IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

BEDROCK COMPUTER TECHNOLOGIES LLC,	§	
	§	
Plaintiff,	§	
	§	**CASE NO. 6:09-cv-269-LED**
v.	§	
	§	**Jury Trial Demanded**
SOFTLAYER TECHNOLOGIES, INC., et al.	§	
	§	
Defendants.	§	

BEDROCK'S REPLY CLAIM CONSTRUCTION BRIEF

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I. INTRODUCTION

The Defendants, in their response brief, do not adhere to the canons of claim construction. Instead, the Defendants attempt to read in language from the preferred embodiments and prosecution history absent disclaimer or lexicography. Further, the Defendants frequently rely on "freeform argumentation"—that is, arguments with no legal basis, no citation to the specification, and instead consist of suspect reasoning. In sum, Defendants fail to advance a single, legally sufficient argument in support of their constructions, and their constructions should therefore be rejected.

II. ARGUMENT IN REPLY

1. "linked list to store and provide access to records" / "linked list of records" [claims 1, 3, 5, and 7]

The sole dispute with this claim term is whether a linked list must have at least two records, as the Defendants argue. The Defendants employ faulty logic in their discussion of the prosecution history of the '120 patent. *See* Res. at 6. Contrary to Defendants' logic, even though the hash table in the '495 patent can contain only a single record at a hash address, it does not follow that a linked list in the '120 patent must have two or more records. Next, the Defendants attempt to explain away the specification's description of a single-record linked list. *See* Res. at 7 ("Bedrock . . . only demonstrates that the deletion procedure may operate on the final element of the linked list, not that the linked list in its entirety may contain only one record."). Plainly, if a linked list can have a "final element," then the linked list contains only one record.[1] In sum, the Defendants' proposed construction should be rejected.

[1] Defendants also seize upon Bedrock's typo in its opening claim construction brief, which inadvertently stated that a preferred embodiment's single-record linked list "ceased being a linked list when it had just one, final element." *See* Res. at 7. Bedrock intended to write that the linked list "did not cease being a linked list when it had just one, final element."

2. *“automatically expiring / expired” [claims 1, 3, 5, and 7]*

For support of their construction for this term, Defendants rely on a description of a preferred embodiment. *See* Res. at 7-8 (citing ’120::6:5-3 (“This is determined by comparing some portion of the contents of the record to some external condition.”)). Specifically, the Defendants assert that, in this sentence, Dr. Nemes acted as his own lexicographer and defined “automatically expiring.” *See* Res. at 7-8. Not so. To be his own lexicographer, a patentee must use a “special definition of the term [that] is clearly stated in the patent specification or file history.” *See Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1580 (Fed. Cir. 1996). Further, “[a] patentee may act as its own lexicographer and assign to a term a unique definition that is different from its ordinary and customary meaning; however, *a patentee must clearly express that intent* in the written description.” *See Helmsderfer v. Brobrick Washroom Equip., Inc.*, 527 F.3d 1379, 1381 (Fed. Cir. 2008) (emphasis added). Here, Dr. Nemes neither assigned a unique definition to the term nor clearly expressed any intent to act as his own lexicographer.

Finally, the Defendants end their discussion for this claim term by arguing:

> Bedrock’s construction is so broad that it encompasses events internal to the system, and possibly internal to the records. But, by its nature, each record contains data (which gets operated on but does not actually do anything) and will not execute conditions considered for record expiration purposes. With every aspect of the specification describing conditions external to the system for automatically expiring records, the intrinsic evidence simply does not contemplate internal events.

See Res. at 8-9. Freeform argumentation like this has no place in construing the legally operative meaning of a claim term. First, the Defendants’ conceptualized “nature” of records is completely unsupported by the specification. Second, the inquiry is not what the intrinsic record explicitly contemplates; the correct inquiry is whether the intrinsic record explicitly, with words or expressions of manifest exclusion or restriction, disavows the scope of a claim term. *See i4i Ltd.*

P'ship v. Microsoft Corp., 598 F.3d 831, 843 ("Generally, a claim is not limited to the embodiments described in the specification unless the patentee has demonstrated a clear intention to limit the claim's scope with words or expressions of manifest exclusion or restriction.") (inner quotations omitted). For these reasons, the Defendants' proposed construction should be rejected.

3. "identifying and removing at least some of the expired records from the linked list when the linked list is accessed" [fabricated claim term]

(a) Is this a claim term to be construed?

The Defendants spend 11 pages of their brief on this phrase; however, this is not a claim term. To fabricate this claim term, the Defendants truncated the claim term that begins "identifying at least some . . ." and concatenated it with the claim term that begins "removing at least some . . . ." Thus, Defendants are asking the Court to construe a fabricated claim term that is the product of their rewriting two actual claim terms. Disputed claim terms are to be construed—not rewritten and then construed.

(b) Should the 112 ¶ 6 limitations be subject to these disputes?

Another defect with Defendants' proposed constructions is that they submit their proposed constructions against 112 ¶ 6 limitations. Means-plus-function limitations are construed by a legal framework that is different from limitations not governed by 35 U.S.C. § 112 ¶ 6, namely, identifying the recited function and then identifying the corresponding structure. *See Medtronic, Inc. v. Advanced Cardiovascular Sys., Inc.*, 248 F.3d 1303, 1311 (Fed. Cir. 2001).[2] As such, only the claim limitations not governed by 112 ¶ 6—the "identifying" and "removing" steps of claims 3 and 7—should be subject to the outcome of these disputes.

[2] Further, it is not proper to impose extraneous limitations on recited functions. *See Micro Chemical, Inc. v. Great Plains Chemical Co.*, 194 F.3d 1250, 1258 (Fed Cir. 1999) ("The statute

(c) Does "when the linked list is accessed" mean "during the same traversal"?

Most of Defendants' cited evidence simply repeats the claim language, "when the linked list is accessed" and does not support the Defendants' proposed construction of "during the same traversal." *See* Res. at 9-11. Indeed, the Defendants' only competent support[3] for their "during the same traversal" construction comes from preferred embodiments. However, those embodiments were described without any intention, much less a clear intention, to limit the claim's scope. The Defendants' proposed construction should therefore be rejected. *See i4i*, 598 F.3d at 843.

(d) Does "removing" mean "deallocating memory"?

Plainly, there is no "deallocating memory" step in the claims of the patent. The Defendants attempt to read in a "deallocating memory" step through the claim language "removing," but no such construction is warranted. First, "[h]ad the inventors intended this limitation, they could have drafted claims to expressly include it." *See i4i*, 589 F.3d at 843. Second, the Defendants' arguments regarding the "goals" of the patent are irrelevant to claim construction. *See id*. ("[N]ot every benefit flowing from an invention is a claim limitation."). That an implementor of the '120 patent would most likely want to deallocate the memory occupied by a removed record does not affect the legally operative scope of the claim. Third, contrary to the Defendants' assertion, the patentee did not use the phrase "present invention" in a limiting sense; rather, the patentee simply stated that the preferred embodiments are "in

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[35 U.S.C. § 112 ¶ 6] does not permit limitation of a means-plus-function claim by adopting a function different from that explicitly recited in the claim.")

[3] Defendants also rely on freeform argumentation, i.e., "it simply would not make sense to identify expired records during one traversal and remove the expired records during yet another traversal of the linked list. This is less efficient . . . ." *See* Res. at 13. Moreover, the Defendants spend the majority of a page discussing a Federal Circuit case that construed the term "when" with respect to another patent. *See* Res. at 13.

accordance with the present invention." *See* '120::8:60-64. Indeed, it is hard to conceive of a preferred embodiment of a patent that is *not* in accordance with that patent's invention. Finally, Defendants claim that the specification does not support Bedrock's construction. *See* Res. at 15-16. Not so. *See* '120::7:43-50 ("The remove procedure *causes actual removal* of the designated element *by adjusting the predecessor pointer* so that it bypasses the element to be removed. . . . Following pointer adjustments, the storage occupied by the *removed* element is returned to the system storage pool for future allocation.") (emphasis added).

(e) Does "identifying" mean "comparing some portion of the contents of the record to some external condition"?

Here, the Defendants repeat their arguments for their construction of "automatically expiring;" their proposed construction should be rejected for the same reasons in § 2, *supra*.

4. "dynamically determining maximum number of expired ones of the records to remove when the linked list is accessed" [claims 4 and 8]

(a) Does "dynamically" mean "immediately before . . ."?

The Defendants contend that the claim language supports their construction that the determination be made "immediately before the linked list is traversed." Not so. The claim language "when the linked list is accessed" modifies the phrase "to remove" not "dynamically determining." [4] Having no support from the claim language, Defendants revert again to freeform argumentation: "[i]t would be nonsensical to determine the maximum number of records to remove when accessing the list if that determination was made after the list had been accessed." *See* Res. at 21. At the end of this freeform argumentation, Defendants announce that Bedrock's construction is somehow at odds with the intrinsic evidence. *See* id. Bedrock's proposed

[4] For the reasons stated above, the 112 ¶ 6 limitations—claims 2 and 6—should be construed separately.

construction is not at odds with the intrinsic record; Bedrock's proposed construction is only at odds with Defendants' freeform argumentation.

(b) Does "maximum number" mean "single quantity"?

The Defendants rely on the prosecution history of the patent as support for their construction. *See* Res. at 22. Specifically, Defendants claim that the patentee acted as his own lexicographer and defined the term "maximum number" during prosecution. *See* id. Not so. Dr. Nemes overcame prior art by explaining the difference between two concepts—not by acting as his own lexicographer. Moreover, to be his own lexicographer, a patentee must use a "special definition of the term [that] is clearly stated in the patent specification or file history." *See Vitronics* 90 F.3d at 1580. In the file history of the '120 patent Dr. Nemes explained the purpose of "maximum number" without giving that term a special definition. Further, Dr. Nemes did not express any intent, much less clear intent, to act as his own lexicographer. *See Helmsderfer*, 527 F.3d at 1381 ("A patentee may act as its own lexicographer and assign to a term a unique definition that is different from its ordinary and customary meaning; however, *a patentee must clearly express that intent* in the written description.") (emphasis added).

Finally, the Defendants' proposed construction would read out a description of a preferred embodiment: "The implementor even has the prerogative of choosing among these strategies dynamically at the time search table is invoked by the caller, thus sometimes removing *all* expired records, at other times removing *some but not all* of them, and yet at other times choosing to remove *none* of them." *See* '120::6:66-7:4 (emphasis added). As such, Defendants' construction should be rejected. *See Vitronics*, 90 F.3d at 1583 (Claim interpretations that do not read on the preferred embodiment are "rarely, if ever, correct and would require highly persuasive evidentiary support").

5. "the record search means including a means for identifying and removing at least some [of the] expired ones of the records from the linked list [of records] when the linked list is accessed" [claims 1 and 5]

Recited Function Disputes. The Defendants propose that the recited function should be construed to include a series of extraneous limitations not found explicitly within the recited function of the claim term, including: "removing requires, while traversing the linked list, both adjusting pointers in the linked list to bypass the previously identified expired records and deallocating the memory occupied by those records." *See* Res. at 25. This is improper. *See Micro Chemical*, 194 F.3d at 1258 ("The statute [35 U.S.C. § 112 ¶ 6] does not permit limitation of a means-plus-function claim by adopting a function different from that explicitly recited in the claim."). As such, Defendants' attempts to import limitations into the recited function should be rejected.

Corresponding Structure Dispute. The Defendants' improper interjection of "deallocating memory" into the recited function contaminates their proposed corresponding structure. Namely, Defendants argue that because "removing" requires "deallocating memory," then box 55 of Figure 4 and the Remove Procedure pseudocode should be mandatory corresponding structure. *See* Res. at 25-26. This argument relies on the false assumption that "deallocating memory" is part of the recited function. Further, to the extent that portions of Figure 4 and the Remove Procedure pseudocode are corresponding structures, the specification makes it clear that it is the pointer arithmetic—not the deallocation of memory—that "causes actual removal". *See* '120::7:43-50. As such, the corresponding structures would be:

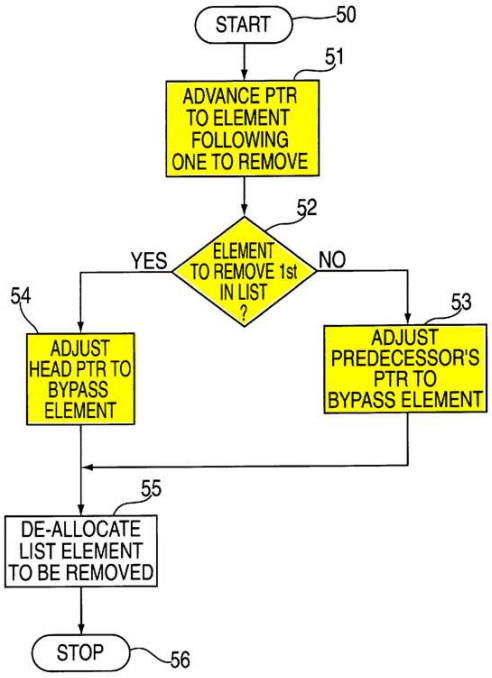

FIG. 4

Remove Procedure

```
procedure remove (var elem_to_del: list_element_pointer;
                  previous_elem: list_element_pointer;
                  index: 0 . . . table_size – 1);
/*   Delete elem_to_del↑ from list, advancing elem_to_del to next element. previous_elem points to
     elem_to_del's predecessor, or nil if elem_to_del↑ is 1st element in list.*/
var p: list_element_pointer;                          /* Save pointer to elem_to_del for disposal. */
begin
  p : = elem_to_del;                    /* Save so we can dispose when finished adjusting pointers. */
  elem_to_del : = elem_to_del↑ .next;
  if previous_elem = nil                              /* Deleting 1st element requires changing */
    then table[index] := elem_to_del                  /* head pointer, as opposed to */
    else previous_elem↑ .next := elem_to_del;         /* predecessor's next pointer. */
    dispose (p)                                       /* Dynamically de-allocate node. */
  end                                        /* remove*/
```

See Asyst Tech., Inc. v. Empak, Inc., 268 F.3d 1364, 1370 (Fed.Cir.2001) ("Structural features that do not actually perform the recited function do not constitute corresponding structure and thus do not serve as claim limitations.").

6. "means, utilizing the record search means, for accessing the linked list and, at the same time, removing at least some of the expired ones of the records in the linked list" [claim 1]

7. "mea[n]s, utilizing the record search means, for inserting, retrieving, and deleting records from the system and, at the same time, removing at least some expired ones of the records in the accessed linked list of records" [claim 5]

Recited Function Disputes. The Defendants' attempts to import limitations into the recited functions for these claims should be rejected. *See Micro Chemical*, 194 F.3d at 1258.

Corresponding Structure Disputes. The first dispute relates to the "accessing the linked list" aspect of the recited function of claim 1. Specifically, the dispute is whether this function can be performed by any one of the insert, retrieve, or delete structures. Defendants contend that the speciation states that all three are necessary to implement the present invention. *See* Res. at 28. Not so. The portion of the specification on which the Defendants rely reads:

> The attached APPENDIX contains PASCAL-like pseudocode listings for all of the programmed components necessary to implement an information storage and retrieval system operating in accordance with the present invention.

See '120::8:60-63. This is not a limiting statement. A fairer interpretation of this statement is that the pseudocode details everything an implementor would need to make a system in accordance with the teachings of the patent. *See also* '120::2:57-60 ("[D]uring normal data insertion ***or*** retrieval probes into the data store, the expired, obsolete records are identified and removed from the external chain linked list.") (emphasis added). In any event, the recited function is "utilizing the record search means, accessing the linked list and, at the same time, removing at least some of the expired ones of the records in the linked list" and because any one of the insert, retrieve, or delete structures can perform this function, any one of those structures alone can serve as the corresponding structure.

The second dispute relates to the "removing" aspect of the recited functions of both claims 1 and 5. Defendants argue that Figure 4 and the Remove Procedure pseudocode must be included within the corresponding structures because the recited function contains the word "removing." This argument ignores that, because another part of the recited function is "utilizing the record search means," the corresponding structures of the record search means can (and do)

perform the "removing" function. *See also* § 5, *supra*. Requiring corresponding structure for "removing" in both this term and the "record search means" term would be unnecessarily duplicative.[5]

8. *Ordering of the Method Claims [claims 3 and 7]*

The parties are not far apart in their understanding of the ordering of the steps of the claims; the issue is that Defendants' proposed *construction* is not appropriately qualified. Namely, the Defendants' proposed construction rigidly requires that the steps be "executed in order." By the Defendants' own reasoning, however, the first steps of claims 3 and 7—"accessing the linked list" and "accessing a linked list of records having same hash address"—are not required to finish execution before the next step begins. Also, neither the logic nor grammar of the claims mandates that the steps cannot be performed with repetition. For example, the logic and grammar of the claims would permit the execution of multiple "identifying" steps before a "removing" step; further, multiple "identifying"/"removing" pairs can execute within a single "accessing" step. The Defendants' proposed construction does not account for these possibilities. Bedrock offers, as its alternative construction, an ordering of the claims that is qualified to account for all possible ways in which the steps of these claims can be executed. Bedrock admits, however, that its alternative construction is verbose. Moreover, Bedrock believes that the jury will understand any required ordering of these claims without construction. As such, Bedrock proposes that no construction would be most helpful to the jury.

III. CONCLUSION

For the foregoing reasons, the Defendants' proposed constructions should be rejected.

[5] Similarly, the third dispute relates to the "at the same time" aspect of the recited function. The Defendants ignore that both parties' proposed corresponding structure for "record search means" already includes the pseudocode they propose for this limitation.

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Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of the forgoing document via the Court's CM/ECF system pursuant to the Court's Local Rules this 24th day of September, 2010.

/s/ J. Austin Curry
J. Austin Curry