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 RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION AND OBJECTIONS TO MEMORANDUM OPINION & ORDER ON CLAIM CONSTRUCTION (DKT. NO. 431)

I. BACKGROUND

This case was referred to Judge Love in accordance with 28 U.S.C. § 636. Dkt. No. 305.

After the parties submitted their proposed claim constructions in the briefing and at the *Markman*

hearing, Judge Love issued a provisional claim construction Order on October 29, 2010. *See*

Dkt. No. 326. On November 12, Defendants[1] requested an extension of time for objecting to

Judge Love's constructions, which Bedrock did not oppose and which Judge Love granted. *See*

Dkt. Nos. 331, 332. In granting the Defendants' motion, Judge Love set the Defendants'

deadline to object to his constructions to December 3, 2010. *See* Dkt. No. 332. Judge Love

subsequently issued a final Memorandum Opinion and Order on January 10, 2011. Dkt. No.

369. Defendants did not file their Motion for reconsideration until January 27, almost two

months after the extended deadline. Because Defendants' Motion is untimely and because

Defendants cannot demonstrate that Judge Love's findings are clearly erroneous or contrary to

law, their Motion should be denied.[2]

II. ARGUMENT

A. Defendants' Motion for Reconsideration is Untimely.

"A party may not assign as error a defect in the order not timely objected to." FED. R.

CIV. P. 72(a). As this Court granted Defendants' *unopposed* motion to extend the deadline for

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[1] Amazon.com Inc., Softlayer Technologies, Inc., Google, Inc., Match.com, LLC, Yahoo! Inc., MySpace Inc., and AOL LLC (collectively, "Defendants").

[2] Another defect of the Defendants' motion for reconsideration is that it objects to every single claim construction not in the Defendants' favor. This scattershot approach was recently denounced by Judge Clark as a failure to comply with the specificity requirement of Rule 4(a) of Appendix B of the Local Rules. *SciCo v. Boston Scientific*, 599 F. Supp. 2d 741, 742 (E.D. Tex. 2009) (finding a motion for reconsideration raising "some 22 points of error . . . based on arguments" in the underlying briefing "no better than a complete failure to object").

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objecting to the provisional claim construction Order,[3] Defendants were on clear notice that their

objections were due on December 3, 2010. Dkt. No. 332. Without requesting an additional

extension or otherwise explaining their delay, Defendants failed to file their objections by that

date and now, almost two months after the deadline, object to each and every one of Judge

Love's constructions. The Defendants have offered no justification for their delay and should

not be permitted to contravene the already-extended deadline set in place by Judge Love. FED.

R. CIV. P. 72(a); *see also Schlafly v. Caro-Kann Corp.*, No. 98-1005, 1998 U.S. App. LEXIS

8250, at *8 (Fed. Cir. Apr. 29, 1998) ("It cannot be disputed that [the plaintiff] did not object to

the entry of the protective order within the time allotted by Fed. R. Civ. P. 72(a); therefore . . .

we hold that [the plaintiff] has forfeited his right to appellate review of that order."). Even if this

Court reviews Defendants' arguments for clear error, their Motion should still be denied because,

as explained below, the Defendants cannot establish that Judge Love's findings are clearly

erroneous or contrary to law.

> **B.** **Defendants Have Not Demonstrated that Judge Love's Findings Are Clearly Erroneous or Contrary to Law.**

Federal Rule of Civil Procedure 72(a) and Appendix B, Local Rule 4(a) make clear that a

district court may modify or set aside a magistrate's order on a non-dispositive issue only where

the order is "clearly erroneous or . . . contrary to law." *See also* 28 U.S.C. § 636(b)(1)(A) ("A

judge of the court may reconsider any pretrial matter under [section (A)] where it has been

shown that the magistrate's order is clearly erroneous or contrary to law."). Because the

standard of review for a motion for reconsideration is so highly deferential, a party seeking

reconsideration must show more than that the prior decision is "just maybe or probably wrong;

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[3] It should be noted that the constructions within the Court's Memorandum Opinion and Order on claim construction differ in no material respects from those in the Provisional Order.

[the prior decision] must . . . strike [the court] as wrong with the force of a five-week-old, unrefrigerated dead fish." *TFWS v. Franchot*, 572 F.3d 186, 194 (4th Cir. 2009).

As is demonstrated below, Defendants have merely rehashed arguments which were properly rejected by Judge Love. In doing so, they have effectively ignored their burden of demonstrating "clear error." In any event, Judge Love issued a well-reasoned claim construction opinion that follows the well-recognized canons of claim construction. Even if the Defendants had actually attempted to show clear error in their motion, they would have failed because no clear error exists. The Court should therefore deny Defendants' motion for reconsideration.

C.   Judge Love Correctly Construed the Claim Terms.

1.   *"removing . . . from the linked list"*

Judge Love properly found this term to mean "adjusting the pointer in the linked list to bypass the previously identified expired records," expressly rejecting Defendants' assertion that removal also requires the deallocation of memory. Dkt. No. 369 at 12-13. Defendants object to Judge Love's refusal to incorporate a deallocation limitation on several grounds, each to no avail.

First, Defendants point to various portions of the specification which they contend support their proposed definition, alleging that, "[w]hen Defendants' proposed definition is used, each and every use of 'removing' in the specification make [*sic*] sense." Dkt. No. 431 at 4. On the contrary, Defendants' proposed definition renders meaningless the statements within the specification which most squarely address this issue: "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 the pointer adjustments, the storage occupied by the *removed* element is returned to the system storage pool for future allocation." '120 patent at

7:43-50 (emphasis added).[4] As Judge Love pointed out, "[o]nly after the pointers are adjusted is the 'removed element,' returned to system storage, which is the actual step of deallocation." Dkt. No. 369 at 13.

Had Dr. Nemes, the inventor of the '120 patent, intended to incorporate Defendants' proposed limitation, he "could have drafted claims to expressly include it." *See i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 843 (Fed. Cir. 2010). Because he did not and because Defendants have not established that he clearly disavowed claim scope or acted as his own lexicographer when drafting the portions of the specification cited by Defendants, they cannot establish that Judge Love's findings are clearly erroneous or contrary to law.[5] *See id.* at 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); *Helmsderfer v. Brobrick Washroom Equip., Inc.*, 527 F.3d 1379, 1381 (Fed. Cir. 2008) ("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).[6]

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[4] Defendants point to the fact that these statements are found "near the end of the textual portion of the specification" in an attempt to overcome their relevancy. Dkt. No. 431 at 4. In addition to the fact that the location of these statements is irrelevant and Defendants have cited no case law suggesting otherwise, Defendants themselves point to statements found even later in the specification as support for their arguments. *See id.* at 5 (citing '120 patent at 7:62-64).

[5] Defendants arguments regarding the "goals" of the patent are as irrelevant now as they were when they were considered and rejected by Judge Love. *See i4i*, 598 F.3d at 843 ("[N]ot every benefit flowing from an invention is a claim limitation.").

[6] Defendants also point to Bedrock's damages theories as support for their rejected claim construction argument. However, it is fundamental that claim construction is intended to ascertain the proper legal scope of the asserted claims; this determination is wholly independent

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2. *"when the linked list is accessed"*

Judge Love found the term "when the linked list is accessed" to mean "both identification and removal of the automatically expired record(s) occurs during the same access of the linked list." Dkt. No. 369 at 21-22. Defendants' principal objection to this finding is Judge Love's statement that "the portions of the patent cited by the Defendants do not use the term 'traversal.'" Dkt. No. 431 at 7. However, in addition to the fact Judge Love is correct in that the word "traversal" does not appear in any portion of the specification cited by Defendants, the Defendants have not shown that Judge Love's finding is clearly erroneous or contrary to law. As such, Judge Love's construction should stand.

First, the majority of the portions of the specification relied upon by Defendants discuss preferred embodiments.[7] *See* '120 patent at 11-12, 6:56-59, 6:46-53. The Defendants, however, have presented no evidence that such embodiments were described with a clear intention to limit the claims' scope. There is, therefore, absolutely no basis upon which to so limit the asserted claims. *See i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 843 (Fed. Cir. 2010) ("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) (emphasis added).

Second, Defendants contend that Judge Love's construction fails to resolve the parties' dispute because it does not construe the term "accessed." On the contrary, Judge Love did resolve the parties' dispute: he expressly rejected Defendants' proposed substitution of the word

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from a patentee's damages theory. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1313–14 (Fed. Cir. 2005).

[7] The other portion of the specification cited by Defendants merely refers to hashing techniques, in general. *See* '120 patent at 5:16-30.

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"traversal" for the word "access." *See* Dkt. No. 369 at 21. As Defendants have offered no other evidence apart from the unavailing arguments discussed above, they cannot show clear error and Judge Love's construction of this term should not be disturbed.

3. *"dynamically determining maximum number"*

Judge Love construed the term "dynamically determining" as "making a decision based on factors internal or external to the information storage and retrieval systems" and found no construction necessary for the term "maximum number." Dkt. No. 369 at 15-18. Defendants contend that Judge Love erred as to both, but they do not offer any evidence apart from their own faulty reasoning and properly rejected prosecution history arguments.

As to Defendants' argument that the dynamic determination occurs immediately after accessing the linked list, Defendants offer only unsupported attorney argument, finding no support in the claim language or specification. *See* Dkt. No. 431 at 8-10 (summarily asserting that Judge Love's construction "defies logic").[8] Defendants' failure to adduce any competent evidence to establish that Judge Love's construction is clearly erroneous or contrary to law is, alone, a sufficient basis upon which this Court should uphold Judge Love's finding. But moreover, Judge Love's construction is supported by the claim language and the specification.

First, as Judge Love correctly stated, "there is no reference to "immediate" or "before" in the portion of the specification to which Defendants cite." Dkt. No. 369 at 14. Additionally, Judge Love correctly noted that "when the linked list is accessed" does not modify "dynamically determining" as Defendants assert; rather, "the claims state that removal occurs 'when the linked list is accessed,' not that a dynamic decision is made 'when the linked list is accessed.'" *Id.*

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[8] If the Defendants' logic were unassailable, they would not need a construction that adopted it. Further, their logic is anything from unassailable as it is premised on their false assumption that "maximum number" means "a single number that serves as an upper limit on the number of records to be removed." A false assumption is one of the classic logical fallacies.

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Furthermore, the specification makes no mention of when the dynamic decision takes place but instead discusses the decision "in the context of changing factors under which the decision may be made dynamically." *Id.* at 15. Defendants' arguments to the contrary are unfounded.

Defendants also argue that "maximum number" should be limited to "'a single number that serves as an upper limit' on the number of records to be removed."[9] In rejecting Defendants' proposed construction, however, Judge Love emphasized the discussion within the specification which makes clear that "the alternative method of on-the-fly garbage removal allows for the removal of all, none, or some of the expired records." *Id.* at 17 (citing '120 patent at 6:66-7:15). Defendants ignore this discussion altogether, focusing instead on a prosecution history argument which was properly rejected by Judge Love. As Bedrock briefed in its Reply Claim Construction Brief, Dr. Nemes expressed no intent, much less a clear intent, to act as his own lexicographer in distinguishing prior art. Dkt. No. 300 at 6. As such, Defendants argument must fail, *see Helmsderfer*, 527 F.3d at 1381, and the Defendants cannot show clear error.

4.   *"automatically expiring" / "expired"*

Judge Love construed "automatically expiring" as "becoming obsolete and therefore no longer needed or desired in the storage system because of some condition, event, or period of time" and "expired" as "obsolete and therefore no longer needed or desired in the storage system because of some condition, event, or period of time." Dkt. No. 369 at 8-9. Defendants object to this construction as "ignor[ing] language from the Detailed Description of the '120 patent that outlines how to determine if a record has expired." Dkt. No. 431 at 10. However, Defendants again fail to show that the cited portion of the specification, which discusses a preferred

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[9] Defendants make much of Judge Love's use of the word "constant" in his rejection of their proposed construction. *See* Dkt. No. 369 at 18. However, Defendants' "single number" limitation is similarly unsupported by the specification. *See* '120 patent at 6:66-7:15.

embodiment, was drafted by Dr. Nemes with a clear intent to disavow claim scope or that he

acted as his own lexicographer. As such, Defendants cannot demonstrate that Judge Love's

construction is clearly erroneous. *See i4i*, 598 F.3d at 843; *Helmsderfer*, 527 F.3d at 1381.

> 5. *"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"*[10]

Defendants contend that Judge Love erred in rejecting their argument that "means . . . for

accessing" requires corresponding algorithms for inserting, retrieving *and* deleting. However,

Defendants improperly attempt to import limitations into the recited functions for this term.

Micro Chemical, Inc. v. Great Plains Chem. Co., 194 F.3d 1250, 1258 (Fed. Cir. 1999) ("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.") In addition, Defendants

fail to address the glaring flaw in their argument: Claim 5 explicitly claims a means for

"inserting, retrieving, *and* deleting." '120 patent at 14:32-36. As Judge Love observed, "the use

of "accessing" in Claim 1 and the use of "inserting, retrieving, and deleting" in Claim 5 seem to

indicate different meanings." Dkt. No. 369 at 34. As such, Judge Love's construction is correct

and consistent with established law, and Defendants cannot meet their burden to establish that it

is clearly erroneous.

> 6. *Ordering of Method Steps*

Judge Love found that "neither logic nor grammar dictate that the method steps of the

'120 patent must be executed in the order they are written, with the exception of (1) the steps in

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[10] Defendants reassert their arguments regarding deallocation and traversal here. In response, Bedrock refers to its arguments set forth in Sections C.1 and C.2., *supra*. The same is true for Defendants' arguments regarding, "record search means including a means for identifying and removing at least some of the expired ones of the records from the linked list when the linked list is accessed."

Claim 7, [which requires the ultimate step to follow or partially follow the penultimate step] and (2) the requirement that identifying must begin before removing can begin." Dkt. No. 369 at 23-24. Objecting to Judge Love's finding because it does not require the method steps to be executed in the order they are written, Defendants wholly fail to demonstrate that either logic or grammar dictates such a requirement. *See Altiris v. Symantec Corp.*, 318 F.3d 1363, 1369 (Fed. Cir. 2003) ("Unless the steps of a method actually recite an order, the steps are not ordinarily construed to require one.").

Instead, Defendants again resort to unsupported attorney argument and ignore their burden to show that Judge Love's construction is clearly erroneous or contrary to law. In particular, Defendants fail to explain why the method steps could not be performed in a "consecutive, repeating, and/or overlapping manner without offending the logic or grammar of the claim." Dkt. No. 369 at 22-23 (citing Dkt. No. 275 at 27). As such, the Defendants cannot show clear error, and Judge Love's findings regarding the ordering of asserted method steps should stand.

III. CONCLUSION.

The Defendants have waived their right to object to Judge Love's claim construction order, and their motion should be denied as untimely. Further, the Defendants, in their motion, simply recast their original, rejected claim construction arguments. In doing so, they have effectively ignored their burden. In any event, Judge Love issued a well-reasoned claim construction opinion that follows the well-recognized canons of claim construction. Even if the Defendants had actually attempted to show clear error in their motion, they would have failed because no clear error exists. Bedrock therefore respectfully requests that the Court deny Defendants' Motion for Reconsideration.

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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 14th day of February, 2011.

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/s/ Ryan A. Hargrave
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