

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

PROXICOM WIRELESS, LLC,

Plaintiff,

v.

Case No. 6:18-cv-64-Orl-37GJK

MACY'S, INC.; and MACY'S FLORIDA  
STORES, LLC,

Defendants.

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**ORDER**

Before the Court are: (1) the parties' joint claim construction statement (Doc. 49); (2) Proxicom Wireless, LLC's ("**Proxicom**") claim construction brief (Doc. 54); and (3) Macy's, Inc. and Macy's Florida Stores, LLC's (collectively, "**Macy's**") responsive brief (Doc. 62). The Court held a claim construction hearing on December 11, 2018. (Doc. 78 ("**Hearing**").) This Order follows.

**I. BACKGROUND**

Proxicom sued Macy's for purportedly infringing Proxicom's patents: U.S. Patent No. 8,090,359 ("**'359 Patent**"), U.S. Patent No. 8,116,749 ("**'749 Patent**"), and U.S. Patent No. 8,374,592 ("**'592 Patent**"). (See Doc. 1 ("**Complaint**").) Specifically, Proxicom alleges that Macy's used Proxicom's beacon technology and method of exchanging information between wireless devices in close proximity in Macy's retail stores, infringing at least claim 1 of the '359 Patent (*id.* ¶¶ 17-29), claim 1 of the '749 Patent (*id.* ¶¶ 30-43), and claim 19 of the '592 Patent (*id.* ¶¶ 44-55).

For claim construction, the parties first filed their joint claim construction statement, which identified three terms with agreed-upon constructions and four terms in dispute. (Doc. 49, pp. 1-2.) The disputed terms include: (1) “loyalty program”; (2) “electronic commerce transaction”; (3) “upon an occurrence of a predetermined event coordinated with said central server”; and (4) “within a specific application on the second wireless device.” (*Id.* at 2.) The joint statement also identified the parties’ evidence to support their proposed constructions. (*Id.* at 4-15.) The parties then filed their respective claim construction briefs. (Docs. 54, 62.) With the Hearing (Doc. 78), the matter is ripe.

## II. LEGAL STANDARDS

“It is well-settled that, in interpreting an asserted claim, the court should look first to the intrinsic evidence of record, *i.e.*, the patent itself, including the claims, the specification and, if in evidence, the prosecution history.” *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996) (citing *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995)). This is because “[s]uch intrinsic evidence is the most significant source of the legally operative meaning of disputed claim language.” *Id.*

So the first step to interpreting an asserted claim is to “look to the words of the claims themselves, both asserted and nonasserted, to define the scope of the patented invention.” *Id.* (citing *Bell Commc’ns Research, Inc. v. Vitalink Commc’ns Corp.*, 55 F.3d 615, 620 (Fed. Cir. 1995)). Claim terms “are generally given ordinary and customary meaning.” *Id.* “[T]he ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005). “The inquiry

into how a person of ordinary skill in the art understands a claim term provides an objective baseline from which to begin claim interpretation.” *Id.* (citing *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1116 (Fed. Cir. 2004)).

The second step involves “review[ing] the specification to determine whether the inventor has used any terms in a manner inconsistent with their ordinary meaning.” *Vitronics Corp.*, 90 F.3d at 1582. Notably, “the person of ordinary skill in the art is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification.” *Phillips*, 415 F.3d at 1313. “The specification acts as a dictionary when it expressly defines terms used in the claims or when it defines terms by implication.” *Vitronics Corp.*, 90 F.3d at 1582 (citing *Markman*, 52 F.3d at 979)). Ultimately, “the specification is always highly relevant to the claim construction analysis. Usually, it is dispositive; it is the single best guide to the meaning of a disputed term.” *Id.*

Third, if necessary, “the court may also consider the prosecution history of the patent, if in evidence.” *Id.* (citations omitted). “This history contains the complete record of all the proceedings before the Patent and Trademark Office . . . [so it] is often of critical significance in determining the meaning of the claims.” *Id.* (citations omitted). Notably, “[t]he prosecution history limits the interpretation of claim terms so as to exclude any interpretation that was disclaimed during prosecution.” *Southwall Techs., Inc. v. Cardinal IG Co.*, 54 F.3d 1570, 1576 (Fed. Cir. 1995).

“In most situations, an analysis of the intrinsic evidence alone will resolve any ambiguity in a disputed claim term,” so “it is improper to rely on extrinsic evidence.”

*Vitronics Corp.*, 90 F.3d at 1582 (citations omitted). If necessary, however, “[t]he court may, in its discretion, receive extrinsic evidence in order ‘to aid the court in coming to a correct conclusion’ as to the ‘true meaning of the language employed’ in the patent.” *Markman*, 52 F.3d at 980 (citations omitted). “Extrinsic evidence consists of all evidence external to the patent and prosecution history, including expert and inventor testimony, dictionaries, and learned treatises.” *Id.*

### III. ANALYSIS

The parties dispute the construction of four terms in the patents. (*See Docs. 49, 54, 62.*) Generally, Proxicom argues that Macy’s proposed constructions of the terms are too narrow, while Macy’s contends that Proxicom’s proposed constructions are too broad. (*See Docs. 54, 62.*) Each disputed term is addressed below.

#### A. “loyalty program”

Claims	Proxicom’s Construction	Macy’s Construction
‘359 Patent, Claims 1 & 14  ‘592 Patent, Claim 19	“a marketing program designed to encourage customers to continue to shop at or use the services of businesses associated with the program”	“a program where a merchant provides customers enrolled in the program a coupon from the merchant as a reward for making a particular number of repeated purchases from the merchant” <sup>1</sup>

The disputed term “loyalty program” appears in the final element of claims 1 and 14 of the ‘359 Patent as one of three possible criteria for delivering information to a wireless device: “information representing a reward for an entity associated with the first

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<sup>1</sup> At the Hearing, Macy’s also proposed the following construction as an alternative: “a marketing program where enrolled customers are rewarded for continuing to make purchases from businesses associated with the program.”

device's participation in a *loyalty program*." '359 Pat., col. 23 ll. 59–61; '359 Pat., col. 25 ll. 47–49 (emphasis added). It also appears in claim 19 of the '592 Patent:

the server delivering information to the first wireless device based at least in part upon the identifier information and information representing a reward for an entity associated with the first wireless device's participation in a *loyalty program*, wherein said information includes a name associated with said entity or object located in proximity to the second wireless device or a name associated with said *loyalty program* as determined by the server utilizing said identifier information.

'592 Pat., col. 24 ll. 65–67, col. 25 ll. 1–7 (emphasis added). And the patent specification discusses an embodiment of the patent, stating, "[a]lternatively if the consumer is a regular purchaser a *loyalty program* may provide a coupon upon a particular number of repeated purchases." '359 Pat., col. 15 ll. 20–23 (emphasis added).

Proxicom argues that the Court should rely on the plain meaning of the term "loyalty program" in the context of the claim language and specification to construe the term to mean "a marketing program designed to encourage customers to continue to shop at or use the services of businesses associated with the program." (Doc. 54, p. 10.) Proxicom asserts that its construction follows the party's agreed-upon construction of other phrases that include the term and the claims' discussions of a reward for participation in a loyalty program. (*Id.*) Further, Proxicom contends that Macy's proposed construction is too narrow because the claims and specification do not require: (1) that a loyalty program require any specific number of purchases, as enrollment alone could suffice, or that the purchases be at a single merchant; or (2) that the reward be a coupon. (*Id.* at 10–13.)

Macy's counters that its construction follows the express disclosure in the

specification, quoted above, that discusses a loyalty program participant receiving a coupon following a certain number of purchases from a merchant. (Doc. 62, pp. 12-13.) Interpreting that specification, Macy's asserts that "[t]he specification does not speak broadly to different types of 'loyalty programs' – rather, it contains one specific statement of what a loyalty program could be in the context of the claimed invention." (*Id.* at 14.) From this, Macy's proposes that "loyalty program" should be construed as "a program where a merchant provides customers enrolled in the program a coupon from the merchant as a reward for making a particular number of repeated purchases from the merchant." (*Id.* at 12.)

Here, the Court finds that Proxicom's proposed construction is most consistent with the plain meaning of the term in the context of the patent claims and specification. While the specification describes a loyalty program in which a customer receives a coupon for repeated purchases from a particular merchant, the patent language is clear that the description represents merely one example of how a loyalty program could operate. *See* '359 Pat., col. 15 ll. 9-12 ("*Alternatively* if the customer is a regular purchaser a loyalty program *may* provide a coupon upon a particular number of repeated purchases." (emphasis added)). Nothing in the claims or specification limits a loyalty to that specific reward for that specific conduct, so the Court declines to impose that limitation here as Macy's proposes. That in mind, the Court also finds slight modifications to Proxicom's proposed construction are necessary. Examining the relevant claim and specification language, the Court concludes that "loyalty programs" in the context of the patent serve to "reward existing customers" who participate in the loyalty

program rather than to simply “encourage customers.” The Court construes “loyalty program” to mean “a marketing program designed to reward existing customers to continue to shop at or use the services of businesses associated with the program.”

**B. “electronic commerce transaction”**

Claims	Proxicom’s Construction	Macy’s Construction
’359 Patent, Claims 1 & 14	No construction needed or “electronic interactions for the sale or purchase of good(s) or service(s)”	“a transaction in which the customer has indicated a desire to make a purchase and pay using the customer’s wireless device” <sup>2</sup>

Like “loyalty program,” the term “electronic commerce transaction” also appears in the final element in claims 1 and 14 of the ’359 Patent as one of three possible criteria for delivering information to a wireless device: “a current step in a multiple step process for an ongoing *electronic commerce transaction*.” ’359 Pat., col. 23 ll. 62–63 (emphasis added).

Proxicom argues that if construction is necessary, the Court should rely on the plain meaning of the term and the claim’s multi-step description of an electronic commerce transaction to construe the term as “electronic interactions for the sale or purchase of good(s) or service(s).” (Doc. 54, p. 14–15.) Unlike Macy’s, Proxicom contends that an electronic commerce transaction does not require that customers indicate a desire to purchase and pay using their wireless devices. (*Id.*) Instead, Proxicom asserts that the sentence from the specification that Macy’s relies on for these requirements simply

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<sup>2</sup> At the Hearing, Macy’s also proposed this alternative construction: “electronic interactions wherein the customer has indicated on his wireless device a desire to purchase goods or services.”

provides an example of an e-commerce transaction and in no way limits the definition of the term. *See id.* at 15; *see also* '359 Pat., col. 11 ll. 47-51 ("The customer, having an account enabled with electronic payments, and wanting an item the vendor has, would press a button or make other input on his phone (or other device) which would indicate they would like to make a purchase and pay using their device . . . .") And because the patent also includes embodiments that do not involve a customer indicating a desire to purchase and paying using their wireless device, Proxicom asserts that including these additional requirements from Macy's proposed construction would contravene the language in the patent. (Doc. 54, p. 15.)

Macy's disagrees and proposes that the term be construed as "a transaction in which the customer has indicated a desire to make a purchase and pay using the customer's wireless device." (Doc. 62, p. 16.) To this end, Macy's relies on the language quoted above and the specification, which Macy's interprets as requiring that an e-commerce transaction involve these steps: "the request for purchase, the payment, the receipt of goods and services, and the providing of payment receipt." (*See id.* at 17 (quoting '359 Pat., col. 3 ll. 50-54).) Macy's suggests that any embodiments in the patent that do not involve a customer indicating a desire to make a purchase and paying using a wireless device are not electronic commerce transactions as the phrase should be properly construed. (*Id.* at 19.)

Upon review of the term within the language of the claims and specification, the Court concludes that no construction is needed for the term "electronic commerce transaction." As the proposed constructions create more ambiguity than the term itself,

the Court declines to construe the term further.

**C. “upon an occurrence of a predetermined event coordinated with said central server”**

Claims	Proxicom’s Construction	Macy’s Construction
’749 Patent, Claim 1	No construction needed or “upon an action or occurrence that is determined in advance that is coordinated with said central server”	“upon an action or occurrence that is determined in advance that is coordinated at the time of the event with the central server”

This disputed term appears in claim 1 of the ’749 Patent, which describes the steps for a method of exchange of information between wireless devices:

at the second wireless, *upon an occurrence of a predetermined event coordinated with said central server*, within a specific application on the second wireless device, providing modified identification information over the first, direct, short range local wireless link in place of the initial identification information, such that the modified identification information is associated at the central server with said identity of a user or entity associated with the second device.

’749 Pat., col. 23 ll. 44–53 (emphasis added). Other claims in the patent reveal that the “predetermined event” may be “elapsed time” or “a number of uses of the identifier,” and that information may be “synchronized such that it is coordinated with predetermined receiving and transmitting times.” ’749 Pat., col. 23 ll. 56–67. And the specification discusses the timing of coordination, stating:

This update may be based on either direct communication with the server, or rule and algorithm based updates previously coordinated with the central server so as to minimize server messaging, but allowing the updates to remain synchronized to the server such that the device and the server are always associating the same identifier between them.

’749 Pat., col. 16 ll. 47–52.

The only difference between the proposed constructions of this term is that Macy's construction requires that the predetermined action or occurrence be coordinated with the central server "at the time of the event." (Doc. 54, p. 16.) Proxicom contends that "[a]n action based on an occurrence that is established or decided in advance clearly need not be coordinated 'at the time of the event' as Macy's now seeks to require." (*Id.* at 17.) Proxicom also relies on the specification language, which reveals that coordination may happen in advance or by direct communication with the server at the time of the event. (*Id.* at 18 (citing '749 Pat., col. 16 ll. 47-52).) Yet Macy's remains steadfast in its conviction that coordination must happen "at the time of the event." (Doc. 62, p. 19.) According to Macy's, regardless of any prior coordination, "there must also be coordination *at the time of the event* with the central server." (*Id.* at 20 (citing '749 Pat., col. 16 ll. 28-33).)

Here, the Court again relies on the plain meaning of the term in the claims and specification and adopts Proxicom's construction of the term because there is no support for Macy's suggestion that coordination must occur "at the time of the event." Rather, the specification provides for coordination by either direct communication with the server at the time of the event or based on previously coordinated activity. So to adopt Macy's proposal would be to impose a requirement that the patent language does not. And for clarity the Court finds it appropriate to modify one word in Proxicom's proposed construction, changing "with said central server" to "with *the* central server." Thus, the Court construes the term to mean "upon an action or occurrence that is determined in advance that is coordinated with the central server."

**D. “within a specific application on the second wireless device”**

<b>Claims</b>	<b>Proxicom’s Construction</b>	<b>Macy’s Construction</b>
’749 Patent, Claim 1	“handled by a specific program or algorithm executing on the second wireless device”	“within computer software instructions and data on the second wireless device”

This disputed term also appears in claim 1 of the ’749 Patent, which reads:

at the second wireless, upon an occurrence of a predetermined event coordinated with said central server, *within a specific application on the second wireless device*, providing modified identification information over the first, direct, short range local wireless link in place of the initial identification information, such that the modified identification information is associated at the central server with said identity of a user or entity associated with the second device.

’749 Pat., col. 23 *ll.* 44–53 (emphasis added). The specification provides this modification of information “may be based on either direct communication with the server, or rule and algorithm based updates previously coordinated with the central server.” ’749 Pat., col. 16 *ll.* 47–52.

Proxicom proposed “handled by a specific program or algorithm executing on the second wireless device” for this term based on language in the specification that describes “rule and algorithm based updates.” (Doc. 54, p. 20 (citing ’749 Pat., col. 16 *ll.* 47–52).) According to Proxicom, the specification does not require, as Macy’s suggests, that “a specific application” be “software instructions and memory”; rather, an algorithm or rule could suffice. (*Id.* at 21.) Further, Proxicom notes that because the patent uses the phrase “application software” elsewhere to indicate where “software” is required, the absence of that language in this claim shows that software is unnecessary. (*Id.* (citing ’749 Pat., col. 7 *ll.* 38–45).)

Macy's argues that the "specific application" must involve "computer software instructions and data," necessitating its proposed construction. (Doc. 62, p. 22.) To reach this result, Macy's relies on language in the specification that notes that memory and disk storage can provide "storage for computer software instructions and data used to implement an embodiment of the present invention." (*Id.* at 23 (quoting '749 Pat., col. 6 ll. 6-11).) Macy's contends that Proxicom's construction fails because any "program or algorithm" would need to be provided within software or hardwired in, but because there is nothing in the patent to suggest any hardwiring, software is required. (*Id.*)

Here, the Court finds Proxicom's proposal consistent with the plain meaning of the term in the context of the claim and specification. The patent language does not require that the "specific application" be "computer software." Instead, the specification contemplates the use of rules and algorithms without mentioning software, unlike other portions of the patent that explicitly discuss the use of software. Because the patent language does not dictate that the "specific application" be software instructions and data, the Court will not do so here. So the Court construes this term as Proxicom proposes: "handled by a specific program or algorithm executing on the second wireless device."

#### IV. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED**:

1. The Court construes the disputed terms as:

<b>Term or Phrase</b>	<b>Claims</b>	<b>Court's Construction</b>
"loyalty program"	'359 Patent, Claims 1 & 14  '592 Patent, Claim 19	"a marketing program designed to reward existing customers to continue to shop at or use the services of businesses associated with the program"
"electronic commerce transaction"	'359 Patent, Claims 1 & 14	no construction needed
"upon an occurrence of a predetermined event coordinated with said central server"	'749 Patent, Claim 1	"upon an action or occurrence that is determined in advance that is coordinated with the central server"
"within a specific application on the second wireless device"	'749 Patent, Claim 1	"handled by a specific program or algorithm executing on the second wireless device"

2. The Court also adopts these agreed-upon term constructions:

<b>Term or Phrase</b>	<b>Claims</b>	<b>Agreed-Upon Construction</b>
"entity"	'359 Patent, Claims 1 & 14  '592 Patent, Claim 19	"A legal entity, such as an individual person or a business."
"reward for an entity associated with the first wireless device's participation in a loyalty program"	'359 Patent, Claim 1 & 14  '592 Patent, Claim 19	"reward for an entity that is associated with the first wireless device, wherein the reward is for that entity's participation in a loyalty program"
"modified identification information"	'749 Patent, Claims 1, 17, & 21	"changed identification information"

**DONE AND ORDERED** in Chambers in Orlando, Florida, on February 12, 2019.



  
ROY B. DALTON JR.  
United States District Judge

Copies to:  
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