

No. 2022-1599

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

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ALEXSAM, INC.,

*Plaintiff-Appellant*

v.

CIGNA CORPORATION, CIGNA HEALTH AND LIFE INSURANCE  
COMPANY, CONNECTICUT GENERAL LIFE INSURANCE COMPANY, AND  
CIGNA HEALTHCARE OF TEXAS, INC.,

*Defendants-Appellees.*

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**Appeal From The United States District Court  
For The Eastern District of Texas In  
Case No. 2:20-cv-00081-RWS-RDP,  
Honorable Robert W. Schroeder III**

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**CORRECTED PETITION FOR REHEARING OR REHEARING *EN BANC*  
OF PLAINTIFF-APPELLANT ALEXSAM, INC.**

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May 6, 2024

**PATENT CLAIMS AT ISSUE – U.S. Patent No. 6,000,608**

32 - A multifunction card system comprising:

- a. at least one debit/medical services card having a unique identification number encoded on it comprising a bank identification number approved by the American Banking Association for use in a banking network;
- b. a transaction processor receiving card data from an unmodified existing standard point-of-sale device, said card data including a unique identification number;
- c. a processing hub receiving directly or indirectly said card data from said transaction processor; and
- d. said processing hub accessing a first database when the card functions as a debit card and said processing hub accessing a second database when the card functions as a medical card.

33 - The multifunction card system of claim 32, wherein the unique identification number further comprises a medical identification number.

**CERTIFICATE OF INTEREST**

Counsel for Plaintiff-Appellant, Alexsam, Inc., certifies the following:

1. The full name of every party or amicus represented by me is:  

Alexsam, Inc. (Plaintiff-Appellant)
2. The name of the real party in interest represented by me is: None.
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party represented by me is: None.
4. The names of all law firms and the partners or associates that appeared for Alexsam, Inc. in the trial court or agency or are expected to appear in this Court (and who have not or will not enter an appearance in this case) are:  

Travis Lynch  
Jonathan R. Miller  
William Cornelius
5. Related Cases: *see* section entitled “Statement Of Related Cases.”
6. Organizational Victims and Bankruptcy Cases: **None**.

Dates: May 6, 2024

Respectfully submitted,

/s/Jacqueline K. Burt  
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*Attorney for Plaintiff-Appellant,  
AlexSam, Inc.*

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**STATEMENT OF RELATED CASES**

Pursuant to Federal Circuit Rule 47.5, Appellant provides as follows:

- (a) There have been no previous appeals in this case.
- (b) Six (6) district court case(s) may be affected by the Court's decision in this case:

- *AlexSam, Inc. v. Mastercard International Inc.*, Case No. 1:15-cv-02799 (Eastern District of New York);

- *AlexSam, Inc. v. Aetna, Inc.*, Case No. 3:19-cv-01025 (District of Connecticut);

- *AlexSam, Inc. v. Simon Property Group, L.P., et al.*, Case No. 2:19-cv-00331 (Eastern District of Texas);

- *AlexSam, Inc. v. U.S. Bank, Inc.*, Case No. 1:21-cv-00588 (Southern District of Ohio);

- *AlexSam, Inc. v. American Express Travel Related Services Company, Inc.*, Case No. 1:21-cv-08116 (Southern District of New York); and

- *AlexSam, Inc. v. HealthEquity, Inc., et al.*, Case No. 2:19-cv-00445 (District of Utah).

## **STATEMENT OF COUNSEL IN SUPPORT OF REHEARING EN BANC**

Based on my professional judgment, I believe the panel decision is contrary to the following decisions of the U.S. Supreme Court and the precedent of this Court:

- *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022) (“Waiver, we have said, ‘is the intentional relinquishment or abandonment of a known right.’”).
- *Advanced Fiber Techs. Trust v. J&L Fiber Servs., Inc.*, 674 F.3d 1365, 1373-74 (Fed. Cir. 2012) (“[T]he claim construction analysis must follow the guiding principles set forth in *Phillips [v. AWH Corp.]*, 415 F.3d 1303, 1316 (Fed. Cir. 2005) (en banc).”)

I also believe that the Panel’s Opinion overlooks critical factual material that proves that Appellant’s qualified expert, Mr. Ivan Zatkovich, did, in fact, go beyond the proof of infringement presented in the prior case of *AlexSam, Inc. v. IDT Corp.*, 715 F.3d 1336 (Fed. Cir. 2013) (“*IDT Case*”), which was ultimately found in that case to be insufficient. By only referencing a select portion of Appellant’s expert’s opinion in this case, the Panel misstated the infringement evidence presented by Appellant and incorrectly concluded that the findings of Appellant’s expert are insufficient under *IDT*. Opinion, pp. 7-8. Mr. Zatkovich addressed and overcame the shortcomings found in *IDT*. Precedent requires that his full opinion be considered and recognized. See *Douglass v. United Servs. Auto. Assoc.*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*) (Court conducting a *de novo* review examines the entire record and makes an independent assessment under the law.).

In light of the foregoing precedent, it is AlexSam’s position that consideration by the full Court is therefore necessary to secure and maintain the uniformity of the law.

/s/Jacqueline K. Burt  
Jacqueline K. Burt  
*Attorney for Plaintiff-Appellant,*  
*AlexSam, Inc.*

**THE POINTS OF LAW OR FACT OVERLOOKED OR  
MISAPPREHENDED BY THE COURT**

For at least three reasons, the Panel’s Opinion is contrary to existing precedent and/or overlooks facts presented by Appellant AlexSam, Inc. (“Appellant”).

*First*, the Panel overlooked facts and misapprehended the law when it found that Appellant waived its right to seek review of a stipulated claim construction. Specifically, the Panel overlooked the fact that **Appellant disclosed its understanding of the phrase well before summary judgment** (and even prior to claim construction), but it was **Appellees** who failed to raise their dispute until summary judgment. Moreover, the Panel misapprehended the law governing the Doctrine of Waiver, which requires more than simply a stipulation to a claim construction – it requires evidence of a specific intention to relinquish or abandon a known right, which does not exist in this case.



*Second*, the Panel overlooked Appellant’s argument regarding the meaning of the derivative term, “for use in the card system.” Appellant’s argument is clear, and it is entirely supported by the intrinsic evidence.

*Third*, the Panel overlooked the totality of the evidence on infringement proffered by Appellant, which included qualified expert opinion and undisputed facts not examined by the Panel. The Panel thus overlooked key facts and misapprehended binding precedent in finding for Appellees.

## **ARGUMENT**

### **I. THE PANEL OPINION FAILS TO RESOLVE THE PARTIES’ CLAIM CONSTRUCTION DISPUTE IN ACCORDANCE WITH BINDING PRECEDENT**

The Panel failed to resolve the parties’ derivative claim construction dispute with an analysis that both considers, and is faithful to, the intrinsic evidence. In failing to do so, the Panel misapprehended the law and overlooked essential facts. Properly construed, the derivative phrase “for use in the card system,” which must be construed in light of the intrinsic evidence, means “for use in performing the claimed functions.”

#### **A. The Facts and Law Do Not Support the Panel’s Finding of Waiver.**

*First*, the Panel overlooked **the fact** that Appellant AlexSam, Inc. (“Appellant”) did not waive its right to challenge claim construction by “wait[ing]

until summary judgment” to raise its understanding of the derivative phrase “for use in the card system” as reported in the Opinion.<sup>1</sup> *Second*, the Panel misapprehended **the law** of waiver when refusing to consider Appellant’s claim construction arguments.

### **1. The Finding of Waiver Overlooks Essential Facts.**

The Panel mistakenly believed that Appellant failed to disclose its understanding of what satisfied the derivative phrase “for use in the card system” until summary judgment. Based on this misunderstanding of the facts, the Panel “decline[d] to consider AlexSam’s eleventh-hour arguments for a broader construction of claim 32 of the ‘608 Patent.” Opinion (“Op.”), p. 6.

In fact, Appellant disclosed its understanding of the phrase “for use in the card system” **at least 46 days before Appellees’ opening summary judgment brief was filed.**<sup>2</sup> Appx0001479-80 (Expert Report of Ivan Zatkovich, ¶¶134-136). This provided Appellees with almost **seven weeks** to raise the dispute with the Court; **Appellees** chose not to do so until summary judgment and any waiver applies to them, not to Appellant.

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<sup>1</sup> “For the first time, on summary judgment in this case, [Appellant] AlexSam argues for a broader construction of claim 32.” Op., p. 5.

<sup>2</sup> The Zatkovich Report is dated June 14, 2021 (Appx1414); Appellee’s Motion for Summary Judgment of Non-Infringement was filed July 30, 2021 (Appx0876).

Moreover, Appellant’s understanding that the “unmodified” claim element was met by the use of a standard Visa card – which is the core of Appellant’s argument that the point-of-sale devices are not “altered for use in the Cigna card system” (Appx1320) – was in fact disclosed in Appellant’s Preliminary Infringement Contentions, which were provided to Appellees on September 9, 2020 (Appx1308), which was more than **six (6) months before Appellees filed their Claim Construction Brief** on March 9, 2021. Appx0784, Appx0818. Again, **Appellees** had the information necessary to understand that a dispute existed regarding the stipulated construction, but they, **not Appellant**, waited to raise the issue until summary judgment.

In any event, as is explained below, even if Appellant had failed to raise its understanding of the derivative phrase “for use in the card system” until summary judgment, which it did not, such a failure alone is not sufficient to find waiver under this Court’s precedent.

## **2. The Finding of Waiver Is Inconsistent With Supreme Court Precedent and Prior Opinions of this Court.**

The mere fact that a party stipulated to a construction does not constitute waiver. Instead, the U.S. Supreme Court has held that waiver is an **intentional relinquishment or abandonment of a known right**. *See Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022) (“Waiver, we have said, ‘is the intentional relinquishment or abandonment of a known right.’”) (citing and quoting *United States*

*v. Olano*, 507 U.S. 725, 733 (1993) (internal quotation marks omitted)); *see also* *Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 428 n. 15 (5th Cir. 2003) (citing *In re Al Copeland Enters., Inc.*, 153 F.3d 268, 271 (5th Cir.1998)).

In this case, however, the Panel failed to consider the legal requirements for finding waiver and then mistakenly found that Appellant had waived its right to challenge what it believes is an improper and legally unsupportable interpretation of the parties' stipulated construction by the District Court. The only bases for the mistaken finding by the Panel (and the District Court) is that (i) the District Court set a claim construction schedule; (ii) the parties subsequently stipulated to the construction of "unmodified ... point-of-sale device" during claim construction; and (iii) the parties did not anticipate a subsequent dispute over the meaning of the construction. The Panel then supported its waiver finding with an erroneous conclusion that Appellant **first raised its understanding** of the disputed language during the summary judgment process, which is incorrect as is shown above. However, such facts, even if true, are not evidence of an "intention[ to] relinquish[] or abandon[] a known right." It is simply evidence that the parties sought to comply with their obligation to reduce the claim construction issues in the case;<sup>3</sup> there is no

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<sup>1</sup> The Eastern District of Texas Patent Local Rules (the "Rules") **require** litigants to meet and confer to "narrow" the parties' claim construction disputes. *See* Eastern District of Texas Patent Local Rules 4-1(b) ("The parties shall ... meet and confer for the purposes ... narrowing or resolving differences [between the parties']

evidence that either party understood or had a basis to understand the subsequent significance of the construction at the time of stipulation.

In contrast, the parties in *Bettcher Indus., Inc. v. Bunzl USA, Inc.*, 661 F.3d 629, 640 (Fed. Cir. 2011), the only case cited by the Panel in support of its refusal to consider Appellant’s arguments, presents markedly different circumstances. Specifically, *Bettcher* did not involve a stipulated construction. Instead, the parties initially raised a term (“bearing face”) in their *Markman* briefs. *Id.* However, the district court found that the issues related to that term were “inadequately presented” and declined to consider them. *Id.* Rather than seek additional briefing or argument, the parties **intentionally** “narrowed [the claim construction] to one disputed definition [fustoconical].” *Id.* Thereafter, the parties – **with full knowledge that they had differing positions** regarding the “bearing face” construction,

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positions regarding terms requiring construction]”); 4-2(c) (“The parties shall thereafter meet and confer for the purposes of narrowing the issues [related to the parties’ respective claim construction positions]”); and 4-3(a)(1) (requiring to identify “terms, phrases, or clauses on which the parties agree”). However, the Rules **do not notify litigants that stipulations may lead to forfeiture** of the right to contest the application of the agreed upon claim construction. *But see Massachusetts Instit. of Tech. v. Abacus Software*, 462 F.3d 1344, 1358-59 (Fed. Cir. 2006), citing and quoting Fed. R. Civ. P. 83(b) (“No sanction or disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.”) (finding that Eastern District of Texas Patent Local Rules failed to provide “sufficient notice that [plaintiff’s] preliminary infringement contentions would be deemed final or that they could only be updated upon a showing of good cause.”).

**affirmatively agreed to proceed without resolving the dispute.** *Id.* Then, more than a year after the *Markman* hearing, defendant Bunzl requested a jury instruction construing “bearing face.” *Id.* The district court found that, under those circumstances, the request for construction was too late. *Id.* Because there are no such facts in the case at bar – Appellant (at least) had no knowledge of any dispute regarding the derivative term “for use in the card system” until Appellees filed their motion for summary judgment – *Bettcher* does not support a finding of waiver here.

The Panel’s Opinion thus misapprehends the law and fails to adhere to rulings of the U.S. Supreme Court because there are no facts that Appellant intentionally relinquished or abandoned its right to seek resolution of the parties’ derivative claim construction dispute.

**B. The Construction of the Derivative Phrase “For Use In The Card System” Must Align With the Intrinsic Evidence.**

Significantly, the Opinion fails to accurately recite the position advanced by Appellant and thus, necessarily, overlooks critical facts. Specifically, the Opinion attributes to Appellant the position that “‘for use in the card system’ means that ‘a closed system that required single-function dedicated hardware to be installed in each retail location’ would not result in infringement of the ‘608 Patent.” Op., p. 5. However, the passage cited by the Panel from Appellant’s summary judgment brief does not support this quotation. In fact, the cited statement was made in the District Court with reference to the term “unmodified,” **not** the derivative phrase “for use in

the card system.” Appellant’s position with respect to the meaning of the derivative phrase is set forth in, *inter alia*, its Blue and Gray Briefs in this Appeal. *See, e.g.*, Blue Brf., p. 34 (“[T]he term ‘unmodified’ ... supports the conclusion that **‘for use in the card system’ should be understood to mean ‘to perform the claimed functions.’**” (Footnote omitted; **emphasis** added.); Gray Brf., pp. 4-5 (“The inventor’s explanation of the term unmodified **relates directly to the primary function of the POS in the Asserted Claims (sending to a network device, i.e., transaction processor, over a banking network)**. By explaining the term in this light, the inventor directly linked ‘unmodified’ with the claimed functions.”)<sup>4</sup> (**emphasis** added.)

The Panel should have evaluated Appellant’s argument in light of the intrinsic evidence, which directly supports Appellant’s understanding. *See Advanced Fiber Techs. Trust v. J&L Fiber Servs., Inc.*, 674 F.3d 1365, 1373-74 (Fed. Cir. 2012); Gray Brf., pp. 10-11; Appx1153.

In passing over derivative claim construction and ruling on infringement, the Panel overlooked the arguments and positions advanced by Appellant and instead

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<sup>4</sup> In this passage, Appellant continued to note that: “Cigna has not refuted nor even responded to this argument, nor did the District Court discuss how its application of the construction comported with the inventor’s explanation.” *Id.*; *but see SmithKline Beecham Corp. v. Apotex Corp.*, 439 F. 3d 1312, 1319 (Fed. Cir. 2006) (“issue ... has been waived for failure to brief it on appeal.”).

upheld the decision below based on a misunderstanding of the facts and a misapprehension of the law.

## II. THE PANEL MISAPPREHENDED THE LAW AND OVERLOOKED KEY FACTS ON INFRINGEMENT

In addition to failing to properly construe the claims before proceeding to infringement, the Panel's Opinion fails to properly consider the issue of infringement in two important respects and thus overlooks facts and misapprehends the law.

The Panel misstated—and thus apparently failed to consider—the evidence of infringement presented by Appellant. Rather, Appellant did **not** merely present evidence of what was “required” for use in the accused system. Op., pp. 7-8. Appellant produced **evidence of actual transactions** from which an undisputed expert concluded that the POS device in such transactions was unmodified.

Appellant's expert, addressing the fact question of modifications to the POS and card system, does not limit his opinion to modifications that are “required,” which is in contrast to AlexSam's expert's opinion in *IDT* that no modifications were “required.” Appellant's expert here accounted for and considered the very facts the *IDT* court faulted the expert in that case for not looking at: the information provided by the intermediary partner. That intermediary in this case is Alegeus, the entity responsible for processing the transactions through the system architecture. *See* Appx1440-1441. Appellant's expert made no less than 80 references in his report to the testimony of Derek Holmes of Alegeus, and AlexSam submitted deposition



testimony of Mr. Holmes for the Court’s consideration. *See, generally* Appx1414-1484.

Contrary to the Panel’s findings, Mr. Holmes’ testimony includes details regarding the platform Appellees **actually** used and **actual** card transactions. Appx1716 at 178:24-181:25<sup>5</sup> (describing data **actually** received during **actual** transactions); Appx1720 at 32:6-33:7; Appx1729 at 82:15-83:21; Appx1730 at 88:7-25; Appx1739 at 206:14-209:10<sup>6</sup>). Based upon his review of the intermediary partner’s data and testimony, Appellant’s expert—whose expertise is unchallenged—was able to conclude that the POS devices were unmodified. Specifically, Mr. Zatkovitch applied the Court’s claim construction and opined that “the accused Cigna Cards meet the limitations of the elements [of an] ... unmodified existing standard point-of-sale device . . . .” Appx1432-1433, Appx1466; *see also* Appx1478

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<sup>5</sup> The naming convention indicates page:line – *e.g.*, page 13, line 12 is identified as 13:12.

<sup>6</sup> Q. Does Alegeus [Appellees’ transaction processor] receive this data listed in these various fields **for all transactions** relating to its cards **as processed at the point-of-sale terminals**.

A. Alegeus receives – the data may not always be filled in, as indicated here, but **receives these fields as part of ISO messages for all of the transactions. Its not always completed, there’s not always data in them, but the fields would always exist.**

Q. That’s true for Cigna or any other client of Alegeus, is that right?

A. That is correct.

Appx1739 at 208:19-209:10 (**emphasis** added).

(“Cigna cards perform transactions using ‘an unmodified standard retail point-of-sale device.’”)

No explanation has ever been provided by Appellees, the Magistrate, or the Panel as **to why or how Appellant’s expert is wrong**—that is, why an expert cannot conclude from the data formatting used in the **actual** transmissions that were **actually** sent and received that the POS devices initiating the transactions were unmodified for use in the card system. This, despite that Mr. Zatkovich has provided detailed reasoning in support of his opinion. *See, e.g.*, Appx1453-1481.

These facts were overlooked by the Panel when it concluded that Appellant had failed to produce evidence from which a reasonable jury could conclude that the POS devices were **actually** unmodified. The Panel instead focused on one opinion expressed by Mr. Zatkovitch that is similar in nature to an opinion offered by the expert in *IDT*: “that while modifications and software updates may have been implemented in POS devices since 1997, they still function as a POS device in 1997 would function regarding the ‘608 patent’s technology.” Op., p.8 The Panel incorrectly points to this statement as being the boundary of Zatkovitch’s testimony and thereby deems it a “flaw” similar to that in *IDT*. The difference is that the similar testimony in *IDT* did serve as the boundary of the expert evidence in that case. **It is not the boundary here.** While Zatkovich’s statement singled out by the Panel is correct, **he went beyond it to conclude**—based upon his review of the actual

systems used by Appellees and its intermediary partner—**that Appellee’s “cards perform transactions using ‘an unmodified standard retail point-of-sale device.’**” Appx1478-1481. No such evidence was in *IDT*.

By having an **uncontested POS expert** review **actual transaction data from the actual transaction processor** (Alegeus, the intermediary) and then offer testimony not limited to what is “required” but rather **describing what actually occurred**, Appellant met the *IDT* standard head on. Its expert offered materially different evidence than in *IDT* and fully addressed the three deficiencies identified by the *IDT* court. Critically, Appellant has provided “enough evidence from which a reasonable jury could conclude that the transactions did **actually** occur at ‘unmodified standard POS device[s].’” Op., p. 8.

The difference in evidence between this case and *IDT* means a different result. Rehearing is warranted for that reason.

### **III. CONCLUSION**

Appellant respectfully submits that the Panel erred by failing to construe the claim term “unmodified” or, at a minimum, the derivative phrase “for use in the card system” before ruling on infringement. Moreover, Appellant respectfully submits that the Panel erred by failing to consider the totality of the evidence presented in the light most favorable to Appellant.

Dated: May 6, 2024

Respectfully submitted,

*/s/ Jacqueline K. Burt*

\_\_\_\_\_  
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# **Addendum**

NOTE: This disposition is nonprecedential.

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

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**ALEXSAM, INC.,**  
*Plaintiff-Appellant*

v.

**CIGNA CORPORATION, CIGNA HEALTH AND  
LIFE INSURANCE COMPANY, CONNECTICUT  
GENERAL LIFE INSURANCE COMPANY, CIGNA  
HEALTHCARE OF TEXAS, INC.,**  
*Defendants-Appellees*

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2022-1599

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Appeal from the United States District Court for the  
Eastern District of Texas in No. 2:20-cv-00081-RWS-RDP,  
Judge Robert Schroeder, III.

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Decided: April 1, 2024

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argued for defendants-appellees. Also represented by NEIL J. McNABNAY, BRET THOMAS WINTERLE, LANCE E. WYATT, JR.

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Before PROST, TARANTO, and HUGHES, *Circuit Judges*.

HUGHES, *Circuit Judge*.

AlexSam, Inc. appeals a summary judgment decision holding that Cigna Corp. and its affiliates did not infringe AlexSam, Inc.’s multifunction card system patent. Because AlexSam, Inc. failed to provide sufficient evidence of infringement, we affirm.

I

A

AlexSam, Inc. (AlexSam) owns U.S. Patent No. 6,000,608 (the ’608 patent), disclosing a “multifunction card system.” J.A. 7. The basic premise of the patent is the ability to use a debit or credit card for purposes other than financial transactions. In the case at hand, the function would be to use a debit or credit card that could also provide a healthcare provider with a cardholder’s medical account information and other health-related information. *See* Appellant’s Br. at 3 n.1.

AlexSam’s infringement claims center on independent claim 32 of the ’608 patent, which is representative:

A multifunction card system comprising:

- a. at least one debit/medical services card having a unique identification number encoded on it comprising a bank identification number approved by the American Banking Association for use in a banking network;

- b. a transaction processor receiving card data from an unmodified existing standard point-of-sale device, said card data including a unique identification number;
- c. a processing hub receiving directly or indirectly said card data from said transaction processor; and
- d. said processing hub accessing a first database when the card functions as a debit card and said processing hub accessing a second database when the card functions as a medical card.

'608 patent at 15:65–16:11.

Dependent claim 33, also at issue in this case, simply claims that the multifunction card includes a user's medical identification number. *Id.* at 16:12–14.

## B

On March 18, 2020, three years after the '608 patent's expiration, AlexSam filed suit against Cigna Corp., Cigna Health and Life Insurance Co., Connecticut General Life Insurance Co., and Cigna Healthcare of Texas, Inc. (collectively, Cigna) in the Eastern District of Texas, alleging that Cigna's Consumer-Driven Health Plan debit cards infringed independent claim 32 and dependent claim 33 of the '608 patent. Before holding a *Markman* claim construction hearing, the trial court issued suggested preliminary constructions for disputed claims to facilitate discussion between the parties. AlexSam requested that the trial court adopt the same construction for the term “unmodified” in claim 32 that was used in a virtually identical claim from a case 15 years prior. *See AlexSam, Inc. v. Datastream Card Servs. Ltd.*, No. 2:03–CV–337, 2005 WL 6220095, at \*9 (E.D. Tex. June 10, 2005) (hereinafter, *Datastream*). *Compare* J.A. 80 (AlexSam proposing the *Datastream*



construction in this case), *with* J.A. 598 (AlexSam noting that since 2005, courts have used the *Datastream* construction at AlexSam’s request).

The trial court adopted the *Datastream* construction but added two commas to it at Cigna’s request for clarity. The final construction for “unmodified” in claim 32 reads: “a terminal, for making purchases, that is of the type in use as of July 10, 1997, and that has not been reprogrammed, customized, or otherwise altered with respect to its software or hardware for use in the card system.” J.A. 80.

After the close of discovery, Cigna filed a motion for summary judgment of non-infringement and AlexSam filed a motion for summary judgment of infringement. After a hearing on the motions, the magistrate judge overseeing the case issued a recommendation that the trial court grant Cigna’s motion for summary judgment of non-infringement, based on a proposed finding that AlexSam lacked sufficient evidence to establish Cigna’s infringement, and deny AlexSam’s summary-judgment motion. The trial court accepted the magistrate judge’s recommendation, granting Cigna’s motion and denying AlexSam’s motion. *Alexsam, Inc. v. Cigna Corp.*, No. 2:20-cv-81 (E.D. Tex. Mar. 16, 2022), ECF No. 248. This appeal followed. We have jurisdiction under 28 U.S.C. § 1295(a)(1).

## II

Our court reviews a claim construction based on intrinsic evidence *de novo* and reviews any findings of fact based on extrinsic evidence for clear error. *SpeedTrack, Inc. v. Amazon.com*, 998 F.3d 1373, 1378 (Fed. Cir. 2021). “We review summary judgment decisions under regional circuit precedent . . .” *Unwired Planet, LLC v. Apple Inc.*, 829 F.3d 1353, 1356 (Fed. Cir. 2016). The Fifth Circuit reviews the grant of summary judgment *de novo*. *Patel v. Tex. Tech Univ.*, 941 F.3d 743, 747 (Fed. Cir. 2019). “Summary judgment is appropriate when, drawing all justifiable inferences in the nonmovant’s favor, the movant shows that

there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Unwired Planet*, 829 F.3d at 1356; *see also* Fed. R. Civ. P. 56(a); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

### III

AlexSam raises two issues on appeal: (1) whether the district court erred in applying the district court’s and parties’ agreed-upon claim construction for claim 32 of the ’608 patent and (2) whether AlexSam lacked sufficient evidence for a reasonable jury to find that Cigna infringed the ’608 patent. We address each in turn.

#### A

During the *Markman* proceedings previously discussed at Section I.B, *supra*, the district court construed the meaning of the term “unmodified existing standard point-of-sale [(POS)] device,” which is found in claim 32 (element b) of the ’608 patent. At that time, AlexSam had proposed the construction. J.A. 598. Now, AlexSam argues that while claim 32 was construed correctly, the district court erred by ignoring the end of the construction, which states “for use in the card system.” We disagree.

AlexSam has advocated for over fifteen years for the same claim construction contained in claim 32 of the ’608 patent. *See, e.g., Datastream*, 2005 WL 6220095, at \*9; *AlexSam, Inc. v. Humana, Inc.*, No. 2:07-cv-288, 2009 WL 2843333, at \*4 (E.D. Tex. Aug. 28, 2009). For the first time, on summary judgment in this case, AlexSam argues for a broader construction of claim 32. AlexSam asserts that “for use in the card system” means that “a closed system that required single-function dedicated hardware to be installed in each retail location” would not result in infringement of the ’608 patent. J.A. 960. Conversely, a “general use POS that applied a BIN (or encrypted BIN) to access a processing hub over an existing banking network would

[infringe], even if the POS device required some preprogramming and configuration.” J.A. 960. The magistrate judge “decline[d] to hear [AlexSam’s] waived claim construction arguments that could have and should have been raised in the first instance during claim construction.” J.A. 108. The magistrate judge’s decision is in line with our precedent. Where a court has prescribed specific claim construction procedures and the parties have proceeded toward trial in reliance on them, the court has discretion to preclude parties from injecting “new claim construction theories on the eve of trial.” *Bettcher Indus., Inc. v. Bunzl USA, Inc.*, 661 F.3d 629, 640–41 (Fed. Cir. 2011). Thus, we decline to consider AlexSam’s eleventh-hour arguments for a broader construction of claim 32 of the ’608 patent.

AlexSam also argues that the magistrate judge did not properly apply the claim term “for use in the card system.” To support this allegation, AlexSam points to the magistrate’s report and recommendation to the trial court. We find the record reflects the opposite. The magistrate judge did consider the term “for use in the card system” when it stated that “any modification to the software or hardware that impacts how the POS device would be *used in the card system* would fall outside of the scope of the claims.” J.A. 109 (emphasis added). Even Cigna acknowledged this, stating that adding a sticker to a POS device or replacing its power cord would not qualify as a modification of the POS device “for use in the card system.” AlexSam is incorrect in its assertion that the trial court did not give weight to the term “for use in the card system.”

We previously applied the same claim construction language in *Alexsam, Inc. v. IDT Corp.*, 715 F.3d 1336 (Fed. Cir. 2013), and left it undisturbed. Discussing AlexSam’s burden of proof for infringement, we stated that “Alexsam needed to prove both that these systems made use of terminals ‘of the type in use as of July 10, 1997,’ and also that those terminals ‘ha[d] not been reprogrammed, customized, or otherwise altered with respect to [their]

software . . . *for use in the card system.*” *IDT*, 715 F.3d at 1341 (emphasis added and emphasis in original omitted). Thus, our court, like previous courts, appropriately considered the limitation “for use in the card system,” despite AlexSam’s claims to the contrary.<sup>1</sup>

## B

While AlexSam spends a significant amount of time arguing about claim construction issues, the reality is that this case hinges on AlexSam’s infringement claims against Cigna, which fail in light of our precedential decision in *IDT*. In that case, AlexSam alleged that IDT Corp. infringed its ’608 patent—the same patent at issue here. We held that AlexSam did not provide sufficient evidence that the alleged infringer used unmodified devices—its experts simply opined that the devices were unmodified because the technology from 1997 in these devices was unchanged for the purposes of the ’608 patent’s technology. *IDT*, 715 F.3d at 1342. Thus, an expert’s opinion on what was simply “required” in order to activate an IDT card was different

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<sup>1</sup> AlexSam contended to the trial court that “the [Federal Circuit] in *IDT* erred by ruling that the POS devices cannot be modified in any way . . . [therefore] the reasoning in *IDT* cannot and should not be applied here.” J.A. 991. To the extent that AlexSam contends that our decision in *IDT* was in error, we see none, and in any event, a panel of this court lacks the authority to overrule a prior panel absent a Supreme Court or en banc decision. *Deckers Corp. v. United States*, 752 F.3d 949, 964 (Fed. Cir. 2014) (“We have . . . adopted the rule that a panel of this court—which normally sits in panels of three, and not en banc—is bound by the precedential decisions of prior panels unless and until overruled by an intervening Supreme Court or en banc decision.”).

from actual evidence that POS devices had been modified to utilize an IDT card. *Id.*

Despite this binding precedent, AlexSam’s expert testimony in this case suffers from similar flaws. AlexSam’s experts stated that while modifications and software updates may have been implemented in POS devices since 1997, they still function as a POS device in 1997 would function regarding the ’608 patent’s technology. But as the magistrate judge noted, “[a]t no point in either [AlexSam’s expert’s] report or [a fact witness’s] deposition did either one offer any evidence ‘*whether modifications have, in fact, been made for any reason*’ to the POS terminals used in the accused system,” as *IDT* requires. J.A. 112 (quoting *IDT*, 715 F.3d at 1342). The magistrate judge continued, “[t]hough Alexsam need not necessarily have conclusive proof at this summary judgment stage that every transaction occurred at an ‘unmodified standard POS device,’ it does need enough evidence from which a reasonable jury could conclude that the transactions did **actually** occur at ‘unmodified standard POS device[s].’ Alexsam has provided none.” J.A. 113. The magistrate judge correctly concluded that “AlexSam’s evidence in this case, like its evidence in *IDT*, simply shows that modifications of standard existing POS devices were not *required* for use in the accused system. Binding precedent establishes that such evidence is insufficient.” J.A. 113. We concur.

#### IV

We have considered the rest of AlexSam’s arguments and find them unpersuasive. We therefore affirm the district court’s decision that AlexSam failed to provide sufficient evidence of Cigna’s infringement of claims 32 and 33 of the ’608 patent.

**AFFIRMED**

# United States Court of Appeals for the Federal Circuit

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ALEXSAM, INC.,  
*Plaintiff-Appellant*

v.

CIGNA CORPORATION, CIGNA HEALTH AND LIFE  
INSURANCE COMPANY, CONNECTICUT GENERAL  
LIFE INSURANCE COMPANY, CIGNA HEALTHCARE  
OF TEXAS, INC.,  
*Defendants-Appellees*

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2022-1599

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Appeal from the United States District Court for the Eastern  
District of Texas in No. 2:20-cv-00081-RWS-RSP, Judge Robert  
Schroeder, III.

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## JUDGMENT

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THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

**AFFIRMED**

FOR THE COURT

April 1, 2024  
Date

  
Jarrett B. Perlow  
Clerk of Court

**CERTIFICATE OF SERVICE**

I hereby certify that on this date, on behalf of Plaintiff-Appellant ALEXSAM, INC., I caused to be filed with the Clerk of the United States Court of Appeals for the Federal Circuit *via* the Court's CM/ECF system, which caused it to be served on all counsel of record, a copy of the CORRECTED PETITION FOR REHEARING OR REHEARING EN BANC OF PLAINTIFF-APPELLANT ALEXSAM, INC.

Dated: May 6, 2024

Respectfully submitted,

*/s/ Jacqueline K. Burt*

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Jacqueline K. Burt

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*Attorney for Plaintiff-Appellant, AlexSam, Inc.*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rules 32(g) and 28.1(e)(3) of the Federal Rules of Appellate Procedure (“Fed. R. App. P.”) and Rules 32(b)(3) and 28.1(c) of the Federal Circuit Rules (“Fed. Cir. R.”), AlexSam certifies:

1. This document complies with the type-volume limitation because it contains 3,049 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b)(2).
2. This document complies with the typeface requirements of because it has been prepared in a proportionally spaced typeface using Microsoft® Word for Microsoft 365 MSO in Times New Roman 14 point font.
3. This document complies with the limitations set forth in Fed. Cir. R. 28(d) because it contains no words (including numbers) marked as confidential.

Dated: May 6, 2024

Respectfully submitted,

/s/ Jacqueline K. Burt

Jacqueline K. Burt

*Attorney for Plaintiff-Appellant, AlexSam, Inc.*