

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

ALOFT MEDIA, LLC,

Plaintiff,

vs.

ORACLE CORP., ET AL.

Defendants.

Civil Action No. 6:09-CV-304 (LED-JDL)

JURY DEMANDED

PLAINTIFF'S OPENING BRIEF REGARDING CLAIM CONSTRUCTION

TABLE OF CONTENTS

I.INTRODUCTION1

II....TECHNOLOGY AT ISSUE2

III..CLAIM TERMS AT ISSUE4

 A. Two “decision” terms should be construed in view of the intrinsic record of the asserted patents.4

 1. “decision making”4

 2. “decision logic”6

 B. Three terms identified by the defendants as indefinite need no construction in view of the construction of the “decision” terms.....7

 3. “logic related to decision making”7

 4. “capable of performing logic related to decision making”8

 5. “capable of performing decision logic”8

 C. The following four terms should be construed in view of the intrinsic record of the asserted patents.8

 6. “potential feasible hybrid theme”9

 7. “decision hierarchy display”10

 8. “universal module”11

 9. “collaborative decision platform”13

 D. The following five terms will be readily understood by the jury, and therefore are not in need of construction.....14

 10. “per the application”15

 11. “computer code for processing”15

 12. “assessing uncertainties”18

 13. “value”18

 14. “sources of value”19

IV..CONCLUSION19

TABLE OF EXHIBITS

Exhibit 1	U.S. Patent Number 7,499,898
Exhibit 2	U.S. Patent Number 7,593,910
Exhibit 3	The Parties' P.R. 4-3 Joint Claim Construction Statement
Exhibit 4	The Defendants' P.R. 4-2 Disclosure
Exhibit 5	<i>Aloft Media, LLC v. Adobe Sys., Inc.</i> , No. 6:07-CV-355 (E.D. Tex. July 29, 2008).

I. INTRODUCTION

The two patents at issue¹ in this case are generally directed to computer program products that facilitate decision making. *See* ‘898 Patent at 1:17-19. Specifically, the computer program products of the patents are capable of assisting a user in making a variety of decisions, regardless of the type and complexity of the decisions. *See id.* at 1:57-60. In this regard, the computer program products can be used to help an organization reach the most effective or optimal decision, such as often depends on the inter-relationship of several variables.

Fourteen claim terms are at issue in this proceeding.² Many of these terms, such as the term “computer code for processing,” carry a plain and ordinary meaning, and are therefore in no need of construction by the Court. For other terms identified by defendants, such as the term “decision logic,” Aloft proffers constructions because further clarification, in view of the intrinsic record, will assist the jury’s understanding of these terms. In contrast, the defendants³ contend that twelve of the fourteen terms at issue are incapable of construction by the Court. Of these twelve terms, the defendants contend, without explanation, that eleven are indefinite under § 112, ¶ 2 as being “intractably ambiguous,” and that one term is indefinite under § 112, ¶ 6. In

¹ The patents at issue are U.S. Patent No. 7,499,898 (Ex. 1) and 7,593,910 (Ex. 2). The ‘910 patent issued as a continuation of the ‘898 patent application. As such, the ‘898 and ‘910 patents share a common written description. For the convenience of the Court, Aloft will consistently cite to the written description of the ‘898 patent, as applicable. Additionally, that patents-in-suit are related to patents that were previously before the Court in *Aloft Media, LLC v. Microsoft Corp.*, No. 6:08-CV-051 (E.D. Tex. Feb. 22, 2008) (“*Microsoft*”), which settled on the eve of the *Markman* hearing. *See, e.g., Microsoft* at Dkt. Nos. 203, 208 and 213.

² It is unclear to Aloft if the defendants have dropped their contention that the terms “per the application” and “assessing uncertainties” are indefinite, in favor of Aloft’s view that these terms need no construction. As such, Aloft addresses these terms in this brief.

³ The remaining defendants in this case are Fair Isaac Company, Halliburton Energy Services, Incorporated and Halliburton Company.

view of the intrinsic record of the patents-in-suit, Aloft respectfully asks the Court to enter its constructions for the fourteen terms discussed below.⁴

II. TECHNOLOGY AT ISSUE

The successful management and administration of a business requires logical and sound strategic decisions; business leadership must weigh varying considerations and assess the advantages and disadvantages associated with a given strategy. This same decision-making strategy, the weighing and comparing of options, is also applicable to the resolution of non-business decision-making, such as personal finance and medical decisions. In order to facilitate these decision-making processes, a number of methodologies and processes have been developed, e.g., Kepner-Tregoe, Value Management, Analytic Hierarchy Process, decision trees, and probability methods. *See* ‘898 Patent at 1:23-49. Generally, each of the above methods/processes involves the comparison of pre-defined alternatives within a pre-specified problem frame. *See id.* at 1:46-49.

Subsequently, the Dialogue Decision Process (“DDP”) was developed as a way to enable multiple decision makers to make strategic decisions in organizationally and technically complex circumstances. *See id.* at 1:50-56. The DDP was proposed as a sequence of four steps—framing, alternatives, analysis, and connection. *See id.* Although the DDP and other similar processes were adept at facilitating a decision-making process, they each faltered in their ability to universally apply to a broad range of decisions regardless of type, complexity, or number of decision makers. *See id.* at 1:57-60. Furthermore, there had not been software capable of supporting the above decision-making processes. *See id.* at 1:60-64. This has resulted in each instantiation of decision processes being tailored to a particular decision. *See id.* As a result,

⁴ In recognition of the Court’s experience with patent cases, Aloft has omitted a legal section summarizing general claim construction principles.

conventional decision making tools were relatively sophisticated, were implemented only in certain circumstances, and only when facilitated by experienced practitioners. *See id.* at 1:64-67. Accordingly, the inventions set forth in the patents-in-suit address the above issues and provide, among other things, a flexible approach for problem-solving and foster clear and conscientious decision-making. *See id.* at 4:1-2.

In this case, Aloft is asserting two independent claims, one from each patent-in-suit, as well as a number of dependent patent claims from each patent. The following two independent claims are illustrative of the claimed computer program products that are at issue in this case:

14. A computer program product embodied on a tangible computer readable medium, comprising, comprising:

computer code for causing execution of an application capable of performing decision logic, the application including at least one application that is a real estate-related application, a medical-related application, a corporate-related application, a product supply-related application, a service supply-related application, or a financial-related application;

computer code for retrieving first information from a database, per the application;

computer code for receiving second information from a user utilizing a user interface, per the application;

computer code for processing the first information and the second information utilizing the decision logic;

computer code for generating at least two of: a tornado diagram, a decision sensitivity display, a decision hierarchy display, an influence diagram, and a potential feasible hybrid theme.

See '898 Patent, cl. 14.

110. A computer program product embodied on a tangible computer readable medium, comprising:

computer code capable of performing logic related to decision-making, the computer code belonging to an application which is a real estate-related application, a medical-related application, a corporate-related application, a product supply-related application, a service supply-related application, or a financial-related application;

computer code for retrieving first information from a storage;

computer code for receiving second information from a user utilizing a user interface;

computer code for processing the first information and the second information;

computer code for generating a display, the display including at least one display that is a tornado diagram, a decision sensitivity display, a decision hierarchy display, an influence diagram, or a potential feasible hybrid theme.

See '910 Patent, cl. 110.

III. CLAIM TERMS AT ISSUE

A. Two “decision” terms should be construed in view of the intrinsic record of the asserted patents.

Each of the two decision terms (“decision making” and “decision logic”) is present in one of the two asserted independent claims.⁵ The two decision terms are straightforward terms that are not difficult to understand. Indeed, standing alone or viewed within the context of the asserted claims, each of the decision terms is readily understandable to one of skill in the art. As such, these terms are amenable to construction, and are therefore not indefinite. In view of the intrinsic record of the asserted patents, the term “decision making” refers to “evaluating alternatives in the course of a decision process,” while the term “decision logic” refers to “operations to execute a decision process.”

1. “decision making”

decision making	
Aloft’s Proposed Construction	Defendants’ Proposed Construction
evaluating alternatives in the course of a decision process	Term is intractably ambiguous

The term “decision making” appears in claim 46 of the ‘898 patent, and claim 110 of the ‘910 patent. Claim 110 of the ‘910 patent is directed to a computer program product that is stored in a computer readable medium, such as computer memory. The computer program

⁵ The term “decision making” appears in claim 110 of the ‘910 patent, and the term “decision logic” appears in claim 14 of the ‘898 patent.

product includes computer code that is described in terms of its functionality. For example, the elements of claim 110 recite the term “computer code” coupled with a description of the computer code’s operation. As explained in the written description, claim 110 is more specifically directed to a “computer-based platform which supports a decision making process.” *See* ‘898 Patent at 1:18-20. As also explained in the written description, a decision making process generally involves evaluating two or more decision alternatives in order to determine which of the two or more decision alternatives is optimal. *See* ‘898 Patent at 1:23-49. In this regard, the patents describe that the evaluation of such alternatives may include assessing various types of decision-related data during the course of a decision making process:

Such input may include the policies that form boundary conditions for the decision, the strategic decision that can be made, the values that are important to the decision makers, the uncertainties that may impact the values desired, and the relationship of the above elements.

See ‘898 Patent at 10:45-51. From this data, it is possible to “develop a set of strategic alternatives that capture the range of possibilities envisioned by the users.” *See* ‘898 Patent at 11:29-32. The patents further provide that one or more of these identified alternatives may undergo processing “to enable the users to have a shared understanding of the significant sources of risk and value in each of the initially defined alternative strategies.” *See* ‘898 Patent at 11:67-12:3. In the context of the claimed invention, the evaluation of identified alternatives includes the generation of one or more displays, such as a tornado diagram, a decision sensitivity display, a decision hierarchy display, an influence diagram, or a potential feasible hybrid theme. *See* ‘910 Patent, cl. 110. The generated display(s) may assist the user in evaluating and understanding the sources of significant risk and value for identified alternatives:

Using the information generated previously and the model structure of the decision application 124, the platform makes the necessary calculations to output tornado diagrams 502 and decision sensitivity output displays for each of the alternative strategies 509. The users confirm or modify the input information 129

and structure from the decision application 124. The tornado diagrams identify the sources of significant risk in each alternative strategy and the decision sensitivity identifies the sources of significant value in each alternative strategy.

See ‘898 Patent at 12:10-19.

In view of this disclosure, then, the term “decision making” refers to “evaluating alternatives in the course of a decision process.”

2. “decision logic”

decision logic	
Aloft’s Proposed Construction	Defendants’ Proposed Construction
operations to execute a decision process	Term is intractably ambiguous

The term “decision logic” appears in independent claim 14 of the ‘898 patent. Claim 14 of the ‘898 patent is directed to a computer program product that is stored in a computer readable medium, such as computer memory. As set forth above, the computer program product includes computer code that is described in terms of its functionality. As explained in the written description, claim 14 is more specifically directed to a “computer-based platform which supports a decision making process.” See ‘898 Patent at 1:18-20. As also explained in the written description, the decision making process is implemented through the execution of decision logic, such as may reside in an application:

FIG. 1 illustrates a method 100 for providing a collaborative decision platform adapted to run on a computer. Initially, an application capable of performing **decision logic** is executed. See operation 102.

Information is then retrieved from a database in accordance with the **decision logic**, as indicated in operation 104. Information is then delivered to and received from a user in accordance with the **decision logic** utilizing a user interface. Note operation 106. The information is then processed in operation 108 utilizing the **decision logic**.

See ‘898 Patent at 3:16-25 (emphasis added).

As shown, a collaborative decision platform 122 is provided which has an interface 125 with at least one application 124 for executing the *decision logic*, as set forth in operation 102 of FIG. 1.

See ‘898 Patent at 3:36-39 (emphasis added).

As set forth earlier, the various steps of FIG. 1 may be carried out using universal modules capable of interfacing with different applications. Such different applications 124 may be capable of performing *decision logic* relating to any type of decision-making process (e.g. financial, medical, buying a house, selecting a corporate strategy, etc.). In use, the collaborative decision platform 122 enables decision-making processes through the sequence and connectivity of a set of common displays, which describes the decision to be made.

See ‘898 Patent at 3:53-61 (emphasis added).

In view of this disclosure, the term “decision logic” refers to “operations to execute a decision process.”

B. Three terms identified by the defendants as indefinite need no construction in view of the construction of the “decision” terms.

The defendants contend that the following three terms are indefinite, presumably because the terms pertain to “decision making,” “decision logic,” or “logic.” As discussed above, though, each of these terms is readily understandable to one of skill in the art, and therefore is not indefinite.

3. “logic related to decision making”

logic related to decision making	
Aloft’s Proposed Construction	Defendants’ Proposed Construction
No construction necessary.	Term is intractably ambiguous

The term “logic related to decision making” appears in claim 110 of the ‘910 patent, and needs no construction in view of the construction of the terms “decision making” and “decision logic”

4. “capable of performing logic related to decision making”

capable of performing logic related to decision making	
Aloft’s Proposed Construction	Defendants’ Proposed Construction
No construction necessary.	Term is intractably ambiguous

The term “capable of performing logic related to decision making” appears in claim 110 of the ‘910 patent, and needs no construction in view of the construction of the terms “decision logic” and “decision making.”

5. “capable of performing decision logic”

capable of performing decision logic	
Aloft’s Proposed Construction	Defendants’ Proposed Construction
No construction necessary.	Term is intractably ambiguous

The term “capable of performing decision logic” appears in claim 14 of the ‘898 patent, and needs no construction in view of the construction of the term “decision logic.”

C. The following four terms should be construed in view of the intrinsic record of the asserted patents.

The defendants initially contended that each of the following four terms was indefinite under § 112, ¶ 2 for being “intractably ambiguous.” *See* P.R. 4-3 Statement (Ex. 3). Since the filing of the P.R. 4-3 statement, however, the defendants have changed their indefiniteness position, and now offer constructions for two of these terms (“universal module” and “decision hierarchy display”). Although Aloft agrees that these two terms are amenable to construction, Aloft objects to the defendants’ proffered constructions because they are directed to a single, preferred embodiment described in the patents. Additionally, the defendants’ constructions are improper because they conflict with the inventions, as they are defined by the claims of the asserted patents.

6. “potential feasible hybrid theme”

potential feasible hybrid theme	
Aloft’s Proposed Construction	Defendants’ Proposed Construction
a strategy resulting from a combination of parameters from two or more alternative strategies	Term is intractably ambiguous

The term “potential feasible hybrid theme” appears in claims 14 and 63 of the ‘898 patent, and claims 110 and 209 of the ‘910 patent. In view of the specification of the asserted patents, this term refers to “a strategy resulting from a combination of parameters from two or more alternative strategies.” In one embodiment, for example, the specification refers to a potential feasible hybrid theme as a hybrid strategy that combines the “most valuable alternatives” from a variety of alternative strategies. *See* ‘898 Patent at 14:5-8 (“In the connection process, the users defined on the strategy table 804, a new, more valuable ‘hybrid’ strategy 811 that combines the most valuable alternatives from each of the initially defined alternative strategies, as shown in FIG. 8h.”). In this regard, the patents describe:

FIG. 6 illustrates an example of Connection 600 in accordance with one embodiment of the present invention. The purpose of Connection is for the users to develop a new, more valuable "hybrid" strategy 602 combining the most valuable decisions in each of the initially defined alternative strategies. During Connection, the users' insight into the sources of risk and value 129 interacts with new decision relevant information from the database 126 and the decision structure provided by the decision application 124 to output an evaluation of the hybrid strategy 602.

See ‘898 Patent at 12:51-60. Through this process, a user is able to achieve a more valuable hybrid strategy. *See* ‘898 Patent at 12:66-13:15.

In view of this disclosure, one of skill in the art would view a “potential feasible hybrid theme” as referring to “a strategy resulting from a combination of parameters from two or more

alternative strategies.” Given that this term is understandable to one of skill in the art, it is not indefinite under § 112, ¶ 2.

7. “decision hierarchy display”

decision hierarchy display	
Aloft’s Proposed Construction	Defendants’ Proposed Construction
a display that indicates the precedence of parameters in a decision process	a display that shows an order of precedence for policies, decisions, and tactics

The term “decision hierarchy display” appears in claims 14, 45 and 63 of the ‘898 patent, and claims 110, 157, 159 and 209 of the ‘910 patent. In view of the specification, this term is properly construed to refer to “a display that indicates the precedence of parameters in a decision process.” In one embodiment, for example, the specification of the asserted patents describes a decision hierarchy as describing the “precedence of decisions” within a logical decision making structure. *See* ‘898 Patent at 11:1-15. In an alternative embodiment, the specification describes a decision hierarchy as identifying decisions that are within the scope of a decision making process. *See* ‘898 Patent at 13:31-34; *see also* ‘898 Patent, cl. 46. In view of this disclosure, then, one of skill in the art would understand a “decision hierarchy display” as referring to “a display that indicates the precedence of parameters in decision process.”

The defendants contend that a “decision hierarchy display” refers to “a display that shows an order of precedence for policies, decisions, and tactics.” The defendants’ proposed construction is an attempt to limit this term to the preferred embodiment described in Figure 3 and 3a, by requiring the display to include three exemplary decision categories (policies, decisions, *and* tactics). Defendants’ proposed construction is improper because it urges violation of a fundamental rule of claim construction – do not import limitations into the claims from an embodiment described in the patent specification. *See Varco Corp. v. Conceptor, Inc.* 436

F.3d 1368, 1373 (Fed. Cir. 2006). Indeed, a cursory review of the claims further reveals the inadequacies in the defendants’ proposed construction. For example, claim 169 of the ‘910 patent, which depends from asserted claim 110, defines a “decision hierarchy display” more broadly than the defendants’ proposed construction. Specifically, claim 169 requires the decision hierarchy display to include only one of the three categories proposed by defendants as mandatory (policies, decisions, and tactics). For example, claim 169 states:

169. The computer program product as recited in claim 157, wherein the decision hierarchy display includes *at least one of policies, decisions, or tactics*.

See ‘910 Patent, cl. 169 (emphasis added). As the Court is well-aware, differences among the claims can assist in understanding a term’s meaning. *See Phillips v. AWH Corp.* 415 F.3d 1303, 1314 (Fed. Cir. 2005). Here, the defendants endeavor to eviscerate an important difference between claim 110 and claim 169 by incorporating “policies, decisions, and tactics” into its proposed construction of “decision hierarchy display.” Had the patentee intended to limit “decision hierarchy display” to policies, decisions, and tactics, it could have easily done so in the language of claim 110. Instead, the patentee relegated a variant of this limitation to claim 169, and that is where it should stay.

The defendants proposed construction is therefore improper because it conflicts with the invention as defined by the claims. *See also*, ‘910 Patent, cl. 171.

8. “universal module”

universal modules	
Aloft’s Proposed Construction	Defendants’ Proposed Construction
a reusable software component for carrying out certain functionality	a module that is capable of interfacing with different applications

The term “universal module” appears in claim 15 of the ‘898 patent, and claims 111 and 118 to 121 of the ‘910 patent. In view of the specification of the asserted patents, this term is

properly construed as referring to “a reusable software component for carrying out certain functionality.” In one embodiment, for example, the specification describes “universal modules” as reusable software components in a software component integration architecture. *See* ‘898 Patent at 4:63-5:8. Additionally, the specification also describes a “universal module” as being a relatively autonomous software component that is responsible for a specific task or function. *See* ‘898 Patent at 4:58-60. In view of this disclosure, one of skill in the art would view a “universal module” as referring to a “reusable software component for carrying out certain functionality.”

The defendants contend that a “universal module” refers to “a module that is capable of interfacing with different applications.” The defendants’ proposed construction is nothing more than an attempt to limit this term to the preferred embodiment described in Figures 1 and 1a, by requiring the “universal module” to be “capable of interfacing with different applications. *See, e.g.,* ‘898 Patent at 3:53-55. A cursory review of the claims, however, reveals the inadequacies in the defendants’ proposed construction. For example, claim 15 of the ‘898 patent, which depends from asserted claim 14, describes the defendants’ proposed limiting capability (of “interfacing with different applications”) separately from the “universal module” term. For example, claim 15 states:

15. The computer program product as recited in claim 14, wherein at least a portion of the computer code is carried out using *universal modules capable of interfacing with different applications* adapted for applying the universal modules differently.

See ‘898 Patent, cl. 15 (emphasis added). The defendants proposed construction is improper because it attempts to incorporate features that are separately claimed, apart from the “universal module” term itself. Indeed, substituting the defendants’ proposed construction of “universal module” renders claim 15 incomprehensible:

15. The computer program product as recited in claim 14, wherein at least a portion of the computer code is carried out using [a module that is capable of interfacing with different applications] *capable of interfacing with different applications* adapted for applying the universal modules differently.

The redundancy and erroneous nature of defendants’ proposed construction is readily observable. Accordingly, the defendants’ attempt to import surrounding claim language and additional limitations from dependent claims into a proposed construction should be rejected by the Court.

9. “collaborative decision platform”

collaborative decision platform	
Aloft’s Proposed Construction	Defendants’ Proposed Construction
computing environment that facilitates decision processes for different purposes by retrieving and receiving information from different sources and processing the information	Term is intractably ambiguous

The term “collaborative decision platform” appears in claim 22 of the ‘898 patent, and claim 117 of the ‘910 patent. In view of the specification of the asserted patents, this term is properly construed as referring to a “computing environment that facilitates decision processes for different purposes by retrieving and receiving information from different sources and processing the information.” In one embodiment, for example, the specification describes the invention as relating to “a computer-based platform which supports a decision making process.” *See* ‘898 Patent at 1:17-19. In general terms, the “collaborate decision platform” is the backbone of the claimed computer program product, serving as a “decision engine” driving the “decision process through a sequence of logical steps to a conclusion.” *See* ‘898 Patent at 10:20-22. The specification also describes the “collaborative decision platform” as having capability for “retrieving and receiving” decision information and for also processing that information in accordance with pertinent decision logic. *See* ‘898 Patent at 3:20-30. Specifically, the

specification describes the decision related capabilities of the collaborative decision platform as follows:

FIG. 1 illustrates a method 100 for providing a *collaborative decision platform* adapted to run on a computer. Initially, an application capable of performing decision logic is executed. See operation 102.

Information is then retrieved from a database in accordance with the decision logic, as indicated in operation 104. Information is then delivered to and received from a user in accordance with the decision logic utilizing a user interface. Note operation 106. The information is then processed in operation 108 utilizing the decision logic.

In use, the foregoing steps are carried out by a *collaborative decision platform* capable of retrieving and receiving the information, and processing such information for different purposes by executing different applications each capable of performing different decision logic.

See '898 Patent at 3:16-31 (emphasis added). Figure 2 of the patents illustrates “a representative hardware environment on which the collaborative decision platform . . . may be implemented.” *Id.* at 4:15-17.

In view of this disclosure, one of skill in the art would understand a “collaborative decision platform” as referring to a “computing environment that facilitates decision processes for different purposes by retrieving and receiving information from different sources and processing the information.”

D. The following five terms will be readily understood by the jury, and therefore are not in need of construction.

Each of the following four terms carries a plain and ordinary meaning that is readily understandable to a jury, and these terms therefore do not need to be construed by the Court. Rather than proffer a construction for these terms, the defendants initially contended that each term was indefinite under § 112, ¶ 2 for being “intractably ambiguous.” Since the submission of the P.R. 4-3 disclosure to the Court, however, the defendants appear to have changed their position regarding the indefiniteness of the “per the application” and “assessing uncertainties”

terms. At this point, it appears that the defendants now agree with Aloft that these terms need no construction. Additionally, since the submission of the P.R. 4-3 disclosure, the defendants have shifted their indefiniteness position for the “computer code for processing” term from § 112, ¶ 2 to § 112, ¶ 6. As discussed below, the term “computer code for processing” is not a means-plus-function term, and § 112, ¶ 6 does not therefore apply to the construction of this term.

10. “per the application”

per the application	
Aloft’s Proposed Construction	Defendants’ Proposed Construction
No construction necessary.	Term is intractably ambiguous

The term “per the application” appears in claim 14 of the ‘898 patent. As discussed above, it appears that the defendants now agree that this term does not need construction. As such, Aloft respectfully asks the Court to determine that no construction of this term is necessary.

11. “computer code for processing”

computer code for processing	
Aloft’s Proposed Construction	Defendants’ Proposed Construction
No construction necessary.	Term is indefinite under 112, 6

The term “computer code for processing” appears in claim 14 of the ‘898 patent.⁶ As discussed above, the defendants’ originally contended that this term was indefinite under § 112, ¶ 2 for being “intractably ambiguous.” *See* P.R. 4-3 Statement (Ex. 3). More recently, however,

⁶ Aloft’s identification of claims in which the claim terms at issue appear is based on (and therefore relies on) the defendants’ P.R. 4-2 disclosure (attached as Exhibit 4). In their patent rule disclosures, the defendants have not always identified every claim in which the terms at issue appear to reside. For example, the term “computer code for processing” appears in both claim 14 of the ‘898 patent, as well as claim 110 of the ‘910 patent. The defendants only chose to identify claim 14 as containing this term when tendering their patent rule disclosures. *See, e.g.*, Defendants’ P.R. 4-2 Disclosure (Ex. 4). As such, Aloft is unsure if the defendants contend that § 112, ¶ 6 applies to the construction of this term only in the context of claim 14 of the ‘898 patent, and that the plain and ordinary meaning of this term applies in the context of claim 110 of the ‘910 patent.

the defendants changed their position, and now contend that this term should be construed in accordance with § 112, ¶ 6. Moreover, the defendants also appear to contend that this term is indefinite under § 112, ¶ 6, presumably for a failure to recite sufficient structure. The defendant's claim construction position is plainly incorrect. As an initial matter, the term "computer code for processing" does not recite the word "means" thus clearly invoking the presumption that §112, ¶ 6 should not govern the construction of this term. The presumption against §112, ¶ 6 is further confirmed because the term "computer code," in itself, connotes sufficient structure to one skilled in the art to avoid the ambit of § 112, ¶ 6. *See Aloft Media, LLC v. Adobe Sys., Inc.*, No. 6:07-CV-355 (E.D. Tex. July 29, 2008) ("*Adobe*") at 15 (attached as Ex. 5).

As this Court is aware, where a claim limitation is expressed in "means-plus-function" language and does not recite sufficient structure for performing the recited function, the limitation is subject to 35 U.S.C. § 112, ¶ 6. *See Braun Med., Inc. v. Abbott Labs.*, 124 F.3d 1419, 1424 (Fed. Cir. 1997). In relevant part, § 112, ¶ 6 mandates that "such a claim limitation be construed to cover the corresponding structure . . . described in the specification and equivalents thereof." *See id.* (citing 35 U.S.C. § 112, ¶ 6). The use of the word "means" in a claim limitation invokes a rebuttable presumption that §112, ¶ 6 applies. *See Personalized Media Communications, L.L.C. v. Int'l Trade Comm'n*, 161 F.3d 696, 703 (Fed. Cir. 1998).

However, the absence of the word "means" in a claim term will trigger a rebuttable presumption that §112 ¶ 6 does not apply. *See id.* at 704. Indeed, use of the word "means" is highly determinative as to whether § 112, ¶ 6 applies to a claim limitation. As the Federal Circuit said in *Greenberg v. Ethicon Endo-Surgery, Inc.*, "the use of the term 'means' has come to be so closely associated with 'means-plus-function' claiming that it is fair to say that the use

of the term ‘means’ (particularly as used in the phrase ‘means for’) generally invokes section 112(6) and that use of different formulation generally does not.” *See Greenberg v. Ethicon Endo-Surgery, Inc.*, 91 F.3d 1580, 1584 (Fed. Cir. 1996); *see also Lighting World, Inc. v. Birchwood Lighting, Inc.*, 382 F.3d 1354, 1358 (Fed. Cir. 2004) (“The presumption flowing from the absence of the term ‘means’ is a strong one that is not readily overcome.”) (citations omitted). Furthermore, where a claim recites well-known structure in the relevant art, the term should not be treated as a “means-plus-function” term. For example, in *Apex, Inc. v. Raritan Computer, Inc.*, the Federal Circuit held that “the term ‘circuit,’ by itself connotes some structure,” and it said “[i]n the absence of any more compelling evidence of the understanding of one of ordinary skill in the art, the presumption that §112, ¶ 6 does not apply is determinative.” *See Apex, Inc. v. Raritan Computer, Inc.*, 325 F.3d 1364, 1372 (Fed. Cir. 2003).

In similar form, this Court has previously determined that the term “computer code,” when used in a claim directed to a “computer program product,” connotes sufficient structure to one skilled in the art to avoid the ambit of § 112, ¶ 6. *See Adobe* at 14-15. The defendants in *Adobe* contended that several “wherein” clauses (which were determined by the Court to modify certain “computer code” elements) should be construed in accordance with § 112, ¶ 6. More specifically, the defendants contended that the claims at issue were indefinite for failing to disclose sufficient structure corresponding to the functionality contained in the “wherein” clauses. *See id.* at 10.

In rejecting the defendants’ position, the Court compared the “computer element” terms at issue to claims that recite a “circuit” for performing a certain function. *See Adobe* at 14-15. Because the Federal Circuit had previously determined that the term “circuit,” when used in this way, “connotes sufficient structure to one of ordinary skill in the art,” the Court concluded that

the same result should apply for the term “computer code” (when used in a similar format, i.e. computer code for performing a certain function). *See Adobe* at 15. As such, the Court confirmed the presumption against § 112, ¶ 6 in its determination that “computer code” recited “sufficiently definite structure to avoid the ambit of § 112, ¶ 6.” *See id.*

Much like the claim terms at issue in *Adobe*, the term currently in dispute (“computer code for processing”) is not written in means-plus-function format, thus triggering a presumption that § 112, ¶ 6 does not apply. Moreover, the presumption against § 112, ¶ 6 is confirmed because term “computer code” recites sufficiently definite structure to one of skill in the art to avoid the ambit of § 112, ¶ 6. As such, the term “computer code for processing” should not be construed in view of § 112, ¶ 6, and does not need to be construed by the Court.

12. “assessing uncertainties”

assessing uncertainties	
Aloft’s Proposed Construction	Defendants’ Proposed Construction
No construction necessary.	Term is intractably ambiguous

The term “assessing uncertainties” appears in claim 35 of the ‘898 patent, and claim 129 of the ‘910 patent. As discussed above, it appears that the defendants now agree that this term does not need construction. As such, Aloft respectfully asks the Court to determine that no construction of this term is necessary.

13. “value”

Value	
Aloft’s Proposed Construction	Defendants’ Proposed Construction
No construction necessary.	Term is intractably ambiguous

The term “value” appears in claims 42 to 44 of the ‘898 patent, and claims 139 to 141 and 176 to 177 of the ‘910 patent. The defendants contend that this term is indefinite as

“intractably ambiguous,” even though this term carries a plain and ordinary meaning to one skilled in the art. It should be beyond dispute that a jury will not be unfamiliar with the term “value.” Indeed, this is an everyday term with which the jury will be sufficiently familiar. This term therefore needs no construction.

14. “sources of value”

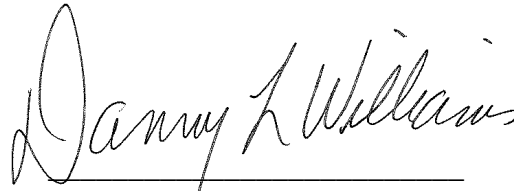
sources of value	
Aloft’s Proposed Construction	Defendants’ Proposed Construction
No construction necessary.	Term is intractably ambiguous

The term “sources of value” appears in claims 42 to 44 of the ‘898 patent, and claims 140 to 141 and 177 of the ‘910 patent. The defendants contend that this term is indefinite as “intractably ambiguous,” even though this term carries a plain and ordinary meaning to one skilled in the art. As a consequence, the term should be readily understood by the jury. This term therefore needs no construction.

IV. CONCLUSION

In view of the above, Aloft respectfully asks the Court to enter its constructions for the fourteen terms at issue in this proceeding.

Respectfully submitted this 23rd day of November, 2010.



Danny L. Williams
Texas Bar No. 21518050
Christopher N. Cravey
Texas Bar No. 24034398
Matthew R. Rodgers
Texas Bar No. 24041802
Michael A. Benefield
Indiana Bar No. 24560-49

David Morehan
Texas Bar No. 24065790
WILLIAMS, MORGAN & AMERSON, P.C.
10333 Richmond, Suite 1100
Houston, Texas 77042
Telephone: (713) 934-7000
Facsimile: (713) 934-7011
danny@wmalaw.com

Eric M. Albritton
Texas Bar No. 00790215
ALBRITTON LAW FIRM
P.O. Box 2649
Longview, Texas 75606
Telephone: (903) 757-8449
Facsimile: (903) 758-7397
ema@emafirm.com

Thomas John Ward, Jr.
Texas Bar No. 00794818
WARD & SMITH LAW FIRM
P.O. Box 1231
Longview, Texas 75606
Telephone: (903) 757-6400
Facsimile: (903) 757-2323
jw@jwfirm.com

Attorneys for Aloft Media, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3). Any other counsel of record will be served by facsimile transmission and/or first class mail on November 23, 2010.

/s/Mark Dunglinson

Litigation Paralegal