United States District Court,
E.D. Texas, Marshall Division.

SKY TECHNOLOGIES LLC,
Plaintiff.
v.
IBM, INC. and i2, Inc,
Defendants.

Civil Action No. 2:03-CV-454 (DF)

Sept. 7, 2005.

Stephen D. Susman, Alexandra G. White, Brian D. Melton, Stephen Frederick Schlather, Max Lalon Tribble, Jr., Susman, Godfrey, LLP, Houston, TX, George Marcus Schwab, Law Offices of George M. Schwab, Mill Valley, CA, for Plaintiff.

Benjamin Charkow, Christopher Earl Loh, Jessica Graham, John D. Carlin, Fitzpatrick, Cella, Harper & Scinto, New York, NY, Damon Michael Young, John Michael Pickett, Lance Lee, Donald J. Curry, Marc J. Pensabene, Peter D. Shapiro, Young, Pickett & Lee, Texarkana, TX, for Defendants.

CLAIM CONSTRUCTION ORDER CONSTRUING THE '653, '105 AND '050 PATENTS

DAVID FOLSOM**, District Judge.**

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I. Background

Plaintiff Sky Technology LLC ("Plaintiff") brings this cause of action against Defendant IBM Corporation ("IBM" or "Defendant") alleging infringement of U.S. Patent No. 6,141,653 ("the '653 patent"), U.S. Patent No. 6,336,105 ("the '105 patent"), and U.S. Patent No. 6,338,050 ("the '050 patent") as well as claims for misappropriation of trade secrets, breach of contract, conversion, and unjust enrichment. IBM generally denies these allegations and asserts various affirmative defenses. Regarding the patent infringement claims, those defenses include non-infringement, invalidity and inequitable conduct. Additionally, IBM asserts

counterclaims against Plaintiff for a declaratory judgment of non-infringement and invalidity of the patents-in-suit.

The patents at issue involve systems relating to negotiations over a network, such as the Internet, among two or more parties. Now before the Court is the claim construction of the respective patents. The Parties filed claim construction briefs and respective responses and supplements thereto, and on April 25, 2005, the court held a Claims Construction hearing. After considering the Parties' submissions, the arguments of counsel, and all other relevant pleadings and papers, the Court finds that the claims of the patents-in-suit should be construed as set forth herein.

II. The Legal Principles of Claim Construction

A determination of patent infringement involves two steps. First, the patent claims are construed, and, second, the claims are compared to the allegedly infringing device. Cybor Corp. v. FAS Techs., Inc., 138 F.3d 1448, 1455 (Fed.Cir.1998) (*en banc*). The legal principles of claim construction were recently examined by the Federal Circuit in Phillips v. AWH Corp., 415 F.3d 1303 (Fed.Cir.2005) (*en banc*). Reversing a judgment of non-infringement, an *en banc* panel specifically identified the question before it as: "the extent to which [the court] should resort to and rely on a patent's specification in seeking to ascertain the proper scope of its claims." Id. at 1312. Addressing this question, the Federal Circuit specifically focused on the confusion that had amassed from its scattered decisions on the weight afforded dictionaries and related extrinsic evidence as compared to the intrinsic record. Ultimately, the court found that the specification, "informed, as needed, by the prosecution history," is the "best source for understanding a technical term." Id. at 1315 (quoting Multiform Dessicants, Inc. v. Medzam, Ltd., 133 F.3d 1473, 1478 (Fed.Cir.1998). However, the court was mindful of its decision and quick to point out that *Phillips* is not the swan song of extrinsic evidence, stating:

[W]e recognized that there is no magic formula or catechism for conducting claim construction. Nor is the court barred from considering any particular sources or required to analyze sources in any specific sequence, as long as those sources are not used to contradict claim meaning that is unambiguous in light of the intrinsic evidence.

Phillips, 415 F.3d at 1324. Consequently, this Court's reading of *Phillips* is that the Federal Circuit has clearly returned to the pre- *Texas Digital* state of the law, allotting greater deference to the intrinsic record. Texas Digital Sys. v. Telegenix, Inc., 308 F.3d 1193 (Fed.Cir.2002).

Additionally, the Federal Circuit in *Phillips* expressly reaffirmed the principles of claim construction as set forth in Markman v. Westview Instruments, Inc., 52 F.3d 967 (Fed.Cir.1995) (*en banc*), *aff'd,* 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996), Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576 (Fed.Cir.1996), and Innova/Pure Water, Inc. v. Safari Water Filtration Systems, Inc., 381 F.3d 1111 (Fed.Cir.2004). Thus, the law of claim construction remains intact. Claim construction is a legal question for the courts. Markman, 52 F.3d at 979. The claims of a patent define that which "the patentee is entitled the right to exclude." Innova, 381 F.3d at 1115. And the claims are "generally given their ordinary and customary meaning" as the term would mean "to a person of ordinary skill in the art in question at the time of the invention, *i.e.,* as of the effective filing date of the patent application." Vitronics, 90 F.3d at 1582. However, the Federal Circuit stressed the importance of recognizing that the person of ordinary skill in the art "is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification." Phillips, 415 F.3d at 1313.

Advancing the emphasis on the intrinsic evidence, the *Phillips* decision explains how each source, the claims, the specification as a whole, and the prosecution history, should be used by courts in determining how a skilled artesian would understand the disputed claim term. *See, generally, id*. at 1314-17. The court noted that the claims themselves can provide substantial guidance, particularly through claim differentiation. Using an example taken from the claim language at issue in *Phillips,* the Federal Circuit observed that "the claim in this case refers to 'steel baffles,' which strongly implies that the term 'baffles' does not inherently mean objects made of steel." *Id*. at 1314. Thus, the "context in which a term is used in the asserted claim can often illuminate the meaning of the same term in other claims." *Id*. Likewise, other claims of the asserted patent can be enlightening, for example, "the presence of a dependent claim that adds a particular limitation gives rise to a presumption that the limitation in question is not present in the independent claim." *Id*. at 1315 (citing *Liebel-Flarsheim Co. v. Medrad, Inc.,* 358F.3d 898, 910 (Fed.Cir.2004)).

Still, the claims "must be read in view of the specification, of which they are part." Markman, 52 F.3d at 978. In *Phillips,* the Federal Circuit reiterated the importance of the specification, noting that "the specification 'is always highly relevant to the claim construction analysis. Usually, it is dispositive; it is the single best guide to the meaning of a disputed term.' " 415 F.3d at 1315 (quoting Vitronics, 90 F.3d at 1582). To emphasize this position, the court cites extensive case law, as well as "the statutory directive that the inventor provide a 'full' and 'exact' description of the claimed invention." *Id*. at 1316 (citing Merck & Co. v. Teva Pharms. USA, Inc., 347 F.3d 1367, 1371 (Fed.Cir.2003)); *see also* 35 U.S.C. s. 112, para. 1. Consistent with these principles, the court reaffirmed that an inventor's own lexicography and any express disavowal of claim scope is dispositive. *Id*. at 1316. Concluding this point, the court noted the consistency with this approach and the issuance of a patent from the Patent and Trademark Office and found that "[i]t is therefore entirely appropriate for a court, when conducting claim construction, to rely heavily on the written description for guidance as to the meaning of the claims." *Id*. at 1317.

Additionally, the *Phillips* decision provides a terse explanation of the prosecution history's utility in construing claim terms. The court simply reaffirmed that "the prosecution history can often inform the meaning of the claim language by demonstrating how the inventor understood the invention and whether the inventor limited the invention in the course of prosecution, making the claim scope narrower than it would otherwise be." *Id*. (citing Vitronics, 90 F.3d at 1582-83). It is a significant source for evidencing how the patent office and the inventor understood the invention. *Id*.

Finally, the Federal Circuit curtailed the role of extrinsic evidence in construing claims. In pointing out the less reliable nature of extrinsic evidence, the court reasoned that such evidence 1) is by definition not part of the patent, 2) does not necessarily reflect the views or understanding of a person of ordinary skill in the relevant art, 3) is often produced specifically for litigation, 4) is far reaching to the extent that it may encompass several views, and 5) may distort the true meaning intended by the inventor. *See id*. at 1318. Consequently, the Federal Circuit expressly disclaimed the approach taken in *Texas Digital*. While noting the *Texas Digital* court's concern with regard to importing limitations from the written description-"one of the cardinal sins of patent law," the Federal Circuit found that "the methodology it adopted placed too much reliance on extrinsic sources such as dictionaries, treatises, and encyclopedias and too little on intrinsic sources, in particular the specification and prosecution history." *Id*. at 1320. Thus, a new emphasis on the specification was born.

In conclusion, the Federal Circuit expressed that reliance on the specification is expedient regardless of the fear of reading limitations into the claim:

In the end, there will still remain some cases in which it will be hard to determine whether a person of skill in the art would understand the embodiments to define the outer limits of the claim term or merely to be exemplary in nature. While that task may present difficulties in some cases, we nonetheless believe that attempting to resolve that problem in the context of the particular patent is likely to capture the scope of the actual invention more accurately than either strictly limiting the scope of the claims to the embodiments disclosed in the specification or divorcing the claim language from the specification.

Id. at 1323-24. Moreover, the sequence of events is not important because "what matters is for the court to attach the appropriate weight to be assigned to those sources in light of the statutes and policies that inform patent law." *Id*. at 1324 (citing Vitronics, 90 F.3d at 1582).

Guided by these principles of claim construction, this Court directs its attention to the patents-in-suit and the disputed claims terms.

III. The Patents-in-Suit Generally

On November 16, 1998, Jeff Conklin, David Foucher, and Daniel Foucher, filed application Serial No. 09/192,735, which matured to the '653 patent, application Serial No. 09/192,979, which matured to the ' 105 patent, and application Serial No. 09/192,729, which matured to the '050 patent. The ' 653 patent issued on October 31, 2000. Thereafter, the '105 and '050 patents issued on January 1, 2002 and January 8, 2002 respectively. All three patents at issue relate to the negotiation system described in the '653 patent. As such, each of the three patents have substantially similar specifications, and the applicants filed terminal disclaimers for the '105 and '050 patents to overcome an obviousness-type double patent rejection in view of the '653 patent. The three patents are thus not patentably distinct. All three patents share the same priority date of November 16, 1998, and all expire on the same date. Therefore, the '653 patent and its specification are the heart of this claim construction analysis. The Court's claim construction applies to all three patents in this matter. Where any distinction exists, the Court will make note.

The patents at issue in this matter all relate to the negotiation of a contract or agreement over a computer network, which is facilitated by specific negotiations software. The patents address the negotiation of numerous terms until a mutual and/or final agreement is reached between the negotiating parties. This may include negotiating over such terms as the type of product, its price, quantity, quality, and color, or how and when payment is to be made, etc.

The negotiations software covered by the patents is integrated with computer storage space that stores the ongoing negotiations process, including any change in terms made during each iteration. The iteration process enables participants to propose terms to one another from a computer, which is enabled by the disclosed software. The software recognizes changes in terms and understands the purpose of the term. For example, a term related to pricing is recognized as such and applied to the agreement respectively. Any proposed change in terms is stored on the corresponding storage space and communicated to the other participant. The software then communicates these changes to participants so as the terms appear on the user's terminal consistent with the user's preferences and stage of negotiation.

Before the negotiation process begins, the negotiation system earmarks one participant as the deciding entity. This means that the iterative process ends with the respective participant. Thus, after the negotiation begins, the negotiation system recognizes any changes in the terms proposed, stores the changes in the

storage system, recognizes the other parties to the negotiation, and communicates any change in terms. The process continues until the deciding entity approves an agreement or discontinues the negotiations.

The '105 patent involves negotiations over a secure network. Essentially, it covers the same negotiation process of the '653 patent over a network wherein the iterative changes are encrypted at one terminal, stored in secure storage space, and then decrypted at the receiving terminal. Each iteration is stored such that all stages can be retrieved at a later time. This allows the parties to revisit the negotiation process in the event they need to resolve a later controversy of the meaning of terms. This may also be used for future negotiations.

Finally, the '050 patent relates to negotiations in an international arena. Likewise, it covers the same negotiation process of the '653 patent where one or more of the terminals are located in different countries. As such, the '050 patent covers methods often used in international negotiations. These include methods of payment such as letter of credit, wire transfer, and documentary collection, which are typically associated with international agreements.

IV. Claim Construction

The parties request the Court to construe nine terms appearing in the patents-in-suit. In their respective briefing and during the *Markman* hearing, the parties focused their arguments on claims 1 and 22 of the '653 patent with reference to additional limitations found in the '105 and '050 patents. Representative claims of the patents-in-suit are repeated below with the disputed terms in bold:

The '653 Patent *Claim 1:*

An apparatus for processing multivariate negotiations, comprising:

a network;

a **multivariate negotiations system** including storage space, and **negotiations software,** such **negotiations software** including an **automated negotiations engine** for **analyzing terms,** the analysis of terms comprising **understanding the purpose of the terms, formatting the terms according to the purpose,** and placing them into user supplied context for use by a user, the **multivariate negotiations system** being connected to the network;

a destination terminal for a first user connected to the network, the destination terminal including software for sending and receiving terms along a communications path over the network which flows through the **multivariate negotiations system;**

an initiating terminal for a second user connected to the network, the initiating terminal including software for sending and receiving terms along a communications path over the network which flows through the **multivariate negotiations system, during iterative processing** the **automated negotiations engine** recognizing the users at the destination terminal and the initiating terminal as negotiators and recognizing one of the users as a deciding entity, such **automated negotiations engine** further recognizing any changes in the terms and storing in the storage space the terms each terminal proposes, and recognizing the terminal to which proposed terms are being sent as the indicated terminal, sending terms to the indicated terminal, the **automated negotiations engine indicating any changes in the terms** until a set of terms is acted upon

in a final manner by the deciding entity.

The '653 Patent Claim 22:

The method of claim 20, wherein the step of including negotiations software further comprises the step of **international processing to enables [sic] proposed terms to be selected from and processed in internationally accepted formats.**

The '105 Patent *Claim 1:*

An apparatus for providing electronic nonrepudiation in a negotiations system, comprising:

a network having a secure communication path;

a **multivariate negotiations system** including control software for providing a controlled access to a secure storage space, **negotiations software,** such **negotiations software** including archiving software, and an **automated negotiations engine** for **analyzing terms,** the analysis of terms comprising **understanding the purpose of the terms, formatting the terms according to the purpose,** processing the terms using the archiving software, and placing them into user supplied context for use by a user, the **multivariate negotiations system** being connected to the network and responsive to terminals communicating along a secure communications path over the network;

a destination terminal for a first user connected to the network, the destination terminal including software for encrypting and sending terms and decrypting and receiving terms along a secure communications path over the network which flows through the **multivariate negotiations** engine system;

an initiating terminal for a second user connected to the network, the initiating terminal including software for encrypting and sending terms and decrypting and receiving terms along a secure communications path over the network which flows through the **multivariate negotiations** engine system, **during iterative processing** the archiving software capturing each set of decrypted proposed terms sent by a terminal and permanently storing each decrypted set of proposed terms as a record in the secure storage space, the **automated negotiations engine** recognizing the users at the destination terminal and the initiating terminal as negotiators and recognizing one of the users as a deciding entity, such **automated negotiations engine** further recognizing any changes in the terms and storing in the storage space the terms each terminal proposes, and recognizing the terminal to which proposed terms are being sent as the indicated terminal, sending terms to the indicated terminal, the **automated negotiations engine indicating any changes in the terms** until a set of terms is acted upon in a final manner by the deciding entity.

The '050 Patent *Claim 1:*

An apparatus for providing user supplied context for processing of **multivariate negotiations,** comprising:

an international network; a **multivariate negotiations system** including storage space, and **negotiations software,** such **negotiations software** including an **automated negotiations engine** for **analyzing terms,** the analysis of terms comprising **understanding the purpose of the terms, formatting the terms according to the purpose, selecting certain of the terms to be processed according to internationally accepted methods,** and placing them into user supplied context for use by a user, the **multivariate**

negotiations system being connected to the international network and responsive to terminals communicating along a communications path over the international network;

a destination terminal for a first user connected to the international network, the destination terminal including software for sending and receiving terns along a communications path over the international network which flows through the **multivariate negotiations system;**

an initiating terminal for a second user connected to the international network, the initiating terminal including software for sending and receiving terms along a communications path over the international network which flows through the **multivariate negotiations system, during iterative processing** the **automated negotiations engine** recognizing the users at the destination terminal and the initiating terminal as negotiators and recognizing one of the users as a deciding entity, such **automated negotiations engine** further recognizing any changes in the terms and storing in the storage space the terms each terminal proposes, and recognizing the terminal to which proposed terms are being sent as the indicated terminal, sending terms to the indicated terminal, the **automated negotiations engine indicating any changes in the terms** until a set of terms is acted upon in a final manner by the deciding entity.

A. "multivariate negotiation [system]"

1. The Parties' Proposed Constructions

Sky's Final Proposed Construction	IBM's Final Proposed Construction
A system of hardware and software that enables participants to perform multiple iterations of bargaining over multiple terms. The multiple iterations of bargaining (i.e., the "negotiation") must allow for an offer and multiple counteroffers between two participants where each iteration is related to prior iterations, and is more than just (a) a system in which a buyer sends out an RFQ, receives a bid in response, which it can accept or reject or (b) a bid submission system with limited counteroffer capability.	A system of hardware and software that enables participants to perform multiple iterations of bargaining over multiple terms, with the terms of a counteroffer building off the terms of the previous offer or counteroffer. The multiple iterations of bargaining (i.e., the "negotiation") must allow for an offer and multiple counteroffers between two participants and is more than (a) a system in which a buyer sends out an RFQ, receives a bid in response, which it can accept or reject, or can then modify and retransmit its RFQ several times or (b) a bid submission system with limited counteroffer capability.

2. Discussion

The parties rely heavily on the written description and prosecution history to support their respective construction of the limitation "multivariate negotiation system." However, before reaching the written description and prosecution history, the context in which the term is used must also be considered. Phillips, 415 F.3d at 1314. The Court looks first to the disputed term itself for some insight into the meaning the applicants intended. The applicants use the term "multivariate" to describe "negotiation." This strongly implies that the term "negotiation" alone does not inherently mean a discussion involving multiple terms. Thus, the applicants found it imperative that the system disclosed enables bargaining over multiple terms.

Of particular concern here, a reading of the claim language alone does not indicate that the applicants intended to limit the disputed term to a negotiation having multiple iterations. Because the negotiation process continues until given finality by one of the participants, the process could continue for an infinite

number of iterations, or a participant could act on the first set of terms in a final manner, thus, having only one iteration. This is supported by a reading of claim 2 of the '653 patent, which is dependent on claim 1. It states "The apparatus of claim 1, wherein the negotiations software enables iterative bargaining about the terms proposed by individuals at the respective terminal." '653 patent 34 :61-63. In claim 2, the applicants describe the software as "negotiations" software but also found it necessary to indicate that the "negotiations software" enables "iterative bargaining." *Id*. This gives the indication that the applicants did not consider the term "negotiations" to inherently mean iteration of bargaining. Thus, based on the language of the claims alone, the Court finds that "multivariate negotiations system" means "a system of hardware and software that enables bargaining over multiple terms.

With respect to the above analysis, the Parties tend to agree; however, both Parties provide for further limitations based on the written description and prosecution history. This analysis focuses specifically on the term "negotiation." First, both Parties proposed construction provides that "negotiation" means multiple iterations of bargaining that must allow for an offer and multiple counteroffers. However, IBM asserts that the claim term "negotiation" excludes "a system in which a buyer sends out [a request for quotes] RFQ, receives a bid in response, which it can accept or reject, or can then modify and retransmit its RFQ several times or [ ] a bid submission system with limited counteroffer capability." IBM argues that the applicants disavowed coverage over such negotiations by distinguishing the prior art in the '653 written description and prosecution history. Specifically, IBM argues that the applicants distinguished their invention from U.S. Patent No. 5,794,207 to Walker, et. al. (the *Walker* reference) and U.S. Patent No. 4,799,146 to Shavit (the *Shavit* reference), thereby disavowing coverage of the claimed inventions disclosed therein. Notwithstanding, the Federal Circuit has explained that merely distinguishing prior art does not necessarily disavow coverage of the respective claim scope. There is "a 'heavy presumption' that claim terms carry their full ordinary and customary meaning unless the patentee unequivocally imparted a novel meaning to those terms or expressly relinquished claim scope during prosecution." Omega Eng'g, Inc, v. Raytek Corp., 334 F.3d 1314, 1323 (Fed.Cir.2003)

For example, in Golight, Inc. v. Wal-Mart Stores, Inc., 355 F.3d 1327 (Fed.Cir.2004), the claim term at issue was "horizontal drive means for rotating said lamp" used in a claim for a wireless, remote-controlled portable searchlight. Defendant, Wal-Mart Stores, Inc., argued that the claims at issue were limited to lamps capable of 360 degree rotation, even though there was no such express limitation in the claim. Id. at 1332. Wal-Mart based its contention on a statement in the specification that described the ability of the lamp to have 360 degree rotation, as well as several statements made during prosecution. *Id*. Similar to the present matter, it argued that the written description indicated 360 degree rotation was a distinguishing feature over the prior art. *Id*. Further, Wal-Mart relied on a response to a Patent Office rejection, in which the patentee argued: 1) that a prior art reference was distinguished because it "would not be rotatable so as to be able to sweep through 360 degrees or greater as achieved by applicants' invention"; 2) that the claims at issue in the Patent Office rejection were amended to recite rotation through at least 360 degrees to avoid prior art; and 3) that the claims recited "separate horizontal and vertical drive means for tilting and rotating as well through 360 degrees" to carry out two different types of adjustments, tilting and rotation. *Id*. at 1333.

Rejecting Wal-Mart's argument, the Federal Circuit found "no clear definition or disavowal of claim scope in the written description" requiring horizontal rotation through 360 degrees. *Id*. at 1331. The court stated:

While it is true that the patentees describe their invention as *having the ability* to rotate through 360 (deg.), this particular advantage is but one feature of the invented search light. The written description describes other significant features as well, such as the use of a particular wireless remote control and differing

mechanisms for attaching the search light to the roof of a vehicle. The patentees were not required to include within each of their claims all of these advantages or features described as significant or important in the written description.

Id. (emphasis added) (citing E-Pass Techs., Inc. v. 3Com Corp., 343 F.3d 1364, 1370 (Fed.Cir.2003) ("An invention may possess a number of advantages or purposes, and there is no requirement that every claim directed to that invention be limited to encompass all of them."); *SRI Int'l,* 775 F.2d at 1121 ("If everything in the specification were required to be read into the claims, or if structural claims were to be limited to devices operated precisely as a specification-described embodiment is operated, there would be no need for claims.").

This Court finds the present situation somewhat similar. FN1 While the ' 653 patent's written description clearly indicates that a distinguishing feature of the invention over the prior art is the ability to perform multiple iterations of bargaining over multiple terms, the patentee did not respectively disavow the specific types of negotiations described in the prior art. For example, the ' 653 patent specification distinguishes the *Walker* reference by stating: "[the *Walker* reference] is similar to other auction sites on the World Wide Web which allow you to submit bids to a seller or auctioneer, but do not *provide the opportunity to bargain interactively* with the seller *on all the terms*." ' 653 patent at 13:33-35 (emphasis added). The applicants then go on to describe that an objective of the invention is "to provide a system for *iterative bargaining* and purchasing over a network which enables buyers and sellers to negotiate prices, terms, and conditions iteratively until an agreement is reached on all points." Id. at 13:52-56 (emphasis added). This language indicates that the invention "provides for" and "enables" multiple iterations of bargaining over multiple terms; it does not clearly disclaim a bid submission system.

FN1. The Court notes that further support for the court's construction in *Golight* was based on claim differentiation because the limitation requiring 360 degree movement was found in a subsequent dependent claim; however, the court's holding was not so limited. Nevertheless, the Court finds the holding persuasive despite this distinction.

IBM also points to language in the prosecution history to support its construction. It argues that "the applicants distinguished their claimed system from an automated system that facilitated that type of transaction, namely, the Walker prior art reference." IBM's Sur-reply Claim Const. Br. at 2 (Doc. No. 83). In making this contention, IBM relies on the follow passage from the prosecution history:

Walker discloses and claims a system for proposing a binding conditional purchase order (CPO) with *several terms* to potential sellers. One or more sellers can log onto a central site to review these buyer CPO's. A seller can accept one and form a contract. A seller also has the option to propose a *counteroffer* with different *terms* which the buyer can bind to or not. However, Walker *does not disclose* or claim an *iterative* multivariate *negotiations* engine system with negotiations software that enables *multiple iterations of bargaining* over multiple terms between an buyer and seller. *Walker more closely resembles a bidding system with a limited counteroffer capability*.

Id. at 2-3 (emphasis original) (citations omitted). Further, IBM points to the applicants' distinction over the *Shavit* reference. It relies on language in the prosecution history wherein the applicants stated:

Shavit describes a procurement function which allows a buyer to send out a request for quotation (RFQ) to a

seller. The seller can send a bid, which the system will forward to the buyer. It *does not disclose or claim an iterative multivariate negotiation engine system with negotiations software that enables multiple iterations of bargaining over multiple terms between a buyer and seller*.

IBM's Opening Claim Const. Br. at 9 (Doc. No. 61). Based on these descriptions of the prior art, IBM asserts that the applicants imposed the limitation of "requiring multiple iterations of bargaining" and specifically disavowed coverage over a simple offer-counteroffer-acceptance type of transaction. *See id*. at 9.

The Court does not completely agree. While the Court finds that the above references clearly and unambiguously disclaim claim scope, it does not go so far as to disclaim all that IBM proposes. From the specification and prosecution history, it is clear that the applicants distinguished their invention based on the allowance of multiple iteration of bargaining over multiple terms. However, the Court does not find this language unambiguously disclaims a "a system in which a buyer sends out an [request for quotes] RFQ, receives a bid in response, which it can accept or reject, or can then modify and retransmit its RFQ several times or [ ] a bid submission system with limited counteroffer capability." It is unclear whether the applicants distinguished their invention based on the allowance of multiple iteration different from that of the prior art, or because their invention allowed for bargaining over multiple terms. And "[a]bsent a clear disclaimer of particular subject matter, the fact that the inventor anticipated that the invention may be used in a particular manner does not limit the scope to that narrow context." BrookhillWilk 1, LLC v. Intuitive Surgical, Inc., 334 F.3d 1294, 1301 (Fed.Cir.2003). Thus, the Court is unpersuaded by IBM's contention that the written description and prosecution history compels importing into the claims the requirement of multiple iterations of terms consisting of more than the systems disclosed in the prior art. To the extent that the prior art reference include "multiple iteration of bargaining over multiple term," the Court leaves that to an invalidity challenge.

Additionally, IBM argues that the claim term "negotiation" includes the limitation: "with the terms of a counteroffer building upon the terms of the previous offer or counteroffer." IBM contends that the term negotiation as understood by one of ordinary skill in the art would necessarily require the terms at each stage of the iterative process to relate to the previous terms. With respect to this argument, Plaintiff essentially agrees. This is reflected by Plaintiff's final proposed construction, which includes "where each iteration is related to prior iterations."

The specification provides guidance. As disclosed in the preferred embodiment, for example, in the event an offer and subsequent counteroffer are made, the participant making the counteroffer inherits the terms of the previous offer (or counteroffer) and changes those terms to which he is not in agreement. This embodiment is shown in Fig. 1i of the '653 patent specification illustrated in relevant part below:

Tabular or graphic material set at this point is not displayable.

At step 212-04, a participant proposes a set of terms and the proposed terms are evaluated by the other participant. '653 patent 24 :1-6. If this participant is the deciding entity and the terms are accepted at step 212-06, the terms are stored at step 212-08 and the system proceeds to closure at step 212-09. *Id*. 24:6-9. However, if the terms are not accepted, this iteration is stored at step 212-10 and the process "loops back up to step 212-04 where terms are proposed again, usually with some variation from the previous set proposed. This iterative process continues between steps 212-04 and 212-10 until the deciding entity accepts the terms and closure is reached at step 212-08." *Id*. 24:12-17.

Cautious of the risk of importing limitations from the preferred embodiment, the Court finds that one of ordinary skill in the art reading the patent document as a whole would interpret the iterative process of the "multivariate negotiations system" as requiring each set of proposed terms to relate to the previous set. Moreover, this interpretation is consistent with the plain meaning of the term as set forth in the claims-a system of hardware and software that enables participants to negotiate over multiple terms. One of ordinary skill in the art would understand "negotiation" not to include a complete disconnect of the initial terms during the iterative process. Notwithstanding, the construction proposed by IBM, particularly "building off," tends to suggest a compilation of each stage, which risks importing such a limitation. As such, the Courts finds the inclusion of each iteration relating to the previous is sufficient.

3. Construction

Accordingly, the Court hereby construes the term "multivariate negotiation systerm" as: **A system of hardware and software that enables participants to perform multiple iterations of bargaining over multiple terms. The multiple iterations of bargaining (i.e., the "negotiation") must allow for an offer and multiple counteroffers between two participants where each iteration is related to prior iterations.**

B. "negotiations software"

1. The Parties' Proposed Construction

Sky's Final Proposed Construction	IBM's Final Proposed Construction
Software that enables participants to perform negotiations, i.e., the multiple iterations of bargaining as described in the construction of "negotiations" in claim limitation 1 above.	

2. Discussion

Both parties agree that the term "negotiations software" should be construed consistently with the construction of the negotiation system above. The Court agrees. A plain reading of the claim language demonstrates that the negotiations software is merely software that enables the iterative bargaining process as described in claim 1 of the '653 patent. As such, the Court finds that one of ordinary skill in the art would interpret the term "negotiations software" as software that enables participants to perform negotiations, *i.e.*, multiple iterations of bargaining where each iteration is related.

3. Construction

Per the definition of terms already settled above, the Court hereby construes the term "negotiations software" as: **Software that enables participants to perform multiple iterations of bargaining, which allow for an offer and multiple counteroffers between two participants where each iteration is related to prior iterations.**

C. "automated negotiations engine"

1. The Parties' Proposed Construction

Sky's Final Proposed Construction	IBM's Final Proposed Construction
Special purpose software that performs the functions necessary to implement the negotiations, i.e., the	

multiple iterations of bargaining as described in the construction of "negotiations" in claim limitation 1 above, without human intervention.

2. Discussion

Again, the parties agree that the term "automatic negotiations engine" should be construed consistent with the negotiation system. The Court agrees. One of ordinary skill in the art would interpret the ordinary meaning of "automated" to mean without human intervention, and the "negotiations engine" to mean software that performs the specific negotiation function as described in the specification.

3. Construction

Thus, in accordance with the Court's previous construction, the Court hereby construes the term "automated negotiations engine" as: **Special purpose software that performs the functions necessary to implement multiple iterations of bargaining, which allows for an offer and multiple counteroffers between two participants where each iteration is related to prior iterations without human intervention.**

D. "analyzing terms"

1. The Parties' Proposed Constructions

Sky's Final Proposed Construction	IBM's Final Proposed Construction
Examining the terms entered by a user or participant as further defined in the claim.	The automated negotiations engine evaluates the content and substance of terms entered by a user.

2. Discussion

The limitation "analyzing terms" appears in all the asserted claims of the patents-in-suit. Specifically, claim 1 of the '653 patent provides in relevant part: "... an automated negotiations engine for analyzing terms, the analysis of terms comprising understanding the purpose of the terms, formatting the terms according to the purpose, and placing them into user supplied context for use by a user...." '653 patent 34 :33-37. Thus, the language of the claims require that the analysis of terms includes understanding the terms purpose, formatting them accordingly, and placing them in the supplied context.

IBM proposes limiting "analyzing terms" to evaluating the "content and substance" of terms. IBM argues that the Plaintiff incorrectly limits the analyzing of terms to the specific action listed in the claim. Specifically, it contends that the applicants carefully drafted the claims with the open-ended transition "comprising" which indicates that the analyzing of terms may include more than that which is listed. Thus, the analyzing of terms encompasses more than that which is defined by the claim.

In construing patent claims, there are certain terms that have specific meaning in the art, which the patent draftsman cannot change. Two such terms are "consisting of"and "comprising." *See* In re Gray, 19 C.C.P.A. 745, 53 F.2d 520, 521 (CCPA 1931). As IBM points out, "comprising" indicates the claim is open-ended and additional elements not recited may be covered by the claim, whereas "consisting of" indicates the claim is closed-ended and no additional elements not recited are covered by the claim scope. *See* Moleculon Research Corp. v. CBS, Inc., 793 F.2d 1261, 1271 (Fed.Cir.1986); D. Chisum, 2 Patents s. 8.06[1][b] at 8-99 to 8-102 (1984). However, these special meanings are not divorced from how the term is used in the claim. In construing a claim, one must first consider whether a special clause such as "comprising" is part of the

preamble, body, or transition of the patent. *See* Schering Corp. v. Amgen Inc., 18 F.Supp.2d 372, 382-83 (D.Del.1998) (construing the term "consisting of" as having its "special meaning" where it appeared twice in a single claim).

Here, the Court finds the applicants use of the term "comprising" in the body of the claim consistent with its "special meaning." That is, additional unrecited elements are not excluded as long as the recited elements are present. Although the claims set out the minimum that must be included in the limitation "analyzing terms," the specification does not clearly define this limitation to exclude additional elements. The prosecution history provides some insight.

During prosecution of the '653 patent, the applicants amended claim 1 to add the disputed claim limitation. In their March 21, 2000, amendment, the applicants cited support for introducing the phrase "analyzing terms, the analyzing of terms comprising understanding their purpose, formatting the terms according to the purpose and placing them into user supplied context for use by a user" in the following portion of the specification:

For example, and still in FIG. 5a, if a buyer participant 08 wishes to place a proposed order, the browser encrypts it at the browser's secure socket layer and Webserver 210s decrypts the proposed order upon receipt at mulitvariate negotiations engine 02's site. *Webserver 210s next analyzes the proposed order to understand it and formats into a request sent to database functions 222*. In addition to basic read and write functions, *database functions 222 shown in Figure 5a, include operations such as search, analyze, compare, report, sort and relate (between databases.)* Formatting can be as simple as "user = username" etc. A request such as "find user = username, return catalog" might be sent through IP firewall 203f.

March 21, 2000 Amendment (emphasis original) (Doc. No. 73, App.G); *see also* '653 patent 33 :66-67-34 :1-10. Nothing is said in the specification that purports to limit "analyzing terms" to "evaluating the content and substance" of the terms. The applicants intended "analyzing terms" to include understanding, formatting, searching, analyzing, comparing, reporting, sorting, and relating. *See id*. This is consistent with the meaning of the term "analyzing" in the applicable art.

Also, in the '653 patent's Notice of Allowability, the Examiner commented on the disputed limitation. Specifically, the Examiner stated:

The limitation "the analysis of terms comprising understanding the purpose of the terms, formatting the terms according to the purpose" has been interpreted to reflect the fact that when a user changes one of the negotiations terms, the negotiations engine does not just merely forward redline corrections, but *it processes the changes to decide to which category of terms the change correlates*. Silverman, et.al. (U.S. Patent No. 5,924,082) teaches an interactive negotiations system ... however, they fail to anticipate or suggest a negotiations engine which itself can identify the types of changes being made. Silverman et. al. maintain a transcript of the negotiations sessions, but its central computer system does not seem to *analyze the changes to classify them by their particular term categories*.

'653 patent File History, Notice of Allowability dated 4/3/00, at 5-6 (emphasis added) (Doc. No. 73, App.Q). The Examiner clearly found that a distinguishing feature of the invention was the ability to determine any changes in terms and classify them accordingly. However, this does not, as IBM argues, become synonymous with evaluating content and substance.

Aided by the prosecution history, the Court finds that the specification and claims use the term "analyzing terms" in its customary sense to mean determining the relationship of terms entered by a user to the negotiation and classifying them accordingly. *See* Phillips, 415 F.3d at 1317 (" 'customary meaning' refers to the 'customary meaning in [the] art field' ") (*citing* Home Diagnostics, Inc. v. LifeScan, Inc., 381 F.3d 1352, 1358 (Fed.Cir.2004)). More importantly, this is consistent with the description in claim 1 of the '653 patent, which describes analyzing terms as "understanding the purpose of the terms, formatting the terms according to the purpose, and placing them into user supplied context for use by a user...." ' 653 patent 34 :33-37. While the ordinary meaning of analyzing terms may indeed be broader than those specifically listed in the claims, at no point does the patent specifically limit analyzing to "evaluating the content and substance." Thus, IBM's proposed construction is unnecessarily narrow.

3. Construction

Accordingly, the Court finds that the limitation "analyzing terms" should be construed to have its ordinary meaning. The phrase does not require or preclude "evaluating the content and substance" of terms. The Court construes "analyzing terms" as: **Determining the relationship of terms entered by a user to the negotiation and classifying them accordingly.**

E. "understanding the purpose of the terms"

1. The Parties' Proposed Constructions

Sky's Final Proposed Construction	IBM's Final Proposed Construction
The automated negotiations engine comprehends the category of the type of term to which it correlates.	The automated negotiations engine comprehends the category of the type of term to which each term correlates by evaluating the content and substance of the terms entered by the user.

2. Discussion

Both parties agree that the limitation "understanding the purpose of the terms" involves comprehending the category of the type of term to which each term correlates. In fact, the Examiner used substantially the same language to reflect his understanding of the claimed invention in the Notice of Allowability, where he stated "[the negotiations engine] processes the changes to decide to which category of terms the change correlates." '653 patent File History, Notice of Allowability dated 4/3/00, at 5-6 (Doc. No. 73, App.Q). However, IBM's proposed construction again offers the further limitation of "evaluating the content and substance of the terms."

Notwithstanding IBM's contentions, and for the same reasoning above, the Court finds that the added limitation unnecessarily narrows the claim scope. One of ordinary skill in the art would recognize that by "understanding the purpose of the terms" the negotiations engine is comprehending or understanding to which category of terms a term entered by a user correlates. Notably, this is consistent with the Court's construction of "analyzing terms," which necessarily includes "understanding the purpose of the terms" per the language of the claim. Conversely, IBM's proposed construction of "understanding the purpose of the terms" inconsistently incorporates its proposed construction of "analyzing terms." This is unnecessarily confusing.

3. Construction

Based on the foregoing, the Court finds that the limitation "understanding the purpose of the terms" should be construed to have its ordinary meaning. The Court construes "understanding the purpose of the terms" as: **The automated negotiation engine understands to which category of terms a term entered by a user correlates.**

F. "formatting the terms according to the/that purpose"

1. The Parties' Proposed Constructions

Sky's Final Proposed Construction	IBM's Final Proposed Construction
The automated negotiations engine arranges the terms according to its category.	The automated negotiations engine arranges the terms according to their category as determined by the automated negotiations engine.

2. Discussion

The Parties' disagreement regarding construction of "formatting the terms according to the/that purpose" relates to IBM's addition of "as determined by the automated negotiations engine" as it refers to the category. Respectively, the Court looks no further than the language of the claim and construes the limitation consistently with its construction of "understanding the purpose of the term." Representative claim 1 of the '653 patent states that the "automated negotiations engine ... understand[s] *the purpose* of the terms [and] format[s] the terms according to *the purpose*...." '653 patent 34 :35-36. The claim refers to "the purpose" consistently and there is nothing in the specification or prosecution history to suggest otherwise. One of ordinary skill in the art would recognize that the automated negotiations engine understands to which category a term belongs and based on that category arranges the terms accordingly. Thus, the arrangement, or formatting of the terms, is dependent on the category determined by the automated negotiations engine.

3. Construction

Accordingly, the Court finds that the limitation "formatting the terms according to the/that purpose" should be construed to be consistent with its plain meaning and the Court's previous construction. The Court construes "formatting the terms according to the/that purpose" as: **The automated negotiations engine arranges the terms according to their category as determined by the automated negotiations engine.**

G. "during iterative [negotiations] processing"

1. The Parties' Proposed Constructions

Sky's Final Proposed Construction	IBM's Final Proposed Construction
The claimed steps can be repeatedly performed by the automated negotiation engine while performing multiple iterations of bargaining involving an offer and multiple counteroffers between two participants where each iteration is related to prior iterations, and is more than just (a) a system in which a buyer sends out an RFQ, receives a bid in response, which it can	The claimed steps are repeatedly performed by the automated negotiation engine while performing multiple iterations of bargaining involving an offer and multiple counteroffers between two participants, with the terms of a counteroffer building off the terms of the previous offer or counteroffer. The multiple iterations of bargaining is more than (a) a system in which a buyer sends out an RFQ, receives a bid in response, which it can accept or reject, or can then modify and retransmit its RFQ several times or (b)

accept or reject or (b) a bid submission system with limited counteroffer capability.	a bid submission system with limited counteroffer capability.

2. Discussion

As reflected by the Parties' proposed constructions, the disagreement over construction of "during iterative [negotiations] processing" centers around the Court's construction of "negotiation" above. Therefore, without regurgitating the same analysis, the Court simply construes the term consistent with its construction of "negotiation" above and in accordance with the ordinary meaning of "iterative," which, as the Parties agree, means simply to repeatedly perform claimed steps by the automated negotiations engine.

3. Construction

Thus, in accordance with the Court's previous construction, the Court hereby construes the term "during iterative [negotiations] processing" as: **The claimed steps can be repeatedly performed by the automated negotiations engine while performing multiple iterations of bargaining involving an offer and multiple counteroffers between two participants where each iteration is related to prior iterations.**

H. "indicating any changes in the terms"

1. The Parties' Proposed Constructions

Sky's Final Proposed Construction	IBM's Final Proposed Construction
Automatically informing a user or participant that one or more terms have been changed by another user or participant so that they can be easily seen.	The automated negotiations engine automatically points out to one participant what changes, if any, have been made by another participant.

2. Discussion

The Parties' disagreement concerning the construction of the limitation "indicating any changes in the terms" centers around the word "indicating." Plaintiff argues that the construction of this limitation should be constructed as "informing" participants. It relies on an exert from the specification for support, which states "[a]ll participants in a negotiation are continually notified by e-mail as the negotiations progress ... When participants log into their protected areas in the system's databases 225, they are also presented with information regarding the latest developments, if any, which have occurred in their respective negotiations." Pl.'s Open Claim Const. Br. at 19 (citing '653 patent at 26:11-19, 24:18-21). Additionally, Plaintiff references the Examiner's note in the Notice of Allowability, which indicates a distinguishing feature of the present invention as being the automated recognition and indication of changes in terms. Id. (citing '653 File History, Notice of Allowability dated April 3, 2000 at 5-6). With no further argument, Plaintiff contends that this language supports its construction.

Conversely, IBM contends that "indicating" as used in the claims of the patents-in-suit is consistent with its ordinary meaning "to point out." *See* IBM's Opening Claim Const. Br. at 25. It offers support for this position in both the specification and prosecution history.

The specification does not explicitly define the term "indicating any changes in the terms." However, the prosecution history is dispositive. In distinguishing the prior art *Shirley* reference, the applicants amended claim 1 of the '653 patent to include "*the automated negotiations engine indicating* any changes *in the*

terms" and relied on the inventions' ability to "indicate *what* has changed" as a basis for distinction. '653 File History, Supplemental Amendment dated March 21, 2000 at 4, 22. This supports a construction of "indicating any changes in the terms" that reflects that the negotiations engine indicates what *specific* changes were made and not simply that changes were made. One of ordinary skill in the art would recognize that the negotiation engine automatically points out what terms, if any, have been changed.

3. Construction

Based on the foregoing analysis, the Court construes the limitation "indicating any changes in the terms" as: **The automated negotiations engine automatically points out to one participant what changes, if any, have been made by another participant.**

I. "internationally accepted methods/formats"

1. The Parties' Proposed Constructions

Sky's Final Proposed Construction	IBM's Final Proposed Construction
The automated negotiations engine chooses a specific term or terms typically associated with international commercial transactions.	The automated negotiations engine chooses a specific term or terms to be used in a payment method, such as a letter of credit, wire transfer or documentary collection, which is typically associated with international commercial transactions. (the '050 patent) (the '050 patent)
Choosing a specific term or terms typically associated with international commercial transactions. (the '653 patent)	Choosing a specific term or terms to be used in a payment method, such as a letter of credit, wire transfer or documentary collection, which is typically associated with international commercial transactions. (the '653 patent)

2. Discussion

The claim terms including the language "internationally accepted formats" and "internationally accepted methods" appear in claim 22 of the ' 653 patent and claims 1-2, 4, 6, 11-12, 14, and 16 of the '050 patent. Specifically, the limitation "international processing to enables [sic] proposed terms to be selected from and processed in internationally accepted formats" appears in claim 1 of the '653 patent and the limitation "selecting certain of the terms to be processed according to internationally accepted methods" appears in claims 1-2, 4, 6, 11-12, 14, and 16 of the '050 patent. In their briefing, IBM request that the Court construe the full limitation set out above; however, the Parties' final proposed constructions limit the disagreement as to the construction of "internationally accepted methods/formats." As such, the Court likewise limits its construction.

The Parties' disagreement focuses on whether the disputed term should be limited to "payment methods, such as a letter of credit, wire transfer or documentary collection" as reflected by each Parties' final proposed construction reiterated above. Plaintiff argues that the "internationally accepted methods/formats" should be given a broad construction inclusive of more than mere payment options. It cites exerts from the specification in support of its proposed construction including statements made that enable use of INCOTERMS to specify and manage the terms of negotiations. That is, because INCOTERMS are not restricted to payment options, the present invention is not so restricted.

IBM contends that the disputed limitation should be construed narrowly to refer only to payment methods. In support of it proposed construction, IBM cites numerous occasions where the patent specification identifies the "internationally accepted methods/formats" as referring to payment methods typically accepted in international commercial transactions. *See* IBM's Opening Claim Const. Br. at 30-31. It also relies on dependent claims 7-9 and 17-19 of the '050 patent that depend from independent claims 1 and 11 as "specify [ing] that the 'internationally accepted methods include payment by a letter of credit,' 'payment by a wire transfer' and 'payment by document collection.' Id.

Despite the Parties' prolific reliance on the specification, the Court finds no reason to look beyond the claims themselves in construing these terms. While the specification provides several examples of payment methods typical of international transaction, the respective claim language does not clearly limit the claims to such a narrow reading. To the contrary, the specification of the '653 patent clearly states "[i]t is an aspect of the present invention that it provide comprehensive iterative bargaining ... to negotiate all the terms and conditions of a transaction- *not just the price*." '653 patent at 14:27-30 (emphasis added). The specification makes clear that the negotiated terms are not restricted to price or payment methods. And the disputed claim language "international processing to enables [sic] proposed terms to be selected from and processed in internationally accepted formats" should be construed consistently. The Court will not limit its construction to a disclosed embodiment.

Additionally, the Court finds that IBM's reliance on the limitation set out in the dependent claims of the '050 patent inapposite. Contrary to IBM contentions, the limitations found in the dependent claims of the '050 patent support a broader construction of this term. The Court finds that claim differentiation is controlling. The Federal Circuit has explained that the doctrine of claim differentiation "normally means that limitations stated in dependent claims are not to be read into the independent claim from which they depend." Karlin Tech., Inc. v. Surgical Dynamics, Inc., 177 F.3d 968, 971-72 (Fed.Cir.1999) (citing Transmatic, Inc. v. Gulton Indus., Inc., 53 F.3d 1270, 1277 (Fed.Cir.1995)). Here, claims 7-9, which depend from claim 1, and 17-19, which dependent from claim 11, recite additional limitation related to the "internationally accepted methods," including "payment by a letter of credit," *see* '050 patent at 34:67, 36:4 (claims 7 & 17), "payment by a wire transfer" *see* id. at 35:2, 36:8 (claims 8 & 18), and "payment by document collection." *See* id. at 35:4-5, 36:12 (claims 9 & 19). While the doctrine of claim differentiation is not a rigid rule, *see* Kalin, 177 F.3d at 972., the Court finds that it supports the broad construction of "internationally accepted methods/formats" that is based on the ordinary meaning of that phrase.

3. Construction

Accordingly, the Court construes the limitation "internationally accepted method/formats" as: The method/formats typically associated with international commercial transactions. Based on this construction, the Court finds that "selecting certain of the terms to be processed according to internationally accepted methods" means "the automated negotiations engine chooses a specific term or terms typically associated with international commercial transactions" and "international processing to enables [sic] proposed terms to be selected from and processed in internationally accepted formats" means "choosing a specific term or terms typically associated with international commercial transactions."

V. Conclusion

Accordingly, the Court hereby ORDERS the disputed claim terms construed consistent herewith.

SIGNED this 6th day of September, 2005.

E.D.Tex.,2005.
Sky Technologies LLC v. IBM, Inc.

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