support its construction. (SMBr. 35.) To be reliable and persuasive, dictionary definitions at least should come from technical dictionaries that are contemporary with the patent’s filing date. *See Phillips*, 415 F.3d at 1321-22. SmartMetric’s dictionary (Merriam-Webster Online Dictionary) is none of that. Worse, SmartMetric cherry-picks an irrelevant definition of “insert” as meaning “to place into action,” which is used primarily in sports (as in “inserted into the lineup”), without explaining why sports analogies are relevant to dial-up internet access. Finally, as this Court has cautioned, “[c]are must be taken lest word-by-word definition, removed from the context of the invention, leads to an overall result that departs significantly from the patented invention.” *On Demand Mach. Corp. v. Ingram Indus., Inc.*, 442 F.3d 1331, 1344 (Fed. Cir. 2006). That is exactly the trap into which SmartMetric’s improper dictionary expedition leads. The relevant term is not the isolated verb “to insert,” but the more complex

phrase “insertion of said data card into said data card reader.” And to that end, SmartMetric’s dictionary offers no help.

E. SmartMetric Again Asserts, Incorrectly, That *Each* Claim Term Must Read On *Every* Preferred Embodiment

SmartMetric misconstrues this Court’s case law when it argues that every claim term must read on every embodiment in the specification, and that the district court’s construction incorrectly reads out a contactless embodiment. (SMBr. 16.) In support, SmartMetric relies on three cases, but each case dealt with “*the* preferred embodiment,” not “*a* preferred embodiment.” See *Interactive Gift Exp., Inc. v. Compuserve Inc.*, 256 F.3d 1323, 1343 (Fed. Cir. 2001) (explaining reading out “the preferred embodiment” is rarely correct); *Crystal Semiconductor Corp. v. TriTech Microelectronics Int’l, Inc.*, 246 F.3d 1336, 1349 (Fed. Cir. 2001) (same); *Hoechst Celanese Corp. v. BP Chemicals Ltd.*, 78 F.3d 1575, 1581 (Fed. Cir. 1996) (same). When claim construction reads out “the preferred embodiment,” this Court understandably queries whether a person of ordinary skill in the art would so read a claim. But that concern is absent when many preferred embodiments are disclosed. Thus, as this Court has explained, “[i]t is not necessary that each claim read on every embodiment.” *Baran v. Med. Device Techs., Inc.*, 616 F.3d 1309, 1316 (Fed. Cir. 2010).

The ’464 patent does not have “*the* preferred embodiment”; it has five of them. See page 10, *supra*. SmartMetric therefore gains no traction by insisting

that the term “insertion of said data card into said data card reader” read on an embodiment specifying contactless cards.

But even if SmartMetric were correct on the law (and it is not), it still fails to show that anything is being read out of the patent. SmartMetric continues to protest that the district court’s interpretation reads contactless data cards out of the patent, when the patent does not disclaim such data cards. (SMBr. 12, 26.) Not so. For one thing, it is not at all clear that a contactless card could not be physically inserted in the same manner as a contact card to trigger the application. After all, if the RFID field exists “near” the data card reader, the same RFID field almost certainly exists in the recess of the data card reader. For another, construing the term “insertion into” as requiring physical insertion places no limitation on how the data card *communicates* with the data card reader when or after the data card is inserted into the reader to *trigger* the application. For example, nothing prohibits triggering by insertion followed by communication after the data card is withdrawn from the data card reader. All that the district court’s construction excludes is contactless *triggering*. Contactless *communication* remains a possibility.

SmartMetric’s chief argument therefore fails both as a matter of law and on the facts of this case.

F. SmartMetric’s Remaining Arguments Repeat Contentions That The District Court Correctly Found Unconvincing

Finally, SmartMetric’s remaining arguments unsuccessful at the district court perform no better on appeal. For one thing, SmartMetric again argues that claim differentiation between independent claim 1 and dependent claims 5-7 (and also their parallel claims 14 and 18-20) requires that the term “insertion into” not be restricted to physical insertion. (SMBr. 30-32.) But the dependent claims SmartMetric cites concern data transfer between the data card and the reader (*i.e.*, communication), not the triggering of the application in the first place. (*See also id.* at 16 (SmartMetric misleadingly focusing on the issue of the data card being “read” upon insertion, which refers to data transfer/communication, while the issue in these appeals is triggering).) The district court properly rejected the same misguided attempt at claim differentiation. (A49-50.) SmartMetric also tries to fuse the issues of communication and triggering by asserting, without support, that “antennas are only found in contactless cards, and are not found in contact cards.” (SMBr. 33.) Nothing in the ’464 patent, however, suggests—and SmartMetric nowhere disputes—that a data card cannot have dual contact and contactless features, where communication could occur in the contactless configuration *after* a physical insertion of the data card into a recess of the data card reader has triggered the application launch.

The district court also soundly rejected SmartMetric’s attempt to rely on the use of the term “insertion of” in the ’464 patent’s prior art (the DiGiorgio patent ’729). (SMBr. 20-21.) As the district court recognized, while the phrase “insertion of” in a vacuum could perhaps be construed as dispensing with the requirement of physical insertion, “insertion of said data card *into* said data card reader” necessarily means placing one object inside another. (A51-52.) SmartMetric tries to erase this difference by focusing on the isolated noun “insertion” (SMBr. 13), but the disputed claim term is not limited to that noun. *See On Demand*, 442 F.3d at 1344 (“Care must be taken lest word-by-word definition, removed from the context of the invention, leads to an overall result that departs significantly from the patented invention.”). As important, the ’729 patent’s use of “insertion” does not describe a contactless interaction; instead, it teaches that insertion can be accomplished by placing a “secure token device *in or against* a reader.” (A139 col. 2:9-13.) “In or against” plainly means “contact.” SmartMetric also neglects to mention that the patent examiner cited the ’729 patent only to reject original claim 28, which, as discussed above, *see* page 26, *supra*, would have claimed that communication between the data card and the reader alone is enough to trigger the application launch. Whatever meaning the ’729 patent’s term “insertion” has in the context of that patent, it is of no use in construing the ’464 patent.

In sum, the district court correctly construed the claim term “insertion of said data card into said data card reader” as “the data card is physically inserted into a recess of the data card reader.” This Court should affirm this construction, and the judgments in the consolidated appeals can be affirmed on this ground alone.

III. THE DISTRICT COURT CORRECTLY CONSTRUED THE TERM “PLURALITY OF NETWORK SERVICE PROVIDERS” AS “A PLURALITY OF ENTITIES THAT PROVIDE A GATEWAY TO A PUBLIC GENERAL-PURPOSE NETWORK SUCH AS THE INTERNET”

The district court’s construction of the claim term “plurality of network service providers” as “a plurality of entities that provide a gateway to a public general-purpose network such as the internet” is required by the claim language and the specification. SmartMetric’s counterarguments fail because they rely on impermissible extrinsic evidence and misread several provisions of the patent’s claims and specification.

A. The Intrinsic Evidence Compels The District Court’s Construction

The ’464 patent’s claims and specifications unambiguously indicate that the patentee sought to solve the problem of *internet* access during the dial-up era, when ISPs played the gateway role between the user and the internet. *See Phillips*, 415 F.3d at 1313; *Renishaw*, 158 F.3d at 1248; A53 (reading that claim at issue “in context”). Throughout claims 1 and 14, the term “network service providers” is

something to which a user “gain[s] access.” (A39 col. 10:18-38; A40 col. 11:32-42.) The ordinary meaning of the words “gain access” claims a gateway between the user and the network to which service is provided. The claim language, therefore, requires that the term “network service provider” indicate a gateway.

The ’464 patent’s specification teaches that the gateway that the “network service provider” offers is to a public general-purpose network such as the internet. The patentee provided a solution to the problem facing internet users in the dial-up era of internet access when they traveled. (A35 col. 2: 18-46.) The specification thus describes the network service provider’s purpose as allowing a user “to gain access to *the internet*.” (*Id.* col. 2:8-11). The specification further clarifies that “[t]ypically, the network service provider is an [ISP] or [IAP] which provides *internet* service to the user.” (A36 col. 4:29-33.) Repeated usage of “ISP” and “IAP” throughout the specification indicates the network providers’ intended function as a gateway to the internet. (*E.g.*, A35 col. 2:39-46 (“The present invention is directed to . . . the local ISP . . .”).) The only alternative meaning—“a proxy server of an intranet” (A36 col. 4:31-33)—is consistent with this construction because a proxy server of an intranet allows users on a private network to access another network, *i.e.*, the internet. Proxy servers thus act as a kind of gateway (in essence a gateway for a network of users as opposed to for an

individual user), which is consistent with the '464 patent's use of the term "network service provider."

The district court thus correctly construed the term "plurality of network service providers" as "a plurality of entities that provide a gateway to a public general-purpose network such as the internet."

B. SmartMetric's Arguments Rely On Impermissible Extrinsic Evidence And Misread The '464 Patent's Claims And Specification

SmartMetric's arguments do not overcome the district court's straightforward interpretation. *First*, for this claim term, too, SmartMetric's reliance on extrinsic evidence—three unrelated patents (SMBr. 17)—does not support reversal. As a preliminary matter, SmartMetric's reliance on extrinsic evidence is impermissible because parties agreed not to use it and because that evidence was not before the district court (and thus not a part of the record on appeal). Defendants object to SmartMetric's reliance on this evidence in its brief, which portions this Court should disregard. *See* Part II.C *supra*.

But even if the Court were to consider SmartMetric's extrinsic evidence, that evidence does not support SmartMetric's proposed construction. The three unrelated patents that SmartMetric cites do not define the term "plurality of network service providers"; nor are they aimed at the issue of connecting to the internet in the dial-up era. (SMBr. 17.) Instead, they merely define or describe the

generic term “network.” While “network,” by itself, could refer to a private network (an intranet), the standalone noun plays no role in these appeals. *See On Demand*, 442 F.3d at 1344 (cautioning against such context-free, word-by-word construction). These three patents are thus nothing more than SmartMetric’s misdirection from a disputed claim term “plurality of network service providers.”

Second, SmartMetric marshals a bullet-point list of references to the term “network service provider” in the specification and argues that none disclaims private networks. (SMBr. 36-37.) This has the law backwards. The threshold question is not what the patent expressly disclaims, but what it actually claims in the first place. *See Johnson & Johnston*, 285 F.3d at 1054 (explaining that, even when a subject matter is disclosed, it belongs to the public unless actually *claimed*). And SmartMetric fails to demonstrate that the claim terms include private networks. The issue of express disclaimer is thus irrelevant.

SmartMetric’s bullet-point list also misses the broader point of the parties’ dispute. None of the items in the list specifies whether the district court’s or SmartMetric’s construction governs. Each item merely mentions some variant of the disputed term. What makes the district court’s construction correct are the parts of the specification that SmartMetric ignores, such as the patentee’s broad “present invention” provision, which disclaim private networks. *E.g.*, A35 col. 2:39-46 (describing the ’464 patent’s solution as pertaining only to the internet);

see also Honeywell Int'l, Inc. v. ITT Indus., Inc., 452 F.3d 1312, 1318 (Fed. Cir. 2006) (highlighting the importance of the phrase “the present invention” in explaining the invention to the public).

Third, SmartMetric accuses the district court (and Defendants) of reading intranet out of the '464 patent. (SMBr. 19.) That is incorrect. Interpreting the term “network service provider” as a gateway into the public network such as the internet does not remove an intranet as a possible link in this process. For example, as is explicit in the patent’s specification, a “*proxy server* of an intranet” is one such network service provider that offers users on the corresponding local network a similar function of providing a gateway to the internet. (A36 col. 4:32-34.) SmartMetric relies on this specification to argue that the network service provider may be a private network, but that argument confuses the end with the means. That a proxy server of an intranet is specified as one example of a gateway does not convert it into the desired end. And a single mention of the word “intranet” in the specification cannot possibly support SmartMetric’s misleading statement that the '464 patent “disclos[es] repeatedly and consistently that the network service provider may be a private network.” (SMBr. 38.) No such thing is disclosed in the patent, repeatedly or otherwise.

Fourth, SmartMetric’s argument regarding claim differentiation misstates what the '464 patent says. (SMBr. 38-39.) SmartMetric points to dependent

claims 8 and 21 and purports to quote them as reading, “the network service provider includes user identification information, area information, and telephone number information.” (*Id.*) SmartMetric then argues that, if this language in claims 8 and 21 can be limited to a general purpose network, claims 1 and 14 cannot, and so claim differentiation rules preclude the district court’s construction. (*Id.*) The problem for SmartMetric is it misquotes the language in claims 8 and 21. Claim 8 (which claim 21 parallels) reads, “The computer system as set forth in claim 1, wherein said information specific to the user and/or network service provider includes user identification information, area information, and telephone number information.” (A40 col. 11:13-16.) Without SmartMetric’s rewriting that substitutes the noun “network service provider” in place of the noun “said information specific to the user and/or network service provider,” it becomes clear that claims 8 and 21 describe merely information that is exchanged between the data card and the reader. That, by definition, sheds no light on the term “network service provider” under rules of claim differentiation.²

Lastly, SmartMetric misconstrues an example of a public website mentioned in the ’464 patent’s specification as supposedly proving that the term “network service provider” can mean access to a private network. The specification states: “For example, the issuer of the smart card may be a bank and the ISP . . . could be

² If anything, language in claims 8 and 21 requires that the term “access number” be construed as “a dialable telephone number.” *See* Part IV.A, *infra*.

owned and managed by the bank. The user would be automatically connected to the bank's home page whenever smart card 14 is inserted into smart card reader 18." (A39 col. 9:49-54.) SmartMetric labels this "an example of such a private network." Nothing could be further from reality. A bank webpage is a *public* resource on a *public* network. It is not a private network just because a private entity, the bank, created it. If a user types "www.cafc.uscourts.gov" into the internet browser, the user reaches this Court's public webpage, not any private, intranet page accessible only by the judges and staff. To appreciate why SmartMetric's use of the bank webpage example is mistaken, one needs only read the specification's sentence that immediately precedes the example: "The smart card may contain data specifying the network preferences of the user, such as the user's personal web page 'book marks' and the specific Uniform Resource Locator (URL) of a particular web site or personalized web page which is accessed whenever the user initially connects to the ISP. . . ." (*Id.* col. 9:43-49.) All of this is about public internet resources, not any kind of private network.

In sum, SmartMetric fails to demonstrate that the district court erred in construing the claim term "plurality of network service providers" as "a plurality of entities that provide a gateway to a public general-purpose network such as the internet." The Court should thus affirm the district court's claim construction, and

affirm the judgments at issue in these appeals for this additional, independent reason.

IV. IF SMARTMETRIC WERE TO PREVAIL ON BOTH CLAIM TERMS SUPPORTING THE JUDGMENTS ON APPEAL, AND THE CASES REMANDED, THE COURT SHOULD REVERSE THE DISTRICT COURT'S OTHER CLAIM-CONSTRUCTION RULINGS

In vacating and remanding, this Court has “jurisdiction to address issues that may arise on remand, as part of [its] statutory authority to ‘require such further proceedings to be had as may be just under the circumstances.’” *MercExchange, L.L.C. v. eBay, Inc.*, 401 F.3d 1323, 1337 (Fed. Cir. 2005) (quoting 28 U.S.C. § 2106), *rev'd in part on other grounds*, 547 U.S. 388 (2006). Although Defendants acknowledge that this Court does not have to address arguments that are not part of the appealed judgment, in appropriate circumstances this Court *may* address claim terms other than the ones on which the district court based its judgment. *See id.*

These appeals present appropriate circumstances for this Court to reach the remaining three disputed claim terms, if the Court vacates the district court’s judgments and remands for further proceedings. *First*, each of the terms independently may be case-dispositive; in the interest of judicial efficiency, resolving them now will eliminate subsequent appeals on issues raised by their construction. *Second*, at least in the MasterCard/Visa case, the parties conditioned their stipulations on MasterCard and Visa’s ability to appeal the three terms that

were not incorporated into the judgment. (A10 ¶ 6.) *Finally*, the additional terms (along with the two terms at issue in these appeals) are likely to be at issue in SmartMetric’s new lawsuit against MasterCard and Visa that is currently stayed pending resolution of appeal number 2011-1497. Their definitive resolution now will eliminate subsequent appeals based on claim construction of the same terms in the new case.

A. The Claim Term “Access Number” Means “A Dialable Telephone Number”

1. Intrinsic Evidence Requires Defendants’ Proposed Construction

Intrinsic evidence requires that the term “access number” in claims 1 and 14 be construed as “a dialable telephone number.” Claim language used in the ’464 patent permits no other construction, because a person of ordinary skill in the art in 2000 would understand “access number” to refer to a dialable telephone number. Not surprisingly, claims 1 and 14 describe a “local access number” as one of the access numbers through which a user can access the network service provider. (A39 col. 10:39, A40 col. 11:45.) The use of the modifier “local” can only have been meant to distinguish between local and long-distance telephone calls.

Other claims, too, are instructive. *See Phillips*, 415 F.3d at 1314 (“Other claims of the patent in question . . . can also be valuable sources of enlightenment as to the meaning of a claim term.”). In the ’464 patent, claims 2, 8, 15, and 21

relate to the term “access number” and describe it only as “telephone number,” “area code,” and “local access number.” (A39 col. 10:49-50; A40 col. 11:14-16, col. 12:3-34.) All of the relevant claims in the ’464 patent thus require that the claim term “access number” be construed as “a dialable telephone number.”

The ’464 patent’s specification further supports such a construction. The specification clarifies that the patentee perceived and solved a problem of a user on business travel having to dial a pre-selected access number, which could mean a long-distance phone call from the user’s travel destination. (A35 col. 2:18-46.) The stated problem, specified in terms of the user potentially having to “pay for a long distance call” (*id.*), can only mean that the term “access number” refers to a dialable telephone number. And thus, throughout the specification, the “access number” is described as a “telephone number” to be “dialed” through a telephone line. (A35 col. 2:8-11 (“a telephone line”); A36 col. 3:43-58 (“dial a default number” and “the number dialed”); A38 col. 7:20-31 (“dial a default access number,” “dial a number,” “the number to be dialed,” and “telephone line”); A38 col. 7:64-67 (“dial the telephone number”); A38 col. 8:9-28 (“telephone number”); A38 col. 8:61-64 (“dial-up connection number”).)

2. The District Court’s Erroneous Construction Elevates A Single Example Disclosed In The Specification But Not Claimed

The district court erred in adopting SmartMetric’s construction of the claim term “access number” as “a number that indicates a designated or selected network service provider.” (A54.) The court’s sole reason was a single instance in the patent’s specification (not reflected in the claims) where the patent teaches that “[t]he network which the user uses to access the ISP does not have to be a telephone line but can be any sort of communications network such as a telecommunications cable or telephony.” (A36 col. 4:34-37.) The district court offered no other support for its construction. (A56.)

But the sentence on which the district court relied does not actually answer the relevant question. That a physical cable connecting a user to the ISP might be “a telecommunications cable or telephony” does not answer how the user instructs his computer to connect to the ISP via that cable. In other words, a person of ordinary skill in the art would understand that one can still use a dialable telephone number even when the cables connecting the user to the ISP are not “telephone line” cables. Contrary to the district court’s construction, a dialable telephone number does not prescribe the type of physical cable (telephone line, telecommunications cable, or telephony) the network must use to connect the user to the ISP.

Moreover, a loose sentence in the '464 patent's specification cannot override a claim term that is plain to a person of ordinary skill in the art. *Phillips*, 415 F.3d at 1314. As the district court pointed out, only when “the ordinary and accustomed meaning of the words used in the claims lack sufficient clarity to permit the scope of the claim to be ascertained from the words alone” may the specification supply the meaning. (A56 (quoting *Teleflex, Inc. v. Ficosa N. Am. Corp.*, 299 F.3d 1313, 1325 (Fed. Cir. 2002)).) Here, in contrast, words alone supply the intended meaning of the term “access number.” Even if the patentee purported to *disclose* something broader in the specification, he failed to *claim* an equally broad definition, and disclosure alone is not enough. *See Johnson & Johnston*, 285 F.3d at 1054; *see also Baran*, 616 F.3d at 1316 (“It is not necessary that each claim read on every embodiment.”).

Another flaw with the district court's (and SmartMetric's) construction is that it reads the word “access” out of the claim term “access number.” Substituting the district court's construction, the claim language would read, “a default [number that indicates a designated or selected network service provider] indicating a designated network service provider.” The result is, of course, surplusage, which is to be avoided if possible during claim construction. “Indicating” merely points to something. “Access,” however, is much broader, because it contains an element of permission. For example, one can *indicate* a car in a public parking garage by

pointing at the car with a finger. But it is only with the right key that a person can “access” that car. The word “access” must not be dropped from the claim term “access number.”

Finally, the district court’s construction does not hold up because it is inconsistent with the purpose of the ’464 patent, which is to improve “access” to the internet when a user travels outside the area covered by the pre-selected local telephone number for accessing the user’s ISP. A35 col. 2: 39-46; *see also Bard*, 388 F.3d at 864 (“Statements that describe the invention as a whole, rather than statements that describe only preferred embodiments, are more likely to support a limiting definition of a claim term.”). By reading the word “access” out of the claim term, the district court’s construction leaves in its place only a meaningless number that indicates a network without granting the user access to its gateway function.

This Court should, therefore, reverse the district court’s construction of the claim term “access number” and construe it to mean “a dialable telephone number.”

B. The Term “Use Said Information To Gain Access To One Of The Plurality Of Network Service Providers” Means “Information Obtained From The Microchip On The Data Card Is Used To Establish Permission Or Right To Use One Of The Plurality Of Network Service Providers”

The '464 patent's claim and specification require that the claim language “use said information to gain access to one of the plurality of network service providers” be construed as “information obtained from the microchip on the data card is used to establish permission or right to use one of the plurality of network service providers.” The language contains two critical limitations. *First*, the use of the word “said” before “information” refers to earlier mentions of “information” that is stored on a data card. (A39 col. 10:23-25 (“a data card which contains the information specific to the user and/or the network service provider to be accessed); A40 col. 11:37-39 (“the information specific to the user and/or the network service provider to be accessed contained on a data card”).) *Second*, the use of the phrase “gain access” means that the user does not have access before using the data card as specified. Defendants' construction—identifying the “microchip” as the source of “said information” and clarifying that “said information” is required “to establish permission or right to use”—is thus required by the claim language.

Defendants' construction also comports with the '464 patent's specification. The specification identifies the microchip as a data card's exclusive information

storage. The “Technical Field” section of the specification defines “data card” as a “smart card” “that is approximately the size of a credit card and stores electronic data on a microchip for use in a variety of applications.” (A35 col. 1:18-21.) Figure 4 of the patent confirms this by listing among the various microchips the “memory chip . . . which stores the information within the data card.” (A38 col. 7:33-42.) What is more, the specification excludes other possible storage media. (A37 col. 6:52-54 (“This process is distinguishable from the process used by magnetic strip reading automated teller machines (ATMs) since there is no embedded-chip present in such devices.”).)

The specification further confirms that the term “gain access” means “to establish permission or right to use.” Information stored on the data card’s microchip would be the user’s ISP, access number, and login information, without which of course the user would not be permitted to access the internet via the ISP. (A36 col. 4:38-44 (“information contained on the data card includes the user’s identification and password which is required to access the ISP”); A37 col. 6:62-67 (“user’s login identification and a password” as “contained on a data card”); A38 col. 7:6-8 (“The smart card reader 18 is adapted to read the login and password information for the ISP 12 that is contained on smart card 14.”); A38-39 col. 7:67 to col. 8:6 (“information relating to the login of the user . . . from the memory chip”).)

In sum, Defendants' construction of the claim term "use said information to gain access to one of the plurality of network service providers" is required by the '464 patent's intrinsic evidence because it both captures the permission-seeking function of the claim term and recognizes that the information is stored on the data card's microchip.

The district court erred by adopting SmartMetric's construction, under which "information from a data card is used to obtain entry to a network service provider." (A57.) The error is twofold. *First*, the adopted construction replaces the claim term "gain access" with "obtain entry," but the two are different. The former describes the act of seeking permission to do something for which one does not already have permission. The latter describes merely an act of doing something, without worrying about the permission aspect. A person walking through an already-open door has "obtained entry," while a person opening a closed door with a key has "gained access." Effectively replacing "gain access" with "obtain entry," the district court impermissibly rewrote the '464 patent's claim terms.

Second, the district court's construction eliminates the data card's microchip as the source of user information's storage. But if not the microchip, there is simply no other place to store that data. To construe "said information" as "information obtained from the microchip" does not, contrary to the district court,

import a limitation from the specification. (A57.) On the contrary, such construction gives meaning to the claim term “said information”—or, “information contained on the data card”—which the specification explains comes from a microchip on the data card.

For these reasons, the Court should reverse the district court’s construction of the claim term “use said information to gain access to one of the plurality of network service providers.”

C. “Immediately Triggering/Triggered Upon” Means “Without Any Intervening Events”

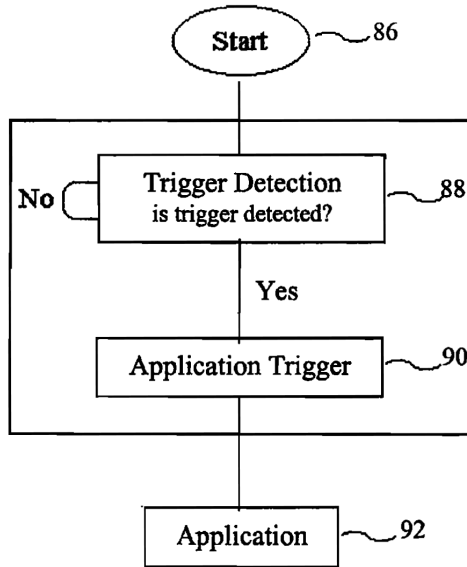
Claim 1 of the ’464 patent recites, “said application program is immediately triggered upon insertion of said data card into said data card reader.” (A39 col. 10:45-47.) Claim 14’s related term is “immediately triggering said application program upon insertion of said data card into said data card reader.” (A40 col. 11:49-50.) Intrinsic evidence dictates that both phrases be construed as “the application program is notified, without any intervening events, as a result of physically inserting the data card into a recess of the data card reader.”³

The word “immediately,” as understood by someone with ordinary skill in the art, means that events are connected directly, without any intervening

³ At issue in this disputed term is mainly the meaning of the phrase “immediately triggering . . . upon.” The rest of the proposed construction mirrors the construction of the term “insertion of said data card into said data card reader.” See Part II.A, *supra*.

circumstances. Defendants’ construction captures this precise meaning. The triggering event is the insertion of the data card into a recess of the data card reader. This is clear from the ordinary usage of the preposition “upon,” meaning “as a result of” some other event. And the event that is being triggered—or the synonymous “notified”—is the application program launch. Thus, the claim term’s plain meaning connects the data card’s insertion and the launching of the application program without any intervening events.

The ’464 patent’s specification confirms the absence of any intervening events between the “insertion” and the “triggering.” The specification, describing figure 1 reproduced below, teaches, “[u]pon insertion of the data card, data representing card insertion is sent to the trigger detector to be detected by the trigger detection step 88. Once the trigger is detected (*i.e.*, the smart card is inserted), the application trigger 90 causes the host application to be launched.” (A37 col. 6:18-25.) The specification describes no intervening steps between the data card’s insertion and the application launching, and no intervening step appears in figure 1.



Thus, both the claim term’s language and the ’464 patent’s specification require Defendants’ proposed construction.

Although the district court did not construe this claim term, it found “that both parties’ proposed constructions impermissibly modify the term.” (A59.) That is incorrect, because Defendants’ construction does no more than construe claim language according to its ordinary meaning and then confirm that construction via the specification. Any impermissible modification arises only in SmartMetric’s construction of “immediately triggering” as “launched in a short time.” (A58.) Because the word “triggering/triggered” in claims 1 and 14 already captures SmartMetric’s concept of “launched in a short time,” the word “immediately” carries no meaning, contrary to a well-established principle of claim construction that every word means something. *See Phillips*, 415 F.3d at 1312, 1314. The

inventor of the '464 patent chose to include the term “immediately” during prosecution and cannot write it out of the claims through claim construction.

Even worse, SmartMetric seeks to replace the word “immediately” with a vague phrase “in a short time,” which would only frustrate the purpose of claim construction process as helping to define the parties’ dispute. And, even though Defendants disagree with SmartMetric’s reliance on non-technical dictionary definitions, *see Bell Atl. Network Servs., Inc. v. Covad Commc’ns Group, Inc.*, 262 F.3d 1258, 1267 (Fed. Cir. 2001) (“caution[ing] against the use of non-scientific dictionaries”), SmartMetric’s own dictionary contradicts its interpretation of “immediately” as meaning “in a short time.” (A150 (defining “immediately” as “2: without interval of time”).) SmartMetric’s proposed construction runs afoul of the “without interval of time” definition because “in a short time” means *some* interval of time. SmartMetric’s own dictionary, therefore, compels Defendants’ construction.


This Court should therefore construe the claim term “said application program is immediately triggered upon insertion of said data card into said data card reader” in claim 1 and the related term in claim 14 as “the application program is notified, without any intervening events, as a result of physically inserting the data card into a recess of the data card reader.”

CONCLUSION

For the foregoing reasons, the district court's judgments should be affirmed because the district court correctly construed both of the claim terms on which the judgments are independently based. In the event this Court finds error in the district court's construction of *both* claim terms underlying the judgments, vacates the judgments, and remands for further proceedings, Defendants respectfully request that the Court construe the remaining three terms in accordance with Defendants' proposed constructions.

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Respectfully submitted,



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Dated: December 5, 2011

Respectfully submitted,


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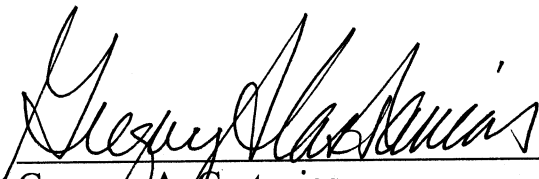
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DECLARATION OF AUTHORITY

I, Gregory A. Castanias, a member of the Bar of this Court, hereby declare that I have been authorized to sign the foregoing BRIEF FOR DEFENDANTS-APPELLEES and CERTIFICATES OF INTEREST on behalf of all counsel for all Defendants-Appellees, pursuant to Fed. Cir. R. 47.3(d).

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: December 5, 2011



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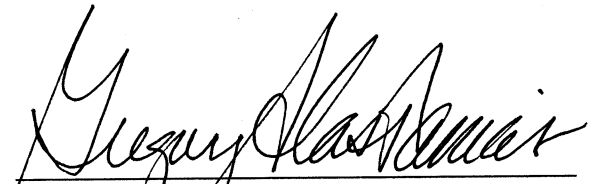
CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December, 2011, two bound copies of the foregoing BRIEF FOR DEFENDANTS-APPELLEES were served via UPS overnight delivery upon:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B), because it contains 13,965 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Times New Roman 14 point font.

Dated: December 5, 2011



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