

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

PHOENIX SOLUTIONS, INC.,

Plaintiff-Appellant,

v.

WEST INTERACTIVE CORP.,

Defendant-Appellee.

*Appeal from the United States District Court for the Central District of
California in Case No. 09-CV-8156, Senior Judge Mariana R. Pfaelzer*

**NON-CONFIDENTIAL BRIEF OF DEFENDANT-APPELLEE
WEST INTERACTIVE CORPORATION**

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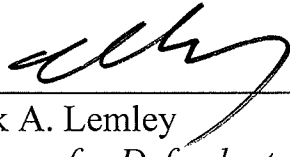
CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4(a)(1) and Federal Rule of Appellate Procedure 26.1, counsel for Defendant-Appellee West Interactive Corporation certifies the following:

1. The full name of every party represented by us is:
West Interactive Corporation
2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by us is:
Not applicable.
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party represented by us are:
West Interactive Corporation is a wholly owned subsidiary of West Corporation. Neither West Corporation nor West Interactive Corporation has publicly traded stock.
4. The names of all law firms and the partners or associates that appeared for the party now represented by me in the trial court or agency or are expected to appear in this court are:
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Dated: April 29, 2011

By:



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TABLE OF CONTENTS

STATEMENT OF ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS	2
I. SPEECH RECOGNITION TECHNOLOGY	2
A. MIT’S Galaxy System	4
B. The SpeechMania System.....	9
C. The Claimed Inventions	10
D. West’s Accused System.....	13
II. JUDGE PFAELZER’S GRANT OF SUMMARY JUDGMENT	15
SUMMARY OF ARGUMENT	18
ARGUMENT	19
I. LEGAL STANDARD	19
II. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT THAT THE ’640, ’854, AND ’431 PATENTS WERE ANTICIPATED BY PUBLIC USE.....	20
A. The Undisputed Evidence Before The Trial Court Was Amply Corroborated And More Than Justifies That Court’s Ruling	20
1. Mr. Schmandt Is An Indisputably Qualified Expert Who Provided Proper Expert Testimony Resting Upon A Proper Foundation.....	21
2. Phoenix’s Questions Do Not Call Mr. Schmandt’s Reliability Into Doubt.....	24

3.	Eight Scholarly Papers Provide More Than Sufficient Corroboration for Mr. Schmandt’s Testimony	25
4.	Even If Mr. Schmandt’s Testimony Were Not Corroborated It Would Not Matter Because Expert Testimony Does Not Require Corroboration.....	31
5.	The SpeechMania System Provides An Independent Ground on Which to Affirm the Judgment.....	36
B.	The District Court Properly Held That the Real-Time Processing Elements of the ’431 Patent Do Not Render Them Novel and Nonobvious	39
III.	THE DISTRICT COURT CORRECTLY CONCLUDED THAT WEST’S SYSTEM DOES NOT INFRINGE THE ’846 PATENT.....	45
A.	West Does Not Generate “Representative Speech Data Values” Separate From “Speech Utterance Signals”	46
B.	The Possibility That West’s Software Could Be Altered To Make It Infringing Does Not Make It “Adapted to” Infringe	50
1.	VAD Does Not Generate “Representative Speech Data Values” That Are Separate From “Speech Utterance Signals”	50
2.	In Any Event, West’s CLASS Platform Is Not “Adapted to” Perform VAD.....	51
C.	The District Court’s Holding Regarding the ’846 Patent Can Be Sustained On Other Grounds.	57

1.	The CLASS Platform Is Not “Characterized By a First Data Content That Is Substantially Inadequate By Itself For Permitting Recognition of Words”	57
2.	West’s IVR System Does Not Use The “First Data Content” In The “Speech Data Values” To Recognize Speech.....	59
	CONCLUSION.....	61

CONFIDENTIAL MATERIAL OMITTED

The material omitted on pages 13-15, 51-53, 60-61 describes West Interactive Corp.’s (“West”) highly confidential CLASS platform product technology and the technology of third party Nuance.

TABLE OF AUTHORITIES

Cases

<i>Abbott Labs. v. Geneva Pharm., Inc.</i> , 182 F.3d 1315 (Fed. Cir. 1999)	30, 31
<i>Becton, Dickinson and Co. v. Tyco Healthcare Group, LP</i> , 616 F.3d 1249 (Fed. Cir. 2010)	47
<i>Berges v. Gottstein</i> , 618 F.2d 771 (C.C.P.A. 1980)	27
<i>Berry v. Webb</i> , 412 F.2d 261 (C.C.P.A. 1969)	27
<i>Bicon, Inc. v. Straumann Co.</i> , 441 F.3d 945 (Fed. Cir. 2006)	49
<i>Brown v. Barbacid</i> , 436 F.3d 1376 (Fed. Cir. 2006)	27, 28
<i>Clock Spring, L.P. v. Wrapmaster, Inc.</i> , 560 F.3d 1317 (Fed. Cir. 2009)	4, 36
<i>Cooper v. Goldfarb</i> , 154 F.3d 1321 (Fed. Cir. 1998)	27
<i>Cross Med. Prods., Inc. v. Medtronic Sofamor Danek, Inc.</i> , 424 F.3d 1293 (Fed. Cir. 2005)	19
<i>Diomed, Inc. v. AngioDynamics, Inc.</i> , 450 F.Supp.2d 130 (D. Mass. 2006)	22
<i>Electro Scientific Indus., Inc. v. General Scanning Inc.</i> , 247 F.3d 1341 (Fed. Cir. 2001)	47
<i>Engel Indus., Inc. v. Lockformer Co.</i> , 166 F.3d 1379 (Fed. Cir. 1999)	49
<i>Fantasy Sports Props., Inc. v. Sportsline.com, Inc.</i> , 287 F.3d 1108 (Fed. Cir. 2002)	54

Cases (Cont.)

<i>Finjan, Inc. v. Secure Computing Corp.</i> , 626 F.3d 1197 (Fed. Cir. 2010)	51, 53
<i>Finnigan Corp. v. International Trade Commission</i> , 180 F.3d 1354 (Fed. Cir. 1999)	32, 33, 34
<i>High Tech Medical Instrumentation v. New Image Industries, Inc.</i> , 49 F.3d 1551 (Fed. Cir. 1995)	54
<i>In re Jolley</i> , 308 F.3d 1317 (Fed. Cir. 2002)	27
<i>In re Reuter</i> , 670 F.2d 1015 (C.C.P.A. 1981).....	32, 33, 35
<i>Intel Corp. v. United States Int’l Trade Comm’n</i> , 946 F.2d 821 (Fed. Cir. 1991)	53
<i>Juicy Whip, Inc. v. Orange Bang, Inc.</i> , 292 F.3d 728 (Fed. Cir. 2002)	30
<i>Knorr v. Pearson</i> , 671 F.2d 1368 (C.C.P.A. 1982).....	28
<i>Koninklijke Philips Elecs. N.V. v. Cardiac Sci. Operating Co.</i> , 590 F.3d 1326 (Fed. Cir. 2010)	46
<i>Kridl v. McCormick</i> , 105 F.3d 1446 (Fed. Cir. 1997)	27
<i>Lacks Industries, Inc. v. McKechnie Vehicle Components USA, Inc.</i> , 322 F.3d 1335 (Fed. Cir. 2003)	32
<i>Lewmar Marine, Inc. v. Bariant, Inc.</i> , 827 F.2d 744 (Fed. Cir. 1987)	56
<i>Mas-Hamilton Group v. LaGard, Inc.</i> , 156 F.3d 1206 (Fed. Cir. 1998)	56
<i>Medichem, S.A. v. Rolabo, S.L.</i> , 437 F.3d 1157 (Fed. Cir. 2006)	27

Cases (Cont.)

<i>Microsoft Corp. v. i4i Ltd. P’ship</i> , 598 F.3d 831 (Fed. Cir. 2010), <i>cert. granted</i> , 131 S. Ct. 647 (Nov. 29, 2010).....	19
<i>Novosteel SA v. United States</i> , 284 F.3d 1261 (Fed. Cir. 2002)	47
<i>Phillips v. AWH Corp.</i> , 415 F.3d 1303 (Fed. Cir. 2005)	57
<i>Phoenix Solutions, Inc. v. Pacific Gas & Elec. Co.</i> , No. 2:09-cv-0774-MRP (SSx), (C.D. Cal. Aug. 26, 2009).....	15, 47
<i>Phoenix Solutions, Inc. v. The DirecTV Group, Inc.</i> , No. 2:08-cv-0984-MRP (SSx), 2009 U.S. Dist. LEXIS 114977, <i>aff’d</i> , 388 F. App’x 998 (Fed. Cir. 2010)	15
<i>Price v. Symsek</i> , 988 F.2d 1187 (Fed. Cir. 1993)	27, 32
<i>Renishaw PLC v. Marposs Societa’ per Azioni</i> , 158 F.3d 1243 (Fed. Cir. 1998)	41
<i>Safeclick, LLC v. Visa Int’l Serv. Ass’n</i> , 208 F. App’x 829 (Fed. Cir. 2006)	47
<i>Sage Prods., Inc. v. Devon Indus., Inc.</i> , 126 F.3d 1420 (Fed. Cir. 1997)	47
<i>Schumer v. Laboratory Computer Systems, Inc.</i> , 308 F.3d 1304 (Fed. Cir. 2002)	29, 32
<i>SIBIA Neurosciences, Inc. v. Cadus Pharm. Corp.</i> , 225 F.3d 1349 (Fed. Cir. 2000)	20
<i>Silicon Graphics, Inc. v. ATI Techs., Inc.</i> , 607 F.3d 784 (Fed. Cir. 2010)	53
<i>Stryker Corp. v. Davol Inc.</i> , 234 F.3d 1252 (Fed. Cir. 2000)	55

Cases (Cont.)

<i>Telemac Cellular Corp. v. Topp Telecom, Inc.</i> , 247 F.3d 1316 (Fed. Cir. 2001)	54
<i>Thomson, S.A. v. Quixote Corp.</i> , 166 F.3d 1172 (Fed. Cir. 1999)	28, 32, 33
<i>TypeRight Keyboard Corp. v. Microsoft Corp.</i> , 374 F.3d 1151 (Fed. Cir. 2004)	25, 34
<i>Unique Concepts, Inc. v. Brown</i> , 939 F.2d 1558 (Fed. Cir. 1991)	49
<i>United States v. Freeman</i> , 498 F.3d 893 (9th Cir. 2007)	22
<i>White v. Dunbar</i> , 119 U.S. 47 (1886).....	40
<i>Zenith Elecs. Corp. v. PDI Commc'n Sys.</i> , 522 F.3d 1348 (Fed. Cir. 2008)	19

Rules

Federal Circuit Rule 28(b)	1, 4
Federal Rule of Civil Procedure 56(e)(3)	12
Federal Rule of Civil Procedure 56(f)	46

Other Authorities

<i>Chambers Concise Dictionary</i> (1992)	41
<i>Webster's Ninth New Collegiate Dictionary</i> (1985)	41
<i>Webster's Third New International Dictionary</i> (1993).....	41

STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, counsel for Defendant-Appellee West Interactive Corporation certifies the following:

1. No other appeal from the same civil action or proceeding in the lower court or body was previously before this or any other appellate court.
2. The following case known to counsel to be pending in this or any other court that will directly affect, or be directly affected by, this Court's decision in the pending appeal: *Microsoft Corp. v. Phoenix Solutions, Inc.*, No. 2:10-cv-03846-MRP-SS (C.D. Cal.).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

West Interactive Corporation (“West”) disagrees with the statement of issues presented for review offered by Phoenix Solutions, Inc. (“Phoenix”). Federal Circuit Rule 28(b). The issues before the Court are:

1. Whether the district court erred in finding Massachusetts Institute of Technology’s (“MIT”) Galaxy system was in public use before the critical date.
2. Whether the unquestioned expertise of West’s expert, Mr. Schmandt, provided a sufficient foundation for his testimony regarding MIT’s Galaxy system, which he used, studied, and worked with at MIT.
3. Whether Mr. Schmandt’s expert testimony must be corroborated and, if so, whether the district court erred in finding Mr. Schmandt’s testimony adequately corroborated under this Court’s rule of reason test.
4. Whether the district court erred in finding that the word “when” in U.S. Patent No. 7,555,431 (“431 patent”) does not mean only “before.”
5. Whether the district court erred in holding that “speech utterance signals” and “speech data values” mean different things.
6. Whether the district court erred in holding that the accused West’s platform does not infringe where that platform would have to be altered to meet the limitations of the patents Phoenix asserts.

7. Whether the district court's order is properly affirmed on the independent ground that the accused West platform lacks other elements of the asserted claims of U.S. Patent No. 6,633,846 ("846 patent").

STATEMENT OF THE CASE

West disagrees with Phoenix's Statement of the Case in two respects. First, Phoenix's systems are not at issue here, only its patents. Second, as more fully described in the Statement of Facts, another prior use—SpeechMania—is at issue here because it provides independent support for the district court's order.

STATEMENT OF FACTS

I. SPEECH RECOGNITION TECHNOLOGY

The patents in suit relate to speech recognition technologies that allow people to pose spoken questions to computer systems and receive salient and correct answers. The patents in suit trace their priority to an application filed November 12, 1999; the critical date here is therefore November 12, 1998.

Speech recognition systems have existed for more than 30 years. In 1980 Christopher Schmandt, the MIT researcher on whose declaration the district court relied in part for its invalidity ruling, co-wrote a multi-modal speech recognition system called "Put That There." JA966 at ¶4. In 1985 MIT's Speech Interface Group, of which Mr. Schmandt was a member, developed The Conversational

Desktop, which could understand the spoken word well enough to take messages, place phone calls, read e-mails, and manage calendars. JA966-67 at ¶5.

One of the prior art systems, the SpeechMania system, included an Automatic Train Timetable demonstration, which provides an example of how such technologies work:

System: Good morning. This is the automatic timetable information service. From where to where do you want to go?

Caller: Good morning. I need a connection from Munich to Hamburg.

System: When would you like to go from Munich to Hamburg?

Caller: Next Saturday, er, at seven o'clock.

System: So you want to travel on Sunday the 19th of February at 7 am?

Caller: No, on Saturday.

System: So you want to travel on Saturday the 18th of February at 7 am?

Caller: Exactly.

System: There is the following connection: With IntercityExpress 682, departure from Munich at 7:20, arrival in Hamburg at 12:51. Would you like me to repeat the connection?

JA511-12.

Two prior art systems are relevant to this appeal. They are the Galaxy system, created at MIT and supported by the Spoken Language Systems program

of the Defense Advanced Research Projects Agency (DARPA), JA2556 at 30, and the SpeechMania system, a Philips system that had been supported by a European research project called SUNDIAL (Speech Understanding and DIALog), JA992.¹ The systems have many similarities but are relevant to different aspects of the district court's summary judgment order, so we summarize each here.

A. MIT'S Galaxy System

The Galaxy System is made up of components MIT developed between 1989 and 1997, a year before the critical date. As early as 1989, MIT's Spoken Language Systems ("SLS") group had developed a component called SUMMIT, which can recognize a user's continuous speech. JA968 at ¶9. SUMMIT takes advantage of constraints on how words may be combined, including what words would likely be spoken given the particular category of information requested, called a domain. JA972 at ¶21; JA 1101-05.

A separate component, called TINA, assists SUMMIT in this task. TINA was developed by the SLS in 1992. JA968 at ¶9. TINA attempts to understand what the words recognized by the SUMMIT recognition engine mean. To do so,

¹ Phoenix asserts that only the Galaxy prior art system is relevant to this appeal. That is not true. The SpeechMania system was in evidence before the trial court and provides independent support for its order. That order may be affirmed on any ground supported in the record. *Clock Spring, L.P. v. Wrapmaster, Inc.*, 560 F.3d 1317, 1324 (Fed. Cir. 2009). The SpeechMania system is therefore relevant to this appeal and is described here. *Cf.* Federal Circuit Rule 28(b) (appellee's statement of facts must be limited to specific areas of disagreement with the appellant).

TINA parses the words using information specific to a particular domain. JA972-73 at ¶¶22-23. If a user asks a question about the weather, for example, TINA is loaded with information in the weather domain; if the user asks about used cars TINA is loaded with information in the auto-classified domain. *Id.* TINA uses such topic-related information to generate the word constraints SUMMIT employs in recognizing speech. *Id.* If a user asked Galaxy about the weather, TINA would limit SUMMIT's recognition analysis to word sequences specific to weather. If a user asked about cars, TINA would limit SUMMIT's recognition analysis to word sequences specific to cars. *Id.* In this way, TINA allows SUMMIT to account for the fact that what words mean depends at least in part on what a user is talking about.

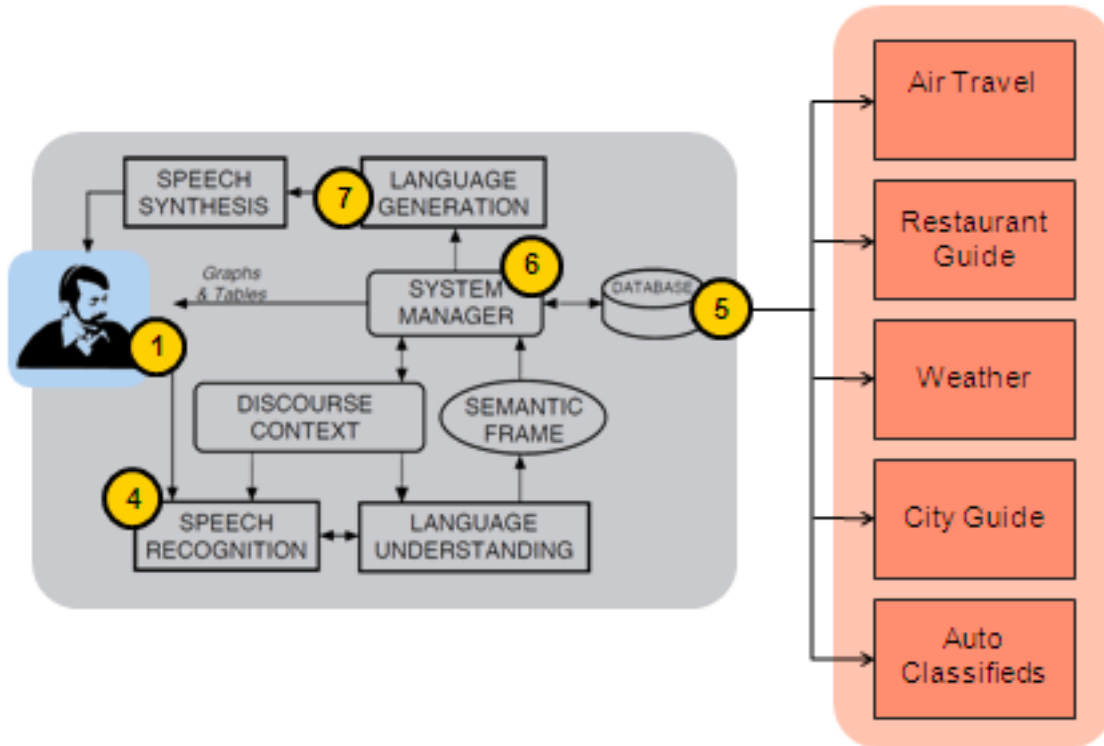
TINA also helps SUMMIT recognize the most semantically correct interpretation of a sentence. As SUMMIT starts to recognize words it generates partial sentences that are candidates for what the complete sentence will be. TINA examines the partial candidates SUMMIT has generated; based on what the speaker is talking about, TINA selects the most probable candidates for further analysis. The function reduces the work SUMMIT has to do to recognize speech by focusing its work on the most probable meanings as judged by the topic of a sentence. JA973 at ¶24. This function of TINA means that the Galaxy system

limits speech recognition based on a context that includes a user's prior speech and the domain of information implicated by that speech. *Id.*; JA990.

In the early days of SLS's work, SUMMIT and TINA served as the underlying components for systems directed to providing users particular types of information. A system called Voyager, for example, knew the streets of Cambridge, Massachusetts and hotels, restaurants, and banks in that area. Central elements of the Voyager system were imported from work done by Mr. Schmandt, the expert witness whose testimony Phoenix challenges in this appeal, in conjunction with one of his students. JA967 at ¶7; JA2562 at 20:11-15. At the same time, a system called Pegasus provided airline information, and a system called Jupiter provided international weather information. Each of these systems used its own database but similar core technologies—SUMMIT and TINA.

By 1994, MIT's SLS group began to develop an architecture called Galaxy.

A diagram reflecting the Galaxy architecture is reproduced below.²



This diagram shows that when a user called into the system (1), the user's voice signals would travel to a speech recognition component (4) to recognize the words in the user's speech. Information about what the caller had said previously was fed into this speech recognition component. The "discourse context" narrowed the speech recognition grammar used to recognize the user's words. Recognized words were passed to the language understanding component, which

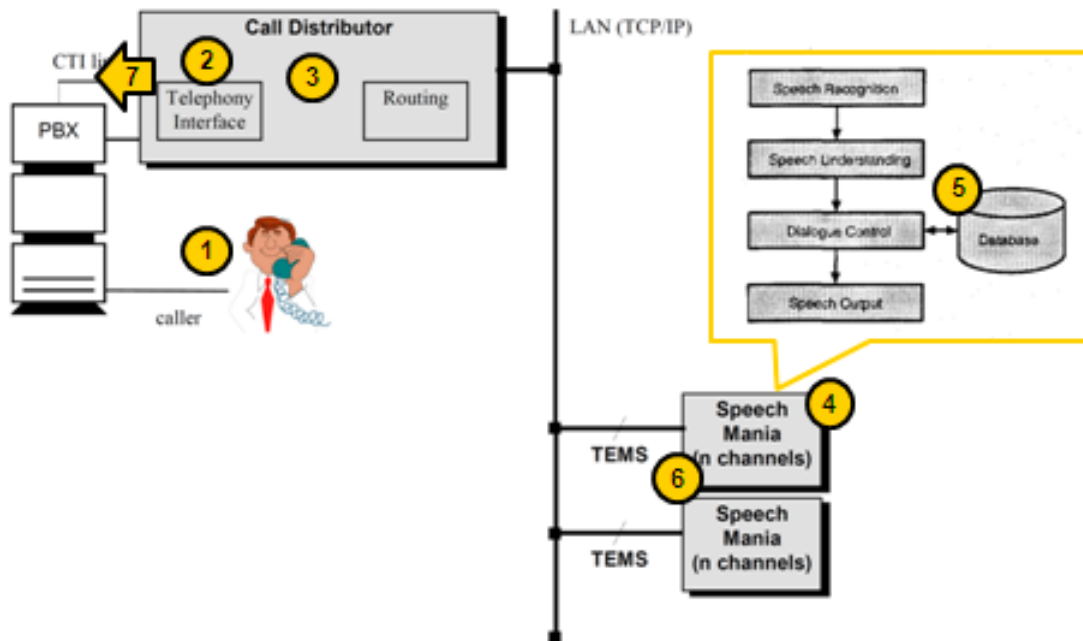
² JA990. The original diagram, published in 1994, is on the left. The numbers and list of specific topics (databases) reflect additional information regarding the Galaxy system contained in Mr. Schmandt's declaration. JA965-79.

would use the same discourse context to interpret the user's meaning. The system then sent that meaning to the System Manager, which would receive it and determine the appropriate next step. For example, the system might prompt the user for additional information or, if such a prompt were unnecessary, the system might query a database (5) for the information the user sought. The answer to the query would be returned to the System Manager (6), which would then relay to answer to the user in an audible form (7). JA970-71 at ¶¶16-19.

MIT operated Galaxy as an integrated “multi-domain” platform. The Galaxy system “could provide information to users on restaurants in Boston, air travel schedules, weather, city guide, and automobile classified ads—all using the same platform.” JA971 at ¶20. Published descriptions of the Galaxy system confirmed that within this platform users could move from one domain to another without interruption. JA1027 (“The user can freely move from one domain to another in the course of a single conversation.”).

B. The SpeechMania System

The SpeechMania system was developed with support from Europe's SUNDIAL project. The operation of the SpeechMania system is reflected in the following diagram:



JA123.

Similar to the Galaxy system described above, this diagram shows a user calling the system (1), and providing voice signals that were sent to a telephony interface that digitized the user's speech (2). This interface sent the resulting digital signals to the Call Distributor software (3), which could be enabled to detect voice activity and eliminate silence. The Call Distributor formatted the resulting signal and sent it to a SpeechMania server, without waiting for the user to stop speaking. The SpeechMania server analyzed the signal to understand what the

caller was saying (4), and returned to a dialog control application a result reflecting what the server understood the user to say. Using this understood meaning, the dialog control application determined the next step; if appropriate it generated a database query to answer a user's request (5). In that case a database would be queried and an answer would be returned to the SpeechMania server (6), to be relayed to the user (7). *See* JA488 at ¶9.

SpeechMania was sold by Philips Speech Processing (Philips). JA484 at ¶7. Philips offered the SpeechMania system for sale no later than February 1996, JA484, and evidence before the trial court documented two sales of the SpeechMania system in the United States before the critical date: one sale was to a company called Tele Direct and the other was to SBC. JA486 at ¶14. SpeechMania also was demonstrated in the United States on two occasions before the critical date, once by Lufthansa at a conference called SpeechTEK in New York in 1997, JA542, and once at the Comdex convention in Las Vegas in 1996. JA943, JA946.

C. The Claimed Inventions

Phoenix did not invent speech recognition and its patents do not claim speech recognition technology as such. The '846 patent, for example, identifies "classic papers" from the 1960s and 1970s that taught the principles of speech recognition, including the extraction of acoustic features from speech utterances.

JA1166, JA1171 at 3:34-67; 4:5-10; 14:1-21.³ Phoenix also did not invent technology to recognize continuous speech as opposed to individual words. JA1166 at 4:19-25. As shown above, such technology existed at MIT from at least 1989.

Nor did Phoenix invent a distributed approach to speech recognition, in which a client and server each perform specific operations. JA1167 at 5:1-62. Phoenix concedes that one prior art patent “describes the benefits that result from locating of the system for acoustic feature extraction at the portable or cellular phone,” and another prior art patent teaches “streaming of the acoustic parameters” from a client to a server, where additional speech recognition operations would take place. *Id.* at 5:33-35; 5:55-58. The prior art also teaches the use of Natural Language Processing (NLP), which (in contrast to word recognition) involves the parsing, understanding, and indexing of transcribed utterances and larger linguistic units.” *Id.* at 4:26-44; 5:44:62. As shown above, such technology (TINA) existed at MIT in 1992.

The process by which the claimed inventions were produced reflects these facts. Dr. Ian Bennett, the inventor on the patents in suit, did not invent the tools

³ The patents at issue are U.S. Patent Nos. 6,665,640 (“the ’640 patent”), JA1244-1301; 7,277,854 (“the ’854 patent”), JA1188-1243; the ’431 patent, JA1302-81; and the ’846 patent, JA1131-86.

necessary to create the claimed system. JA1585-86 at 119:24-120:9.⁴ For example, after considering Dragon Speaking Naturally, a consumer product available for \$99, JA1580-81 at 114:6-15; 115:15-24, Dr. Bennett chose to license prior art speech recognition technology from a company called Entropic. JA1615. Dr. Bennett also sought and received technical advice from Entropic, which he implemented. *Id.* This advice extended to implementation of the client server architecture described in the patents in suit. JA1616 at 150:22-25 (describing issues on which he sought assistance as “[b]asically getting it to work”).

At his deposition Mr. Bennett was unfamiliar with basic aspects of the inventions he claims. He was, for example, unable to say whether each of inventions relevant here include natural language functionality. JA1669-70 at 203:16-204:11. He was similarly unable to say whether Claim 1 of the ’640 patent is directed to a file of questions that are matched with answers, JA1683-84 at

⁴ The description of Dr. Bennett and his work contained in Phoenix’s opening brief cites Phoenix’s complaint, not any evidence before the trial court. Just as citations to a complaint are insufficient to defeat summary judgment, Federal Rule of Civil Procedure 56(e)(3), those citations are entitled to no weight here. As the discussion and citations cited here reveal, the evidence presents a very different picture than is contained in Phoenix’s brief.

217:20-218:2, or whether the remote speech capturing system referenced in that claim is limited to a system that uses an IP protocol. JA1693-94 at 227:9-228:4.⁵

D. West's Accused System

Phoenix accuses West's CLASS Platform of infringing Claims 1 and 34 of the '846 patent. JA2601-02 at 1:24-2:8. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁵At his deposition in a related case (which the parties stipulated to treat as admissible in this case), Dr. Bennett confirmed that he had never published a paper in any journal on speech recognition, JA1499 at 21-24, and, unless his thesis is counted, never published an article on natural language processing. JA1499-1500 at 33:21-34:9. When asked to explain what he understood natural language processing to mean (and why his thesis might relate to it), Dr. Bennett was either unable or unwilling to do so. JA1500-04 at 34:24-38:15. At his deposition Dr. Bennett displayed limited or no familiarity with basic principles of speech recognition or natural language processing. *E.g.* JA1609 at 143:13-22 (unable to define "stemming"); JA1610 at 144:14-19 (unable to define "tokenization").

⁶Nuance is a company spun out from the Stanford Research Institute. JA 203; Geck ¶7. Nuance has sold speech recognition software since it was established in 1994. *Id.*

[REDACTED]

[REDACTED]

JA3228 at ¶3.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁷ In the accused CLASS platform, the software “recognition client” and “recognition server” are not located on separate client and server devices (unlike version 6.0, which formed the basis for West’s invalidity motion). JA3229 at ¶6. Instead, functions previously performed by the recognition client were combined into the Nuance speech recognition software run on the Nuance MRCP Speech Recognition Server (also called the “host”). *Id.*

II. JUDGE PFAELZER'S GRANT OF SUMMARY JUDGMENT

Both parties moved for summary judgment on various aspects of the case. The motions were heard by Judge Mariana R. Pfaelzer of the Central District of California, one of the most respected patent trial judges in the country.⁸ Judge Pfaelzer held that the Galaxy system described above was in public use more than a year before the filing date of the '640, '854, and '431 patents and anticipated the asserted claims of those patents. Accordingly, she found it unnecessary to decide whether those claims were also anticipated by the SpeechMania system also in public use at that time.

Phoenix raised the same credibility and corroboration arguments it makes here before the district court, and Judge Pfaelzer rejected each of those. She also

⁸ Judge Pfaelzer is no stranger to patent litigation by Phoenix, having granted summary judgment of noninfringement of four different Phoenix patents in *Phoenix Solutions, Inc. v. The DirecTV Group, Inc.*, No. 2:08-cv-0984-MRP (SSx), 2009 U.S. Dist. LEXIS 114977, at *28-30 (C.D. Cal. Nov. 23, 2009), *aff'd*, 388 F. App'x 998 (Fed. Cir. 2010), JA3905-42, and having construed the claims of the '846 patent in *Phoenix Solutions, Inc. v. Pacific Gas & Elec. Co.*, No. 2:09-cv-0774-MRP (SSx), slip op. at 13 (C.D. Cal. Aug. 26, 2009) (Docket No. 34), JA3943-61.

relied upon a number of articles that documented various individual features of the Galaxy system and that corroborated Schmandt's testimony about that system.⁹ And she noted that "Phoenix does not present any evidence of its own to demonstrate that there is a genuine issue of material fact with respect to any of the asserted patent claims," JA9, meaning the only question is whether West presented sufficient evidence to demonstrate the existence and characteristics of the prior art systems.

With respect to the '431 patent, Phoenix argued that patent Claims 1 and 9 required that a domain-specific speech context (such as weather or travel) be preloaded into the system so that the speech could be processed in real time, and that the Galaxy system did not preload the speech-recognition grammar. In fact, however, as Judge Pfaelzer recognized, the claims do not require preloading, but instead require that the application program operate "at a time when said speaker provides said speech based query." JA1242, Claim 1. Judge Pfaelzer rejected Phoenix's attempt to redefine "when" in Claim 1 as meaning "before." She found that both testimony and documentary evidence supported "the Galaxy system's ability to load a grammar for context." JA18.

⁹ Judge Pfaelzer also rejected a laundry list of other objections Phoenix made that were specific to each of the patents. With one exception, discussed below, Phoenix has abandoned those arguments on appeal and we do not discuss their resolution further here.

Finally, Judge Pfaelzer rejected Phoenix’s motion for summary judgment of infringement of the asserted claims of the ’846 patent, and granted West’s cross-motion for summary judgment of noninfringement.¹⁰ The central issue before Judge Pfaelzer was whether West’s system generated “representative speech data values” by using Voice Activity Detection (VAD). She rejected Phoenix’s argument on multiple grounds: “[b]ecause VAD does not produce representative speech data values, because the West CLASS platform does not perform VAD, and because the mere capability of being modified to perform VAD would not support infringement, the Court **GRANTS** summary judgment of noninfringement.” JA7 (emphasis in original).

Because she granted summary judgment of noninfringement on this ground, Judge Pfaelzer did not reach either West’s other noninfringement arguments or West’s motion for summary judgment of invalidity of the ’846 patent. She did, however, hint that if Phoenix had succeeded in reading its claims to cover the mere capability of modifying software, that broader construction would render those claims invalid. JA7-8 (“The Court does, however, note that had it canvassed the invalidity arguments, it would have been required to give the same interpretation to the claims for the purposes of both the infringement and invalidity analyses.”).

¹⁰ While Judge Pfaelzer characterized her grant of summary judgment for West as “sua sponte,” JA7, West had in fact indicated in its briefing papers that summary judgment of noninfringement was appropriate. JA2957.

SUMMARY OF ARGUMENT

Phoenix argues that MIT's Galaxy voice system was a group of individual technologies that never cohered into one system and therefore did not anticipate the '640, '854, and '431 patents. Phoenix does not argue that the district court improperly resolved factual conflicts on this issue because there were no conflicts. On the issues relevant here, Phoenix presented no evidence of its own. Phoenix instead argues that the district court erred because the evidence it did not dispute was not strong enough to justify judgment against it.

Phoenix is wrong. Summary judgment cannot be defeated by rhetorical questions and "what if" conjectures. It takes facts to fight facts, and Phoenix offered none. The testimony of West's expert, Mr. Schmandt, required little if any corroboration, and corroboration was amply supplied by the scholarly publications he cited. Judge Pfaelzer correctly concluded that West had sustained its burden of proving public use of the anticipatory system.

Next, Phoenix tries to salvage one of those patents, the '431, by arguing that the Galaxy system operated differently than the system Phoenix claims. To make that claim, Phoenix proffers a bizarre construction of term "when" – that the term can mean only "before." Judge Pfaelzer properly rejected this construction, which is contrary to the ordinary meaning of the term "when," finds no support in the

language of the specification, and makes no sense in the context of the patent claim.

Finally, Phoenix challenges Judge Pfaelzer's ruling that West does not infringe the '846 patent because West's system lacks critical claim elements. Judge Pfaelzer correctly concluded that a patent claim that required a system "adapted to" perform a specific function was not infringed by a system that could not perform that function unless a third party substantially rewrote the code of the West system to make it infringe. And even if that conclusion were mistaken, the record demonstrates that West's system does not infringe the asserted claims of the '846 patent for other reasons.

ARGUMENT

I. LEGAL STANDARD

The grant of summary judgment is reviewed *de novo*. *Zenith Elecs. Corp. v. PDI Commc'n Sys.*, 522 F.3d 1348, 1357 (Fed. Cir. 2008).

Phoenix bears the ultimate burden of proving infringement by a preponderance of the evidence. *Cross Med. Prods., Inc. v. Medtronic Sofamor Danek, Inc.*, 424 F.3d 1293, 1310 (Fed. Cir. 2005). Because the district court relied in part on evidence not before the PTO, the burden of proving anticipation is a matter of some uncertainty at this writing. *See Microsoft Corp. v. i4i Ltd. P'ship*, 598 F.3d 831 (Fed. Cir. 2010), *cert. granted*, 131 S. Ct. 647 (Nov. 29, 2010) (No.

10-290) (granting certiorari to consider the question). Judge Pfaelzer granted summary judgment applying the higher “clear and convincing evidence” standard. JA17-18. Should the Supreme Court conclude that a lower standard, such as “preponderance of the evidence,” applies to prior art not considered by the PTO, this Court should apply that lower standard to the anticipation issues here because the court’s finding of anticipation was based in part on evidence not before the PTO. Even under the clear and convincing evidence standard, the burden of showing invalidity “may be more easily carried” where references not before the PTO are shown. *SIBIA Neurosciences, Inc. v. Cadus Pharm. Corp.*, 225 F.3d 1349, 1355-56 (Fed. Cir. 2000).

II. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT THAT THE ’640, ’854, AND ’431 PATENTS WERE ANTICIPATED BY PUBLIC USE

A. The Undisputed Evidence Before The Trial Court Was Amply Corroborated And More Than Justifies That Court’s Ruling

West presented the trial court with testimony from an expert witness whose expertise was unchallenged and who also had percipient experience with a system that was funded by DARPA, developed at MIT, widely publicized among scholars, and made available to the public through an “800” number. To the extent his testimony called for corroboration, the numerous publications describing the system relied on by the trial court more than satisfy the rule established by this Court’s cases.

1. Mr. Schmandt Is An Indisputably Qualified Expert Who Provided Proper Expert Testimony Resting Upon A Proper Foundation

Mr. Schmandt is the Director of the Speech + Mobility Group (formerly known as the Speech Interface Group) and a Principal Research Scientist at the M.I.T. Media Laboratory. JA966 at ¶3. He has been a principal research scientist at M.I.T. since 1985. JA 981. He is a computer systems architect, JA967 at ¶7, and he has written or co-authored over 60 scholarly papers. JA982-86. Phoenix did not and does not challenge Mr. Schmandt’s qualifications as an expert.

As detailed above, Mr. Schmandt’s testimony showed that “[u]sing the Galaxy architecture, by 1997, SLS provided a test speech-enabled interactive voice response (“IVR”) system.” JA969 at ¶12. The district court found this testimony persuasive and further found that “taken as a whole and evaluated under the rule of reason, the Court finds that Schmandt has provided ample articles and papers that corroborate his testimony.” JA12, lines 1-3. The district court pointedly noted “Phoenix has not countered West’s evidence with any facts to the contrary.” *Id.*, line 15.

Phoenix concedes that Mr. Schmandt may offer expert opinion regarding scholarly articles describing Galaxy but contends that whether Galaxy was an operational IVR system in 1997 “is an assertion of fact” and thus not a subject for

expert opinion – and that Mr. Schmandt “cannot competently testify as a percipient witness” to confirm it. App. Br. at 24.

Phoenix’s concession is right but its assertion is wrong. Mr. Schmandt explained in detail how published scholarly papers established that the Galaxy system both was in use in 1997 and met each element of the ’640, ’854, and ’431 patents. His unchallenged expertise is an independent and sufficient basis for that testimony. In addition, Mr. Schmandt’s expert testimony was reinforced by testimony regarding his extensive personal experience with the Galaxy system. That fact strengthens his expert testimony rather than detracting from it, as Galaxy wrongly implies. *Cf. United States v. Freeman*, 498 F.3d 893 (9th Cir. 2007) (finding it proper for case agent to testify both as an expert on drug trade jargon and as fact witness); *Diomed, Inc. v. AngioDynamics, Inc.*, 450 F.Supp.2d 130, 135-38 (D. Mass. 2006) (holding that one of the inventors of a patent in suit could testify as an expert witness as well as a fact witness).

Phoenix asserts that Mr. Schmandt’s testimony regarding his personal experience with Galaxy lacks foundation, App. Br. at 24, but that assertion is wrong. The record shows four bases for Mr. Schmandt’s personal knowledge of the Galaxy system. First, he used the system:

Q Did you ever test the Galaxy system?

A I’m not sure what you mean by “test.” I’ve used the Galaxy system.

JA2564 at 28:4-6.¹¹ Accord JA2568-69 at 63:21-64:6; JA2581 at 13-14. Phoenix asked Mr. Schmandt questions specifically naming particular components of the Galaxy system, such as Pegasus and Jupiter, and Phoenix directs the Court to the answers to those questions, skipping over or working around more general testimony about the system as a whole. Those answers do not detract from Mr. Schmandt's testimony regarding the Galaxy system itself, and they provide no basis for questioning the foundation for Mr. Schmandt's testimony.

Second, Mr. Schmandt's lab and Galaxy's developers both receive funding from Bell South. Mr. Schmandt worked with Bell South to port Galaxy to Bell South's yellow pages environment. JA2562-63 at 20:23-21:3. Thus, he not only used the system but worked with it.

¹¹ Phoenix's brief directs the Court to the question and answer following this testimony, which pertained to Dr. Schmandt's *first* use of Galaxy, which involved an early system element, but does not refer to this testimony. Similarly, Phoenix cites Mr. Schmandt's answer to a question specifically aimed at the Pegasus element of the Galaxy system but does not direct the Court to previous testimony on the same page:

- A The question is when did they call it "Galaxy." But I believe that I had used a system which they were calling "Galaxy" -- my belief is that they were calling it "Galaxy" at the time in their laboratory in the mid-1990s.
- Q Okay. So we're talking about using it in the MIT lab in the mid-1990s?
- A That is correct.
- Q Is that correct?
- A Yes.

JA2569 at 64:2-11.

Third, Mr. Schmandt followed the development of the Spoken Language Systems group that developed Galaxy: Mr. Schmandt attended lectures, seminars, and thesis defenses from students in the group. He used SLS publications in his own seminars on conversational systems. JA967 at ¶7. He was accordingly familiar with the system as an academic keeping up with developments in his field.

Fourth, together with a student Mr. Schmandt wrote software that was imported into one element of the Galaxy System. JA967 at ¶6; JA2562 at 20:11-15. Phoenix says literally nothing about these elements of foundation. Its failure to do so reveals its objection to Schmandt's testimony as a merits argument in thin disguise, and one that is unsupported by the law.

2. Phoenix's Questions Do Not Call Mr. Schmandt's Reliability Into Doubt

Phoenix questions Mr. Schmandt's testimony in various ways: Did he access Voyager through a telephone or microphone? Why didn't he cite Galaxy in one of his own patent applications? Does he remember a specific time the Jupiter element was open for public use (other than the May 1997 date specified in an SLS article)? App. Br. at 33-34. Phoenix did the same in the district court, which rightly noted "Phoenix has not explained how the details that Schmandt apparently cannot recall are significant." JA11, line 10. Even in the face of such direct criticism from the district court, Phoenix offers no explanation here, either.

Phoenix's fervid questioning is not itself sufficient to withstand summary judgment because it misconceives the summary judgment standard. Phoenix submitted no evidence of its own contradicting Mr. Schmandt's testimony. The district court rightly faulted Phoenix for this failure, and *TypeRight Keyboard Corp. v. Microsoft Corp.*, 374 F.3d 1151, 1158-59 (Fed. Cir. 2004), holds that this failure compels affirmation of the district court's order.

Summary judgment should not be denied simply because the opposing party asserts that the movant's witnesses are not to be believed. However, summary judgment is not appropriate where the opposing party offers specific facts that call into question the credibility of the movant's witnesses.

374 F.3d at 1158 (emphasis added). Phoenix offers no such facts here.

3. Eight Scholarly Papers Provide More Than Sufficient Corroboration for Mr. Schmandt's Testimony

Phoenix's many quibbles with Mr. Schmandt's testimony aim at one statement: that by 1997 Galaxy was a multi-domain speech-enabled IVR system. JA969 at ¶12. This aspect of Mr. Schmandt's testimony was corroborated by two scholarly papers. The first, published in 1997 by Victor Zue, head of the SLS laboratory at M.I.T., described Galaxy as a distributed architecture system:

In 1994, researchers at MIT started the development of GALAXY an architecture that enables universal information access using spoken dialogue. GALAXY distinguishes itself *from other conversational systems* in several respects. First, it is distributed and decentralized—GALAXY uses client-server architecture to allow sharing of computationally expensive processes (such as large vocabulary speech recognition), as well as knowledge intensive processes. Second, *it is*

multi-domain, intended to provide access to a wide variety of information sources and services while insulating the user from the details of database location and format. It is presently connected to many real, on-line databases, including the National Weather Services, the NYNEX Electronic Yellow Pages, and the World Wide Web. Users can query GALAXY in natural English . . . and receive verbal and visual responses. Third, it is extensible; new knowledge domain servers can be added to the system incrementally. Finally, GALAXY is mobile, it can be launched anywhere in the world using an ordinary Web browser for display and a telephone for speech input/output.

JA992-93 (emphasis added). *See also* JA998-1002 (additional article documenting Galaxy architecture). The second paper, entitled *Porting the Galaxy System to Mandarin Chinese*, confirmed that when using Galaxy “[t]he user can freely move from one domain to another in the course of a single conversation.” JA1027.

Phoenix never explains why these papers do not adequately corroborate the aspect of Mr. Schmandt’s testimony Phoenix challenges. Phoenix asserts that no article describes Galaxy as a single system but offers no explanation for how a system that indisputably allows users to move among domains during a single continuous conversation could be anything else. No such explanation exists. And it defies belief that someone would publish a paper entitled “Porting the Galaxy System to Mandarin Chinese” if there was, as Phoenix claims, no such system at all.

Even if this aspect of Mr. Schmandt’s testimony had not been confirmed by two independent sources, Phoenix’s criticisms would still be unsound because the

corroboration doctrine employs a rule of reason analysis that asks only whether Mr. Schmandt's testimony is credible. *Kridl v. McCormick*, 105 F.3d 1446, 1450 (Fed. Cir. 1997) (purpose of analysis is "to determine whether the inventor's testimony is credible"); *Price v. Symsek*, 988 F.2d 1187, 1195 (Fed. Cir. 1993) (purpose of rule requiring consideration of all evidence is to ensure "a sound determination of the credibility of the inventor's story may be reached"); *Cooper v. Goldfarb*, 154 F.3d 1321, 1331 (Fed. Cir. 1998) ("each corroboration case must be decided on its own facts with a view to deciding whether the evidence as a whole is persuasive") quoting *Berges v. Gottstein*, 618 F.2d 771 (C.C.P.A. 1980).¹²

Credibility is determined by taking the evidence as a whole, not by checking off boxes next to each paragraph or answer. *Brown v. Barbacid*, 436 F.3d 1376, 1380 (Fed. Cir. 2006) ("corroboration of every factual issue contested by the parties is not a requirement of law") quoting *In re Jolley*, 308 F.3d 1317, 1328 (Fed. Cir. 2002); *Cooper*, 154 F.3d at 1330 ("In order to corroborate a reduction to practice, it is not necessary to produce an actual over-the-shoulder observer.

Rather, sufficient circumstantial evidence of an independent nature can satisfy the

¹² As used in the corroboration cases, credibility is not an abstract concept to be analyzed through subtle assessments of precise degrees of credibility. It refers to whether testimony is likely to mislead a fact finder. *Medichem, S.A. v. Rolabo, S.L.*, 437 F.3d 1157, 1170 (Fed. Cir. 2006) ("Credibility concerns undergird the corroboration requirement, the purpose of which is to prevent fraud"); *Kridl*, 105 F.3d at 1450; *Berry v. Webb*, 412 F.2d 261, 267 (C.C.P.A. 1969) ("The purpose of the rule requiring corroboration is to prevent fraud").

corroboration requirement”); *Knorr v. Pearson*, 671 F.2d 1368, 1373 (C.C.P.A. 1982) (same).

Phoenix argues that *Brown* is distinguishable from this case because the evidence in *Brown* was so strong. App. Br. at 39. Phoenix misunderstands the law of corroboration. The evidence in *Brown* was from an inventor, his lab technician, and their notebooks. That is the kind of self-interested evidence most susceptible to bias and thus in greatest need of corroboration. *Cf. Thomson, S.A. v. Quixote Corp.*, 166 F.3d 1172, 1176 (Fed. Cir. 1999) (requiring corroboration only of inventor, not expert, testimony). That an inventor’s testimony can be corroborated by his subordinate and their work product shows that the unquestionably independent evidence supporting Mr. Schmandt’s unbiased testimony more than satisfies that requirement.

Phoenix also asserts that Mr. Schmandt’s testimony is conclusory. App. Br. at 41. Not so. Phoenix itself can point to no claim limitation not anticipated by the Galaxy system. JA1463-64 (Phoenix Rebuttal Invalidity Contentions regarding Galaxy). Unlike the testimony in *Schumer v. Laboratory Computer Systems, Inc.*, 308 F.3d 1304, 1316-17 (Fed. Cir. 2002), which Phoenix cites, Mr. Schmandt walks through the Galaxy system in painstaking detail and grounds each component and claim in the relevant literature. He explains the general architecture, JA969-72 at ¶¶14-20, the speech recognition component, JA971-74 at

¶¶21-25, the natural language component, JA974-76 at ¶¶26-36, and the dialog control and database access components. JA976-79 at ¶¶37-45. Some might consider the testimony a tough slog; conclusory it is not.

Phoenix also asserts that separate systems cannot be combined to show anticipation. App. Br. at 41. The evidence recounted above shows that the elements of the Galaxy system were integrated into a single system. That integrated system is what Mr. Schmandt used, and that is how the literature described it. The district court cited the corroborating articles quoted above. JA13, lines 24-28. Phoenix makes no effort to explain why the district court erred in concluding that they corroborated Mr. Schmandt's testimony on the point Phoenix disputes. Phoenix's failure to provide such an explanation, and even more importantly its failure to produce facts supporting its assertions, supports the district court's decision to credit Mr. Schmandt's testimony. *Cf.* JA9, lines 10-17; JA12, lines 15-25 (noting that Phoenix failed to introduce responsive evidence).

Phoenix similarly argues that different systems may not be combined to provide a missing limitation, but not even Phoenix contended that the Galaxy system failed to meet any relevant limitation. JA1463-64 (Phoenix Rebuttal Invalidity Contentions regarding Galaxy). Nor is West impermissibly cobbling together references from different sources, as Phoenix asserts. App. Br. at 41. Galaxy demonstrates anticipation by use, not by printed publication. Multiple

sources may be used to confirm use. *See, e.g., Abbott Labs. v. Geneva Pharm., Inc.*, 182 F.3d 1315, 1317 & n.2 (Fed. Cir. 1999) (samples from various lots of a patented compound used to establish public use).

Phoenix also asserts that public use must be independently corroborated. App. Br. at 41. Galaxy's public use is amply documented. Mr. Schmandt testified that "[t]he system was available at various times over a telephone. So as long as you could dial a U.S. telephone number, you could talk to the system." JA2566 at 1-2. By May 1997 MIT provided toll-free numbers to call the system, which were documented in Mr. Schmandt's declaration, JA968-69 at ¶12, and in the article published by Mr. Zue. JA993. Mr. Zue confirmed that by May 1997 MIT had received nearly 1,500 calls. *Id.*¹³ Such use is unsurprising; because the calls helped MIT researchers refine their algorithms, they had every reason to promote use of the system. JA2573 at 84:11-15.¹⁴

Finally, Phoenix complains that the district court considered corroborating evidence published three weeks after the critical date. App. Br. at 46. Phoenix

¹³ Mr. Zue similarly confirmed that Galaxy "can be launched from anywhere in the world using an ordinary Web browser for display and a telephone for speech input/output." JA993.

¹⁴ This case is therefore unlike *Juicy Whip, Inc. v. Orange Bang, Inc.*, 292 F.3d 728, 738 (Fed. Cir. 2002), in which the court found that "the record lacks substantial evidence regarding at least one limitation of each asserted claim." As noted above, not even Phoenix contends the Galaxy system failed to anticipate all relevant limitations, and the published evidence of use therefore renders *Juicy Whip* irrelevant.

cites no authority holding that all corroborating evidence must be contemporaneous with use, however, and no such requirement exists. *See, e.g., Abbott Labs.*, 182 F.3d at 1317 & n.2 (Fed. Cir. 1999) (relying on tests performed after the critical date to establish use before the critical date). The article in question in any event discussed Galaxy’s continuous speech recognition capability and improvements to it. JA1101-05. That capability was independently confirmed by two 1994 publications, JA1102 (Galaxy human language interface ran in “near real time” four years before critical date), JA1109 (discussion under the heading “continuous speech recognition”), and by Mr. Schmandt’s testimony regarding his personal use of Galaxy. JA2581, lines 13-14 (“I know that it was real time, because I used it, okay?”). The district court did not err in considering an additional piece of evidence, itself confirmed three times, which it properly understood to corroborate Mr. Schmandt’s testimony rather than to constitute an invalidating publication. JA11.

4. Even If Mr. Schmandt’s Testimony Were Not Corroborated It Would Not Matter Because Expert Testimony Does Not Require Corroboration

Had Mr. Schmandt never personally encountered the Galaxy system his testimony still would be admissible as expert testimony explaining what the scholarly literature means in relation to Phoenix’s patents. Such testimony

properly requires no corroboration beyond the articles themselves, which were as available to Phoenix as to Mr. Schmandt.

This Court has held that corroboration is required “only when the testifying inventor is asserting a claim of derivation or priority of his or her invention and” has a stake in the case. *Thomson, S.A.*, 166 F.3d at 1176. Mr. Schmandt is not a testifying inventor, and this Court’s predecessor held that “the statement of an expert’s opinion set forth in an affidavit need not be corroborated.” *In re Reuter*, 670 F.2d 1015, 1021 (C.C.P.A. 1981).

Finnigan Corp. v. International Trade Commission, 180 F.3d 1354, 1367 (Fed. Cir. 1999), does hold that the testimony of any single witness providing evidence of invalidity under Section 102 must be corroborated, and some later cases repeat this language.¹⁵ Even after *Finnigan*, however, in *Schumer*, 308 F.3d at 1316 (Fed. Cir. 2002), and *Lacks Industries, Inc. v. McKechnie Vehicle Components USA, Inc.*, 322 F.3d 1335, 1349-50 (Fed. Cir. 2003), this Court described the corroboration requirement as extending only to testimony by an interested party. 322 F.3d at 1350 (“oral testimony by interested parties must be corroborated by documentary testimony”); 308 F.3d at 1316 (corroboration is

¹⁵ *Finnigan* relied for its holding on *Price v. Symsek*, 988 F.2d 1187, 1194 (Fed. Cir. 1993), a case involving inventor testimony that held “an *inventor’s* testimony, standing alone, is insufficient to prove conception—some form of corroboration must be shown.” (emphasis added).

required “if the testimony relates to prior invention and is from an interested party. . . .”).

Reuter makes clear that expert testimony is not considered interested testimony for purposes of corroboration analysis. *Reuter* dealt with an expert who, like Mr. Schmandt, also was a percipient witness. Unlike Mr. Schmandt, however, the witness in *Reuter* was an inventor testifying about his own inventions. 670 F.3d at 1021. The C.C.P.A. held that the witness’s statements about his own work required corroboration but that his “factual statement regarding the state of the art, known to him in his capacity as an expert . . . absent any contrary evidence, is entitled to full consideration.” *Id.* at 1023.

Like the patentee in *Reuter*, Phoenix here presented no evidence contradicting Mr. Schmandt’s testimony. Absent such evidence, even assuming the corroboration requirement applies to experts in light of *Finnigan* there is no reason to discount Mr. Schmandt’s testimony. Indeed, *Finnigan* distinguished *Thomson* on the ground that in *Thomson* the record contained corroboration, much of which came from an expert witness. *Finnigan*, 180 F.3d at 1368 (quoting *Thomson* noting corroboration from “an expert’s report and portions of his deposition testimony. . . ; the expert’s exhibits; and certain. . . documents that the expert had reviewed” (citation omitted)). If expert testimony were suspect this

aspect of *Finnigan* would make no sense—suspect testimony is not corroborated by more suspect testimony.

Phoenix asserts that *TypeRight Keyboard*, 374 F.3d at 1158-59, shows that Mr. Schmandt counts as an interested witness, but the case does not support that claim. The paid witnesses in that case were fact witnesses who testified that an undated document found in a folder of 1990 materials was similar to or looked like a document they had seen in 1986, even though the author of the document submitted patent applications that would have been improper had the document actually dated to 1986. *Id.* at 374 F.3d at 1158. Of the six reasons the court found to question the testimony, the sixth was that “as fact witnesses (*not as experts*),” the witnesses were paid for their time and one of them previously had served as a paid consultant to the party who hired him. *Id.* (emphasis added). The facial implausibility of the testimony and the court’s distinction between fact and expert witnesses show that Phoenix can draw no support from *TypeRight Keyboard*.

Phoenix also asserts that Mr. Schmandt’s testimony is somehow suspect because West did not present evidence from Mr. Zue, or from researchers who worked more directly on Galaxy. App. Br. at 26. The assertion is a *non sequitur*—that SLS researchers might have knowledge in no way implies that Mr. Schmandt does not—and it gets corroboration law backwards. If West had presented testimony from Mr. Zue, Phoenix would now be denouncing that

testimony as the self-interested proclamations of an inventor, precisely the sort of evidence the corroboration requirement guards against.

Phoenix's corroboration argument is in fact a Catch-22 game: Experts are unreliable because they are not inventors, and inventors are unreliable because they are self-interested. Nothing prevented Phoenix from obtaining evidence from Mr. Zue or members of his team. If Phoenix really thought such witnesses would have favorable information Phoenix would have obtained it. It didn't. Phoenix's assertion should be rejected because it is illogical and because it perverts this Court's corroboration precedents.

Finally, Mr. Schmandt's testimony requires little if any corroboration because he is a longtime senior researcher at one of the world's major research universities testifying about publicly funded work conducted at that university and widely publicized in both the academic and business worlds. JA2566 at 30: 8-25. These facts are material to two of eight factors sometimes used to apply the rule of reason by which corroboration is judged. *Reuter*, 670 F.2d at 1021 n.9. Factor seven in this list asks whether the prior use is probable given the state of the art at the time. It is no surprise to find that a longstanding DARPA/MIT project anticipated Phoenix's claims.

Factor eight in this list asks about the impact of the invention on the industry and its commercial success. Phoenix introduced no evidence that its claimed

inventions have changed anything, and Mr. Bennett acknowledges that he searched the web and found sites for companies doing work similar to that he claims.

JA1663-64; JA1666-68.¹⁶ That fact is unsurprising as well, given the prominence and availability of alternative systems.

A stringent corroboration requirement makes sense when an obscure inventor drops in out of nowhere to assert he or she created the invention in suit. This is not that case. Notwithstanding the highly public nature of the work and ample opportunity to do so, Phoenix presented no contrary evidence regarding the existence or capabilities of the Galaxy system. If such evidence existed, Phoenix would have found and presented it. Its failure to do so confirms that there is nothing surprising about Mr. Schmandt's testimony that calls for corroboration.

5. The SpeechMania System Provides An Independent Ground on Which to Affirm the Judgment

It is axiomatic that the judgment of a district court may be affirmed on any ground supported in the record. *Clock Spring, L.P.*, 560 F.3d at 1324. In this case, Judge Pfaelzer did not find it necessary to determine whether the SpeechMania system also anticipated the '640, '854, and '431 patents because anticipation by the

¹⁶ Mr. Schmandt's testimony easily passes muster under the balance of the other factors as well. Mr. Schmandt's relationship with the Galaxy system and its creators is that of a user and an informed observer (factors 1 and 6). Though Mr. Schmandt's testimony was given well after 1997 he was a user and informed observer throughout the relevant time (factor two). He has no interest in the case, there was no contradiction or impeachment of his testimony, and that testimony was corroborated by detailed scholarly publications (factors 3-5).

Galaxy system was so clear. But the evidence before the district court also shows that the SpeechMania system was on sale or in public use before the critical date, and that it contains all the elements of the relevant patent claims. It therefore provides an independent ground to affirm the judgment of invalidity of the asserted claims of the '640, '854, and '431 patents.

Before the trial court, Phoenix asserted that the Speech Mania system was missing two claimed features of the '640: (1) real-time behavior and (2) a natural language routine that is separate from speech recognition. In each case, however, Phoenix has no evidentiary support for its contention, and simply ignores the evidence presented by West.

Speech Mania responded to callers in real-time, as not only a former Speech Mania employee declared under oath but as audio tapes of the Speech Mania system as it existed before the patent's priority date confirm. JA502 at ¶59; JA947-50. Indeed, as Aust explained: "our current system needs just 28 ms [microseconds] to understand a sentence." JA515. Nor does the natural language objection find support in evidence. Documentary and testimonial evidence is explicit that the speech recognition and speech understanding components were "separated into independent modules and executed sequentially." JA510. Therefore, Speech Mania also anticipates the asserted claims of the '640 patent.

With respect to the '854 patent, Phoenix argued before the district court that three elements are missing from SpeechMania: (1) a database of query/answer pairs, (2) a separate natural language routine and (3) prompts with “suggestions on queries.” Phoenix has no evidentiary support for its contention that SpeechMania lacks a separate natural language routine; the evidence is explicit that the speech recognition and speech understanding components were “separated into independent modules and executed sequentially.” JA510. The same is true with respect to the suggestion of questions by SpeechMania, which offered a suggestion that a caller ask about connections between railway stations across Germany. *See* JA948. As to a database, Phoenix took a different position with respect to its validity contentions about SpeechMania than it did with its infringement contentions against West. But the scope of the claims must be the same for the infringement and validity inquiries. Under the scope of the term “database” that Phoenix asserted to try to prove infringement, the SpeechMania system provides such a database. *Compare* JA1406 with JA499-502 at ¶¶52-54, 58. Public use of the SpeechMania system is accordingly an independent basis for invalidating each of the asserted claims of the '854 patent.

B. The District Court Properly Held That the Real-Time Processing Elements of the '431 Patent Do Not Render Them Novel and Nonobvious

With respect to one of the patents, the '431, Phoenix advances additional arguments related to the real-time processing elements of various asserted claims.

Claim 1 of the '431 patent provides in relevant part for a speech-recognition grammar “which is loaded for a context experienced by said speaker when said speech-based query is made.” JA1380, Claim 1. The program then chooses a context “automatically by an application program executing for said speaker at a time when said speaker provides said speech-based query.”

Phoenix’s rebuttal invalidity contentions listed no element the Galaxy system failed to anticipate. JA1463-64. Phoenix does not dispute that the limitation it actually described in its infringement contentions is met by the Galaxy system, which was a “multi-domain” system that offered users information about a number of topics, including weather and automobile classified ads. JA992-93 at 3.2.2. When a user sought information about weather, the Galaxy system limited the speech recognition grammar to weather-specific words. JA972 at ¶23; JA993, Figure 4. The flexibility of the Galaxy system allowed users to “freely move from one domain to another in the course of a single conversation.” JA1027. As a user spoke, the Galaxy system determined which domain was appropriate to the question and limited the speech recognition grammar to the words and phrases

relevant to that domain. Thus, just like the West system, the Galaxy system used a limited grammar that was specific to the subject matter of the user's query.

Phoenix tries to avoid the Galaxy prior art by articulating a theory that the claim language requires that the speech-recognition grammar already be pre-loaded before the speech query begins. Phoenix now claims that the Galaxy system did not meet this limitation because it did not *pre-load* speech-recognition grammars, but loaded them in real time as the speech-based query occurred. It did not make this argument in its invalidity contentions, however. Indeed, in its infringement contentions before the district court, Phoenix contended that the West system met this element because “the SRE [speech recognition engine] used by the West IVR [interactive voice response system] has a large number of grammars that it supports, and *at any moment in time it uses a limited grammar that is specific and unique to the particular client customer (such as DTV, Comcast, etc.) caller.*” JA1427 (emphasis added). The focus on the particular caller that Phoenix argued in its infringement contentions requires real-time loading, not pre-loading. Phoenix has now reversed ground in hopes of avoiding invalidity. Patent claim terms may not be treated as a “nose of wax” twisted to mean one thing for infringement purposes and something completely different when it comes to invalidity. *White v. Dunbar*, 119 U.S. 47, 51 (1886).

In any event, Phoenix’s argument depends on its assertion that the term “when” means “before.” Judge Pfaelzer properly rejected that proposed construction.

The ordinary meaning of the term “when” is not limited to “before.” Indeed, such a construction is radically counterintuitive. If I ask you to pass the salt “when you’re done with it,” I surely do not mean “pass the salt before you’re done with it, but not after.” Telling a teenager “you can drive when you’re 16” does not mean “you can’t drive once you are older than 16,” and certainly not “you can drive only before you turn 16.”

Unsurprisingly, therefore, standard dictionaries define the term “when” as meaning “at or during the time that”; “just at the moment that”; “at any or every time that”; or “at, during, or after the time that.” *Webster's Ninth New Collegiate Dictionary* 1342 (1985); *Webster's Third New International Dictionary* 2602 (1993); and the *Chambers Concise Dictionary* 1223 (1992). And while it is possible to imagine contexts in which the term “when” can *include* before, neither common meaning nor dictionary definitions limit the term “when” to meaning *only* before, as Phoenix now claims.

Consistent with this standard usage, this court’s prior construction of the term “when” in other patents is not limited to acts that occur “before.” To the contrary, in *Renishaw PLC v. Marposs Societa’ per Azioni*, 158 F.3d 1243, 1251-

52 (Fed. Cir. 1998), the only question was whether the term “when” meant “as soon as” or “at or after the time that.” Neither the parties nor the court even suggested that the term “when” could mean “before.”

The structure of Claim 1 reinforces the conclusion that “when” does not mean that the speech-recognition grammar must be pre-loaded. To the contrary, the claim provides that the grammar should be loaded “when said speech-based query is made.” “When” in that context seems to mean “at approximately the same time as.” Judge Pfalzer concluded that “‘When’ has a broader meaning that could also include at, during, or shortly after the time. The Court agrees with West that the claims do not require the grammar to be loaded before the user interacts with the Galaxy system.” JA18.

Nor does the specification support Phoenix’s newly-minted interpretation of the term “when.” To the contrary, the language to which Phoenix points says the opposite: “grammars and dictionaries . . . will be *dynamically* loaded to speech recognition engine 182 (Fig. 1) for Viterbi decoding *during processing of the user speech utterance.*” JA1371 at 29:63-30:2 (emphasis added). The loading of the grammars is “dynamic” – that is, it occurs over time, rather than already being present in the system. And the specification identifies the time during which it is loaded: “during processing of the user speech utterance.” If there were any

lingering question what the term “when” means in the context of Claim 1, the specification dispels it. The grammar may be loaded while the user is speaking.¹⁷

Once the term “when” in Claim 1 is given its ordinary meaning, it is evident that the Galaxy system in fact satisfies the requirement that the speech-recognition grammar “is loaded for a context experienced by said speaker when said speech-based query is made.” While Phoenix titles a section of its brief “Galaxy Did Not Load a Limited SR Grammar Until After the User Spoke,” that section in fact establishes no such thing. App. Br. at 49. It in fact argues that Galaxy did not pre-load context-specific grammars *before* the user interaction begins. But that’s not what Claim 1 requires.

The evidence before the district court unambiguously established that the Galaxy system did in fact load grammars and parse them by context while the user was speaking. The papers describing the system indicated that “Galaxy . . . has *three* subdomains in its knowledge base: *city guide, air travel, and weather . . .* The user can freely move from one domain to another in the course of a single conversation.” JA1027 (emphasis in original). The only way a Galaxy user could move between domains during a single conversation is if the various grammars

¹⁷ Pre-loading is possible only if the system is not to be a multi-domain system, but one limited to a particular context. If a voice-recognition system is to be used only by a bank, for example, it may be possible to pre-load a speech-recognition grammar only for banking. But to be a multi-domain system, as Phoenix’s claims require, the system must be able to determine context as the caller speaks.

were loaded during the conversation, allowing the system to determine from context which domain should be invoked.

The same evidence also establishes that the speech-recognition grammar in Galaxy was “loaded for a context.” Galaxy allowed users to move between different domains, loading a speech-recognition grammar in real time based on the semantic context of the user’s conversation. JA769-70 at ¶¶14-18. Which speech-recognition grammar was invoked depended on what subject the user appeared to be speaking about. Nothing in the phrase “loaded for a context” requires that the grammar be *pre-loaded*; Phoenix reads that requirement into the patent claims. The Galaxy system loaded the speech-recognition grammar in real time as the context of the speech was established; that meets any reasonable definition of “loaded for a context.”

The Galaxy system anticipates Claim 1 of the ’431 patent because it contains every element of that claim, including the requirement that the speech-recognition grammar be “loaded for a context experienced by said speaker when said speech-based query is made.”

Finally, the SpeechMania system provides an alternative ground for invalidation of the ’431 patent. SpeechMania, like Galaxy, was in public use more than a year before Phoenix filed its patent application, having been sold in the United States by August of 1997. JA486 at ¶14. SpeechMania relied on the

caller's interaction with the system to limit both the speech recognition grammar used to recognize the caller's speech and the set of possible answers. For example, in its program logic, SpeechMania included a "tag" that specified the Language Resource to be used at a given moment in the dialog with the caller. JA495 at ¶40. That tag specified, for example, "French," in which case the system loaded a recognition grammar tailored to "French" (and not "English") to be used to recognize the speech. SpeechMania also used this information to specify the database from which to pull answers, limiting answers to the "French" database so that people speaking French didn't receive answers in English. JA497 at ¶45, JA500 at ¶56. For the reasons documented in briefing before the district court, the SpeechMania system too anticipates the '431 patent.

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT WEST'S SYSTEM DOES NOT INFRINGE THE '846 PATENT

The district court concluded that West's system did not "generate representative speech data values from said speech utterance signals," as required by asserted Claims 1 and 34, for two independent reasons. First, Judge Pfaelzer held that "it is clear that West does not perform [Voice Activity Detection] VAD." JA5-7. Second, she found that even if it were used, Voice Activity Detection (VAD) did not in fact generate speech data values that were different than the speech utterance signals. JA4-5. Either conclusion is sufficient to support the

district court's judgment that the '846 patent could not be infringed as a matter of law.¹⁸ Both conclusions are correct.

A. West Does Not Generate “Representative Speech Data Values” Separate From “Speech Utterance Signals”

Phoenix tries to avoid Judge Pfaelzer's alternative holdings on VAD, either of which is fatal to the '846 infringement claim, by suggesting on appeal that it was not VAD but the initial process of digitizing a user's speech that generates “representative speech data values.” App. Br. at 54-55. This Court should reject that argument at the outset because it was not made before the district court. Summary judgment briefing focused entirely on the question of whether West provided VAD capability, and, if so, whether providing VAD generated “representative speech data values.” Phoenix never asserted in its infringement contentions that that it was the initial process of digitization that generated such values. JA1382-99. Nor did it make that argument in its opening brief in support

¹⁸ The district court referred to its grant of summary judgment for West on this ground as “*sua sponte*,” since it was Phoenix that had moved for summary judgment in the first instance. In fact, however, West did request summary judgment in its favor in its opposition brief. JA2976 at 20-21. Phoenix had an opportunity to object to that request under Fed. R. Civ. P. 56(f), but did not object or seek delay on this issue. JA20 (resolving the unrelated Rule 56(f) motion Phoenix did raise). And in any event, the district court had the power under Ninth Circuit law to grant summary judgment *sua sponte* even if West had not requested it. *Koninklijke Philips Elecs. N.V. v. Cardiac Sci. Operating Co.*, 590 F.3d 1326, 1332 (Fed. Cir. 2010) (“Thus, a district court in the Ninth Circuit may enter summary judgment (1) as long as the losing party has had a full and fair opportunity to present arguments and (2) the parties have no genuine dispute as to a material fact.”).

of its summary judgment motion. Accordingly, Phoenix has waived this new argument. *See, e.g., Becton, Dickinson and Co. v. Tyco Healthcare Group, LP*, 616 F.3d 1249, 1261 (Fed. Cir. 2010) (infringement theory waived when not properly raised during discovery); *Safeclick, LLC v. Visa Int’l Serv. Ass’n*, 208 F. App’x 829, 833-36 (Fed. Cir. 2006) (infringement theory waived when not raised in infringement contentions); *Electro Scientific Indus., Inc. v. General Scanning Inc.*, 247 F.3d 1341, 1349-50 (Fed. Cir. 2001) (infringement theory waived when not properly presented to the district court); *Sage Prods., Inc. v. Devon Indus., Inc.*, 126 F.3d 1420, 1426 (Fed. Cir. 1997) (same).¹⁹

In any event, Phoenix’s new effort to find a part of the West system that infringes flies in the face of the unchallenged construction of Claim 1. In prior litigation brought by Phoenix, Judge Pfaelzer construed the term “speech utterance signals” to mean “a digital or analog signal representing a speech utterance.” *Phoenix Solutions, Inc. v. Pacific Gas & Elec. Co.*, slip op. at 13, JA3955. She reiterated that claim construction in this case.

¹⁹ Phoenix alluded in a few lines in its reply brief to the possibility that the initial conversion from analog voice to digital might generate the representative speech data values. JA3602, lines 7-19. But arguments raised for the first time in reply are likewise not preserved. *See Novosteel SA v. United States*, 284 F.3d 1261, 1273-74 (Fed. Cir. 2002) (finding that an argument raised for the first time in a summary judgment reply brief is waived). And Phoenix never argued below, even on reply, that transcoding digital speech utterances constituted the required representative speech data values.

On appeal, Phoenix argues that West converts speech utterance signals into representative speech data values by taking the analog voice inputs that come over a telephone and converting them into digital representations of those analog signals. Those digital signals are representative of speech data, Phoenix argues, so they are “representative speech data values.” In fact, Phoenix itself emphasizes that *every* analog speech utterance signal must be converted to a digital signal in order to be processed. App. Br. at 56-57.

In effect, Phoenix argues that the phrases “representative speech data values” and “speech utterance signals” are entirely redundant. On its view, any system that collects analog speech utterance signals must of necessity create “representative speech data values” by converting the analog voice signals into digital voice signals. Judge Pfaelzer rejected this argument. She held that “the speech data values must be something different than a signal representing a speech utterance.” JA5. Phoenix itself admits that its argument means the two claim phrases are “not wholly different.” App. Br. at 55 n.19.

As Judge Pfaelzer recognized, Phoenix’s argument makes no sense given the construction of the term “speech utterance signals.” Because “speech utterance signals” means “a *digital or analog* signal representing a speech utterance,” the mere act of converting an analog voice signal representing a speech utterance into a digital signal representing the speech utterance does not prevent the digital signal

from being a speech utterance signal. Notably, Phoenix has not disputed that claim construction, either in *PG&E* or in this appeal. Accordingly, Phoenix has waived any objection to that claim construction. See *Engel Indus., Inc. v. Lockformer Co.*, 166 F.3d 1379, 1383 (Fed. Cir. 1999) (“An issue that falls within the scope of the judgment appealed from but is not raised by the appellant in its opening brief on appeal is necessarily waived.”). And once we understand that a speech utterance signal includes the digital values created from analog speech utterances, Phoenix cannot point to any difference at all between the things it identifies as “[digital] speech utterance signals” and the things it identifies as “representative speech data values” in West’s system.

Phoenix’s interpretation violates the familiar maxim that claims should be construed to give every word meaning. *Bicon, Inc. v. Straumann Co.*, 441 F.3d 945, 950-51 (Fed. Cir. 2006); *Unique Concepts, Inc. v. Brown*, 939 F.2d 1558, 1563 (Fed. Cir. 1991). Phoenix would have this court vitiate the “representative speech data values” claim limitation by saying that it adds nothing whatsoever to the “speech utterance signals” claim limitation, and vitiate the requirement that the representative speech data values be “generated from” the speech utterance signals. That cannot be the right result.

B. The Possibility That West’s Software Could Be Altered To Make It Infringing Does Not Make It “Adapted to” Infringe

Phoenix argues that while West’s software does not enable VAD, it could be reprogrammed to do so, and that fact means that it is “adapted to” use VAD to generate “representative speech data values” from the “speech utterance signals.”

This argument suffers from two flaws, either of which is fatal.

1. VAD Does Not Generate “Representative Speech Data Values” That Are Separate From “Speech Utterance Signals”

First, as Judge Pfaelzer found, Phoenix’s argument about VAD suffers from the same flaw as its argument that the analog-digital conversion generates “representative speech data values.” VAD does not convert speech utterance signals into something else; rather, it strips certain sounds that it determines *not* to be speech utterances out of the signal before processing it. Phoenix’s own expert acknowledged that even after applying VAD, the output would still be “speech utterance signals.” JA3197 at 103:22-104:6. As a result, even if West’s system did employ VAD, doing so would not generate “representative speech data values” that differ at all from the “speech utterance signals” required by Claims 1 and 34. For the same reasons described in the last section, therefore, even if West’s system were modified to include VAD capability, it still would not infringe those claims according to the undisputed claim construction.

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2. In Any Event, West’s CLASS Platform Is Not “Adapted to” Perform VAD

Second, the unambiguous evidence makes it “clear” that, as Judge Pfaelzer held, “West does not perform VAD.” JA5. The only evidence in the record about how the West system is actually configured is from West’s Aaron Fisher, who has unequivocally stated that voice activity detection is not, and has never been, enabled on the Dialogic boards in the CLASS platform. JA3229-30 at ¶¶9-10. At his deposition, Phoenix’s expert acknowledged that he had “no evidence that West has ever turned on voice activity detection.” JA3194 at 89:2-5.

Nor is this a situation in which the capability sits fully established on the server, waiting to be enabled, as in *Finjan, Inc. v. Secure Computing Corp.*, 626 F.3d 1197, 1204-05 (Fed. Cir. 2010). Phoenix accuses the CLASS platform, a system architecture that incorporates Nuance software and Dialogic telephony boards. But West does not in fact implement VAD capability in that platform.

Nuance advises its customers that they should not enable voice activity detection on any MRCP client device, which includes the Dialogic telephony boards in the CLASS platform. Specifically, Nuance warns that the [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] A3345.

West followed Nuance’s advice. West did not implement voice activity detection on its MRCP client—the VRU server—including on the Dialogic boards. JA3229-30 at ¶ 9. Instead, pursuant to Nuance’s instructions, West’s [REDACTED]

[REDACTED]

Id.

It would not be trivial to reprogram the system to enable voice activity detection on the VRU. It would require changes to both the software that controls the Dialogic boards and likely to the Nuance software that controls speech recognition. JA3230 at ¶11. In order to enable voice activity detection on the VRU, [REDACTED]

[REDACTED] *Id.* West has never tried to do this, and it is not readily apparent how one would reprogram the Dialogic boards to enable voice activity detection. *Id.* at ¶10.

Enabling voice activity detection on the VRU would also likely require changes in the Nuance software. *Id.* at ¶¶11. In order for those changes to be made, [REDACTED]

[REDACTED]

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██████████ *Id.* West does not know what changes would have to be made or what it would have to do to make them. *Id.* at ¶10.

Given these facts, West's platform simply is not "adapted to" perform VAD. Phoenix's expert Mr. Rosenberg conceded that his "infringement opinion is predicated on the idea that West's system could be changed so that it would act in an infringing manner, but that it does not actually act in an infringing manner as it is actually offered, sold or used by customers." JA3188 at 67:5-9.

Patent law does not permit a finding of infringement based merely on the possibility that someone could change the defendant's system to add an infringing capability it does not currently possess. In the cases that have found infringement, either the infringing capability was expressly offered as an option users could enable, as in *Finjan*, or the claim language itself expressly contemplated changes made by others. *See Intel Corp. v. United States Int'l Trade Comm'n*, 946 F.2d 821, 832 (Fed. Cir. 1991) (the term "programmable selection means" covered devices "capable of operating in the page mode . . . actual page mode operation in the accused device is not required").

By contrast, absent language expressly devoted to capability, this Court has consistently held that a system claim is infringed if the "product is designed in such a way as to enable a user of that [product] to utilize the function . . . *without having to modify [the product].*" *Silicon Graphics, Inc. v. ATI Techs., Inc.*, 607

F.3d 784, 794 (Fed. Cir. 2010) (emphasis added) (internal quotations and citation omitted); *Fantasy Sports Props., Inc. v. Sportsline.com, Inc.*, 287 F.3d 1108, 1118 (Fed. Cir. 2002); *High Tech Med. Instrumentation, Inc. v. New Image Indus., Inc.*, 49 F.3d 1551, 1555 (Fed. Cir. 1995) (“[A] device does not infringe simply because it is possible to alter it in a way that would satisfy all the limitations of a patent claim.”). A finding “that a device is capable of being modified to operate in an infringing manner is not sufficient, by itself, to support a finding of infringement.” *Telemac Cellular Corp. v. Topp Telecom, Inc.*, 247 F.3d 1316, 1330 (Fed. Cir. 2001)).

Here, the uncontroverted evidence is that VAD could not be enabled on the CLASS platform without modifying the system. Phoenix’s expert Rosenberg admitted that the platform cannot perform VAD without modification. While Phoenix argued below that those modifications would be “easy,” improperly introducing a declaration from a new expert for the first time in its reply brief, Judge Pfaelzer rejected Phoenix’s new, untimely expert declaration to that effect as “conclusory and unsupported,” JA7 at n.4, and Phoenix has not chosen to pursue that line of argument on appeal. Given the evidence – undisputed on this appeal – that substantial modification would be required to implement VAD, the CLASS platform simply is not “adapted to” do so.

Phoenix seeks to persuade this court to construe “adapted to” as meaning “capable of.” That is a dubious reading; something that is adapted to do a particular thing has been specifically changed so that it can do that thing; “capable of” is a far broader term. But even were that the correct construction, this Court has made it clear that an accused device must be “presently capable” of meeting the claim requirements. *Stryker Corp. v. Davol Inc.*, 234 F.3d 1252, 1257 (Fed. Cir. 2000) (summary judgment of non-infringement proper in absence of evidence that accused device was “presently capable” of meeting claim requirements). Even if “adapted to” means “capable of,” the CLASS platform is not *presently* capable of implementing VAD; it would have to be modified to do so.

The change in the law for which Phoenix advocates would be a sweeping one indeed. If a product that does not infringe a patent can be held to infringe because someone could modify that product, no product would be safe from outlandish claims of infringement. Indeed, this case provides a perfect example of the extraordinary reach of Phoenix’s argument. Phoenix’s expert testified that he thought every computer connected to the Internet infringed the ’846 patent because someone theoretically could install software on the laptop to perform voice activity detection and to connect to the Nuance software:

Q. Okay. So isn’t it the case, sir, in fact since Nuance is connected over the Internet and all computers are connected over the Internet, that my computer sitting

here today infringes the patent because I could install VAD processing software on my computer?

A. You're infringing on the process, yes.

JA3209 at 149:2-8; *see also* JA3208-09 at 148:5-149:1. Phoenix's reading of the law undermines the fundamental principle that each and every element of the patent claim must be present to find literal infringement. *Mas-Hamilton Group v. LaGard, Inc.*, 156 F.3d 1206, 1211 (Fed. Cir. 1998). This court should reject it.

Finally, as Judge Pfaelzer noted, JA7-8, Phoenix is arguing for an extraordinarily broad construction of the '846 patent, one under which absent claim limitations do not avoid infringement as long as someone could later modify the system to add those limitations. But that which literally infringes if later in time, anticipates if earlier. *Lewmar Marine, Inc. v. Bariant, Inc.*, 827 F.2d 744, 747 (Fed. Cir. 1987). Even if Phoenix could point to particular elements of the prior art Nuance or SpeechMania systems that were not currently present, under Phoenix's capacious view of its patent claims the absence of those elements would not avoid anticipation, because the prior art systems could simply be modified to incorporate them.²⁰ Phoenix cannot have it both ways. If systems that lack claim

²⁰ Before the district court, West moved for summary judgment that claims 1 and 4 of the '846 patent were invalid because each and every element of those claims was present in two different prior art systems on sale by 1997. Judge Pfaelzer did not rule on this motion because she found the relevant claims not to be infringed. But were this Court to conclude that West infringed the '846 patent, the invalidity of those claims would remain an issue on remand.

elements nonetheless infringe, prior art systems that lack those same claim elements nonetheless anticipate. If there is any doubt remaining about the proper interpretation, this court should construe the term “adapted to” to avoid interpreting the term in a way that will surely render the asserted claims invalid. *Phillips v. AWH Corp.*, 415 F.3d 1303 , 1327-28 (Fed. Cir. 2005) (en banc).

C. The District Court’s Holding Regarding the ’846 Patent Can Be Sustained On Other Grounds.

It is a fundamental maxim of the law that a district court’s judgment can be affirmed on any ground supported in the record. In this case, the record demonstrates that the CLASS platform lacks other elements of Claims 1 and 34, meaning that summary judgment of noninfringement can be based on those alternative failings. Further, the record demonstrates that the ’846 patent is invalid, and the judgment can be sustained on that ground.

1. The CLASS Platform Is Not “Characterized By a First Data Content That Is Substantially Inadequate By Itself For Permitting Recognition of Words”

Even if the CLASS platform had enabled VAD, and even if VAD met the requirement of producing “representative speech data values” that differ from “speech utterance signals,” the output of VAD would not be “characterized by a first data content that is substantially inadequate by itself for permitting recognition of words,” as Claim 1 requires. Even if voice activity detection were enabled, the speech signal would have *all* of the data content used by the Recognition Server to

recognize words. JA3199 at 111:19-112:15 (signals sent from the West VRU client provide “a sufficient amount of data for the Nuance MRCP recognition server to recognize words” even if VAD is enabled); JA3231 at ¶14. The recognition server processes the data content in the speech signal to derive acoustic features in order to recognize speech, but it doesn’t use any data content from another source in doing so. JA3202 at 121:21-122:11,123:3-8; JA3231 at ¶14. And Phoenix offers no evidence that any additional data content is used to recognize speech.

Phoenix argued before the district court that the data content in the speech signal is inadequate because the recognition server *processes* the data content to recognize speech. In particular, Phoenix contends that the claim is met because the server extracts feature vectors that “represent the characteristics of the user’s speech” from the speech signal “to complete recognition.” JA2611, lines 6-9. Phoenix, however, misses the point. Nothing in the claim language addresses whether the data content of the speech data values is sufficiently “processed” for recognition. The claim requires the “*data content*” to be “substantially *inadequate* by itself” to complete recognition. Thus, as Claim 1 recites elsewhere, the “first data content” must be inadequate by itself and needs to be combined with “additional data content” to “complete recognition.” Because there is no dispute that the data in speech signal itself is sufficient (subject only to further processing)

to recognize speech, the output from the VAD function does not meet the claim, and West cannot infringe the asserted claims for this additional, independent reason.

2. West’s IVR System Does Not Use The “First Data Content” In The “Speech Data Values” To Recognize Speech.

Claim 1 also requires that a “second processing routine” use the “first data content” of the “representative speech data values” to “compute additional data content.” The “additional data content . . . when combined with said first data content is sufficient for a speech recognition routine to complete recognition” of the user’s speech. JA2744 at 39:1-5. As Phoenix concedes, the claim requires that, when the “first data content” and the “additional data content” are combined, they are sufficient to complete recognition.

Phoenix accused the processing at the recognition server of meeting this claim: “here, the initially inadequate first data (data representing the user’s speech) undergoes processing at the Recognition Server (feature extraction) to determine the additional data values (feature vectors), *all of which combined allow for recognition.*” JA2615, lines 21-25 (emphasis added). But it is not the case that the recognition server uses both the first data content (the signals representing a user’s speech utterance) and the alleged additional data content (the feature vectors) to recognize speech. As Phoenix’s expert concedes, the recognition server uses *only*

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the feature vectors to recognize speech, and the un-processed speech signals themselves are not used by the recognition server to recognize speech:


Q. Do you agree with me that the data stream output by the VRU --

A. Yeah.

Q. -- does not get added to the information calculated by the Nuance recognition server from that data in order to recognize speech?

A. Yes. Yes. I was on the wrong path.

JA3202 at 121:20-122:1; *see also id.* at 122:2-11 (agreeing with the questioner that “[r]egardless of whether or not VAD is turned on or off, the Nuance recognition server takes the output of the VRU, uses it to calculate vectors and other data and then uses those vectors and other data to complete recognition without ever combining those vectors and other data with the data it received from the VRU”). Thus, the additional data content (feature vectors) is not combined with the first data content (user’s speech signals) to complete recognition. In fact, combining the user’s speech signals with the feature vectors would *prevent* speech recognition, as the Nuance recognition engine works by matching features of the speech to models about how words sound. JA2615, lines 16-20 (citing JA2845)




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████████████████████. West cannot infringe the asserted claims of the '846 patent for this additional, independent reason.

CONCLUSION

The judgment of the district court should be affirmed in all respects, either on the grounds provided by Judge Pfaelzer or on any of the numerous available alternative grounds.

April 29, 2011

By: 

Mark A. Lemley
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CERTIFICATE OF SERVICE

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by Durie Tangri LLP, Attorneys for Defendant-Appellee West Interactive Corporation to print this document. I am an employee of Counsel Press.

On the **29th Day of April, 2011**, I served the within **Confidential Responsive Brief of Defendant-Appellee West Interactive Corporation and Non-Confidential Responsive Brief of Defendant-Appellee West Interactive Corporation** upon:

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By Express Mail and E-Mail, by causing two true copies of each to be deposited, enclosed in a properly addressed wrapper, in an official depository of the U.S. Postal Service.

Unless otherwise noted, 12 copies of the Confidential Brief and 5 copies of the Nonconfidential have been hand-delivered to the Court on the same date as above.

April 29, 2011

By: _____

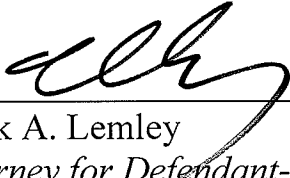

John C. Kruesi, Jr

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(B), because it contains 13,814 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 2007 SP2 in Times New Roman 14 point font.

Dated: April 29, 2011

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