IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

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| **FLYPSI, INC. (D/B/A FLYP),** | |
| **Plaintiff,** | **Civil Action No. 6:21-cv-642-ADA** |
| **vs.** | |
| **DIALPAD, INC.,** | **JURY TRIAL DEMANDED** |
| **Defendant.** | |

**PLAINTIFF FLYPSI, INC.'S**
**REPLY CLAIM CONSTRUCTION BRIEF**

Pursuant to the Court's Order Governing Proceedings – Patent Cases ("OGP") (Dkt. No. 20), and the Court's Amended Scheduling Order (Dkt. No. 29), Flyp submits this Reply Claim Construction Brief. Here, the disputed terms of the Asserted Patents do not require construction and should be given their plain-and-ordinary meaning to a person of ordinary skill in the art.

**A.** **Primary Telephone Number**

Dialpad has conceded that it was not accurate to construe "primary" to mean "assigned … at activation" as such a construction would be contrary to established law and the common understanding of a POSITA[1] (as well as lay jurors). As previewed in Flyp's responsive brief, the remaining question is whether the remainder of Dialpad's proposed construction—now its revised construction—is necessary. It is not.

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[1] Dialpad has not submitted any argument regarding the level of ordinary skill in the art. Accordingly, the Court should adopt Flyp's unrebutted proposal.

Dialpad's revised construction—"a telephone number or identifier that is assigned to a handset or mobile device"—does nothing to distinguish "primary telephone number" from "secondary telephone number." Indeed, both numbers are used to connect to a handset or mobile device as discussed throughout the specification and the claims. Dialpad's revised construction has reached a level of abstraction such that it no longer defines the term in dispute but rather applies equally to nearly any "telephone number." Dialpad's revised construction is thus not only unhelpful but now invites possible juror confusion.

As established in Flyp's response brief, both a POSITA and lay jurors are already familiar with the common meaning of a "telephone number." The modifiers "primary" and "secondary" as used throughout the patents provide a simple and readily ascertainable delineation—one number is primary, and the other is secondary. Where, as here, "there is nothing about the claim term that is confusing … the term requires no construction." *Pisony v. Commando Constr., Inc.*, Case No. W-17-cv-55, 2019 WL 928406, at *5 (W.D. Tex. Jan. 23, 2019) (Albright, J.)

Dialpad concedes the argument that "secondary telephone number" and other similar terms in the claims need no construction. As argued in Flyp's response and left unaddressed in Dialpad's reply, if "secondary telephone number" needs no construction, then "primary telephone number" likewise requires no construction.

Finally, Dialpad's revised construction is also impermissibly limiting. Just as a user may change his or her primary phone number at some point after activation, a user may also carry a primary telephone number from one mobile phone to a different mobile phone. Both a POSITA and lay jurors would be familiar with the basic process of phone upgrades, which often involves porting an existing number from an old phone to the upgraded phone. A "primary telephone number" thus may be assigned to a particular mobile phone or handset for only a limited time but

be assigned to a particular account for a longer period. Dialpad's revised construction fails to account for this well-understood arrangement and thus impermissibly limits the claims.

Because the term "primary telephone number" is a readily understandable term by both a POSITA and lay jurors, the Court should decline to rewrite this simple, three-word term into a complicated and confusion-causing 14-word construction.

### B.    Voice Channel

Dialpad also confusingly argues for a construction of "voice channel" while conceding that "data channel" needs no construction, as it would be readily understood by a POSITA. While Dialpad argues that the specification is definitional as to "voice channel," it concedes that parallel statements related to "data channel" are <u>not</u> definitional.

In truth, the specification passage on which Dialpad's entire argument rests is not definitional but rather exemplary and permissive. As quoted in full in Dialpad's reply, the specification states:

> The communications between the server 100 and the handset 340 over the Internet 316 **may** utilize IP as a protocol opposed to protocols used to establish communications according to CDMA, GSM, or like standards. Such IP governed communications are referred to herein as being conducted over a "data channel." Conversely, communications between the Switch 110 and the handset over the PSTN 310 **may** be transmitted and received in accordance with CDMA, GSM or like standards as opposed to using IP. Such CDMA, GSM **or like governed communications**, **when used to carry voice information**, are referred to herein as being conducted over a "voice channel.

'770 Patent at 4:35-46 (emphasis added). By not seeking a construction, Dialpad concedes that the specification's statements on "data channel"—that it "<u>may</u> utilize IP as a protocol"—are not definitional. But similarly, the specification's parallel statements on "voice channel" are also not definitional. Indeed, the specification's treatment of "voice channel" is more exemplary and more permissive than its treatment of "data channel." Regarding "voice channel," the specification states

(1) that communications **may** be transmitted in accordance with CDMA/GSM, (2) that communications may also be transmitted via undefined and future released "like governed standards," and (3) that such governed standards are only considered to be a voice channel "when used to carry voice information." *Id.* Contrary to being definitional, the specifications treatment of "voice channel" is at best exemplary.

For that reason, Dialpad's reliance on *The Trustees of Columbia University* v. *Symantec Corporation* is misplaced. (Dkt. No. 33 ("Reply") at 5 (citing *Trs. of Columbia Univ. in the City of N.Y. v. Symantec Corp.*, 811 F.3d 1359, 1363 (Fed. Cir. 2016)). That case stands for the unremarkable proposition that disavowal or lexicography need not necessarily be explicit or follow some rigid formalism but may instead be found implicitly in the whole of the intrinsic record. *Trs. of Columbia Univ*, 811 F.3d at 1363. Here, however, the language in the specification is explicitly exemplary in nature such that it cannot be read to be definitional either explicitly or implicitly.

Moreover, even if Dialpad's definitional arguments are accepted by this Court (they should not be), Dialpad's proposed construction is improper. Dialpad's proposed construction strays too far from the specification's alleged definition. None of the specification's language regarding permissible standards, "like standard or "like governed communications," or "when used to carry voice information" is found in Dialpad's proposed construction. And the phrase "communications path" appears nowhere in the patent—a fact on which Dialpad has no response. Dialpad's proposed construction is thus completely removed from the portion of the specification on which its arguments rely.

Dialpad's proposed construction strays far from that actual language in the specification because, contrary to its definitional arguments, Dialpad is really attempting to rewrite the term to suit its own argumentative purposes. As previewed in Flyp's response, Dialpad's proposed

construction could be read to suggest that voice channels only carry voice. (Dkt. No. 26 ("Response") at 13). Dialpad's reply does not disavow this argument, which suggests its real motivation. Because the specification clearly envisions telecom standards that may carry both data and voice but are considered voice channels "when used to carry voice information," Dialpad's proposed construction and the arguments that stem from it are contrary to the intrinsic evidence.

### C.      Switch *and* Associated With

Dialpad's response underscores that its indefiniteness contention is based on three flawed premises: (1) a mistaken belief that a POSITA with the requisite experience and education in telecommunications would not understand what the term "switch" means; (2) the misapprehension that a POSITA possessing the requisite experience and education would not understand with reasonable certainty how a switch may be associated with other elements on a telecommunications network; and (3) the misguided contention that "switch" is merely a nonce term that lacks sufficient structure and should be given means-plus-function treatment. As explained below, Dialpad is wrong on each of these points, and the Court should thus find the term "switch" sufficiently definite and apply its plain-and-ordinary meaning in the art.

***First***, a POSTA would understand with reasonable certainty what a switch is and what kind of structure it represents. A switch is a well-known term of art that describes a long-understood structure in telecommunications. Dialpad accordingly admits (as it must) that the evidence in the record shows that "a switch is a class of structures." (Reply at 7). Yet Dialpad incorrectly argues that the term is indefinite because it "covers a variety of elements from mechanical devices, to electrical devices to software." *Id.* But "breadth is not indefiniteness." *BASF Corp. v. Johnson Matthey Inc.*, 875 F.3d 1360, 1367 (Fed. Cir. 2017) (quoting *SmithKline Beecham Corp. v. Apotex Corp.*, 403 F.3d 1331, 1341 (Fed. Cir. 2005)). The fact that a switch describes a class of structures accordingly does not render it indefinite.

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