Aloft Media, LLC v. Oracle Corporation et al Doc. 174

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 RESPONSE IN OPPOSITION TO DEFENDANTS' CORRECTED MOTION FOR SUMMARY JUDGMENT OF INVALIDITY OF THE ASSERTED CLAIMS OF UNITED STATES PATENT NOS. 7,499,898 AND 7,593,910 FOR INDEFINITENESS (DKT. NO. 165)

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I. INTRODUCTION

Halliburton's position that numerous claim terms used in the '898 and '910 patents[1] are indefinite is not meritorious. Halliburton's arguments are based upon mischaracterizations of claim terms, faulty assumptions, and misapplications of legal precedent. Notwithstanding Halliburton's mischaracterizations and protests, the claim terms all relate to features or aspects of the claimed computer program products that are readily determinable by one of ordinary skill in the art.

Initially, defendants[2] alleged that fourteen claim terms from the asserted claims are intractably ambiguous and not amenable construction.[3] Halliburton has now distilled defendants' unwieldy indefiniteness list down to four claim terms – "decision logic," "logic related to decision making," "computer code for processing," and "potential feasible hybrid theme." For convenience, the parties group the first two terms together and reference them collectively as the "decision terms."

II. SUMMARY OF ALOFT'S ARGUMENT

In an apparent disregard for the law of indefiniteness, Halliburton's brief misinterprets the asserted claims and ignores pertinent facts. Halliburton wrongly insists that the "decision terms" could potentially include virtually any type of decision making *process* and that decision making is a function of the human mind based on subjective criteria. Halliburton's argument ignores the fact that the claims at issue are directed to *computer program products* – not processes – as well as the fact that the "logic" recited in the claim terms at issue is actually

[1] U.S. Patent Nos. 7,499,898 and 7,593,910 are attached as Ex. 1 and Ex. 2, respectively.

[2] The remaining defendants are Halliburton Company and Halliburton Energy Services, Inc. (collectively "Halliburton") and Fair Isaac Corporation ("FICO"). Aloft and FICO have reached an agreement in principle to resolve the disputes between them, as indicated in the letter to the Court dated December 7, 2010. FICO did not join in Halliburton's indefiniteness motion (Dkt. No. 165), filed December 9, 2010.

[3] *See* Ex. 3, P.R. 4-3 (6:09-CV-304), Defendants' Ex. B (Dkt. No. 157-2).

specified in the asserted claims as computer code that resides within a computer software application. The fact that the computer code is directed to a specific area of interest, decision making, does not render the claims subjective or indefinite. Furthermore, Halliburton's attack that the claims fail to inform one of ordinary skill in the art on "*how* to reach a decision" is a tactical diversion from the real issue, as the claims do not require that any decision ultimately be reached. Halliburton cannot meet its clear and convincing burden to prove indefiniteness by relying on extraneous concepts and proposed limitations that do not appear in the claims. Focusing the inquiry where it belongs – on the language of the claims – dictates a conclusion that the metes and bounds of the claimed "decision terms" are not subjective and are readily understood by one of ordinary skill in the art.

The term "computer code for processing" does not recite the words "means," thus invoking a presumption that § 112, ¶ 6 does not govern the construction of this term. Significantly, Halliburton does not cite a single case where a software claim element not employing the word "means" was construed pursuant to § 112, ¶ 6. In fact, many courts, including courts in the Eastern District of Texas, have rendered decisions that directly refute Halliburton's arguments; finding that "computer code" or similar software related claim phrases connote sufficient structure to avoid the ambits of § 112, ¶ 6.[4]

Moreover, contrary to Halliburton's arguments, there is no axiom of claim construction requiring that the term "processing" be linked to a specific algorithm in order to survive an

[4] *Beneficial Innovations, Inc. v. Blockdot, Inc.*, 2010 U.S. Dist. LEXIS 35784, at *43-46 (E.D. Tex. Apr. 12, 2010) (finding that "programmatic elements" connotes sufficient structure and that § 112, ¶ 6 does not apply) (attached as Ex. 4); *Aloft Media, LLC v. Adobe Systems Inc.*, 570 F. Supp. 2d 887, 894 (E.D. Tex. 2008) (finding that "computer code" recites sufficient structure to avoid § 112, ¶ 6) (attached as Ex. 5); *Affymetrix, Inc. v. Hyseq, Inc.*, 132 F. Supp. 2d 1212, 1232 (N.D. Cal. 2002) ("The Court finds that 'computer code' is not a generic term, but rather recites structure that is understood by those of skill in the art to be a type of device for accomplishing the stated functions.") (attached as Ex. 6); *Trading Technologies Intern., Inc. v. eSpeed, Inc.*, 2006 U.S. Dist. LEXIS 80153, at *38 (N.D. Ill. 2006) (finding that "program code" connotes sufficient structure and that § 112 ¶ 6 does not apply) (attached as Ex. 7).

indefiniteness challenge. Rather, Halliburton's argument is based upon the misapplication of cases, such as *WMS Gaming*, that deals with the construction of certain claim terms containing the word "means" pursuant to § 112, ¶ 6.[5] The § 112, ¶ 6 analyses discussed in these cases is not applicable to "computer code for processing." Casting the misplaced § 112, ¶ 6 argument aside, it is disingenuous for Halliburton to argue that one of ordinary skill in the art would be unable to discern whether computer code, when executed, processes certain input data, as required by the asserted claims. Indeed, Halliburton's brief is replete with exemplary forms of processing (e.g., calculations, equations, etc.). It appears that Halliburton's real concern is that "processing" is too broad – not whether one of ordinary skill in the art can ascertain the meaning of the term in view of the intrinsic record. Halliburton's arguments concerning claim scope are unpersuasive as it is well-settled that "breadth is not indefiniteness."[6]

Halliburton asserts that the term "potential feasible hybrid theme" is insolubly ambiguous and impossible to construe in the context of the asserted patents. The term "potential feasible hybrid theme" is addressed conceptually in the disclosure of the asserted patents and specifically in the underlying provisional patent application, which is incorporated by reference into the disclosure of the patents-in-suit.[7] Notwithstanding Halliburton's misguided obfuscation of this term, one of ordinary skill in the art would be able to ascertain its meaning in view of the intrinsic record. In so doing, one of ordinary skill in the art would not complicate the term with

[5] *WMS Gaming Inc. v. International Game Tech.*, 184 F.3d 1339, 1348 (Fed. Cir. 1999) (The claim term at issue was "means for assigning," and the parties stipulated that the disclosed structure for this § 112, ¶ 6 term was "an algorithm executed by a computer.")

[6] *Ultimax Cement Mfg. Corp. v. CTS Cement Mfg. Corp.*, 587 F.3d 1339, 1352 (Fed. Cir. 2009) ("Merely claiming broadly does not render a claim insolubly ambiguous, nor does it prevent the public from understanding the scope of the patent."); *see also In re Gardner*, 427 F.2d 786, 788 (C.C.P.A. 1970) ("Breadth is not indefiniteness.")

[7] Provisional Application No. 60/163,984 is attached hereto as Ex. 8.

the extraneous baggage and subjectivity that Halliburton attempts to inject in order to avoid liability.

Halliburton has not met its burden of showing, by clear and convincing evidence, that a person of ordinary skill in the art could not determine whether an accused computer program product infringes the asserted claims of the '898 and '910 patents. Accordingly, Aloft respectfully asks the Court to recommend the denial of Halliburton's motion.

III. ALOFT'S RESPONSE TO DEFENDANTS' STATEMENT OF ISSUES

While Halliburton's statement of the issues identifies three issues to consider, the fundamental question is whether Halliburton has demonstrated by clear and convincing evidence, that the terms at issue fail to reasonably apprise those skilled in the art of their scope. *See Aloft Media v. Adobe Sys.*, 570 F. Supp. 2d at 892.

IV. ALOFT'S RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS

1. Agreed.

2. Agreed.

3. Agreed.

4. Agreed.

5. Aloft agrees with Halliburton that the asserted patents both have the same title. Aloft also agrees with Halliburton that one embodiment of each of the asserted patents is directed at computer software for performing logic related to decision making. Aloft disagrees with Halliburton to the extent they urge that this is the only embodiment of the asserted patents.

6. Aloft agrees with Halliburton that claim 14 of the '898 patent and claim 110 of the '910 patent are the only two independent claims currently being asserted. Aloft also agrees with Halliburton that its respective recitations of claim 14 of the '898 patent and claim 110 of the

‘910 patent are accurate. Aloft disagrees, however, with the punctuation and presentment of these two claims by Halliburton. For example, Halliburton has improperly used a semi-colon instead of a comma after the phrase “computer code capable of performing logic related to decision making” when presenting claim 110 of the ‘910 patent. Moreover, Halliburton has improperly attempted to isolate sections of the claim, i.e., the sections reciting the applications, from the claim language as it appears in the patent claims.

7. Denied. Each of the asserted independent claims are directed towards a computer program product embodied on a tangible computer readable medium.

8. Agreed.

9. Agreed.

10. Agreed.

11. Denied. Each asserted claim is directed to a computer program product embodied on a tangible computer readable medium. Although the asserted claims do not recite the phrase “computer *source* code,” embodiments of the claimed invention may include computer source code stored on a tangible readable medium. As an example, the patents disclose that certain embodiments may include object oriented programming written in JAVA, C, and C++ programming languages. *See* ‘898 Patent at 4:40-42. Furthermore, the patents contain a lengthy disclosure of object oriented programming concepts, techniques, advantages, and applicability to the claimed invention. *See* ‘898 Patent at 4:40 – 10:18.

12. Denied for the reasons stated above.

V. APPLICABLE LAW

A. Issued patents are presumed valid; challengers bear a clear and convincing burden to prove otherwise

An issued patent enjoys a presumption of validity under 35 U.S.C. § 282 that can be overcome only by clear and convincing evidence. *U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1563 (Fed. Cir. 1997). Accordingly, a party "seeking to invalidate a patent at summary judgment must submit such clear and convincing evidence of invalidity." *Eli Lilly & Co. v. Barr Labs., Inc.*, 251 F.3d 955, 962 (Fed. Cir. 2001). A determination of whether a claim is invalid as indefinite under § 112, ¶ 2 is a question of law, soundly within the province of the Court. *Allen Eng'g Corp. v. Bartell Indus.*, 299 F.3d 1336, 1348 (Fed. Cir. 2002).

B. The standard for indefiniteness is strict and requires the conclusion that the term at issue is not amenable to construction.

The standard for indefiniteness is stringent and clear: "a claim is invalid as indefinite if it is not 'amenable to construction.'" *Realtime Data, LLC v. Packeteer, Inc.*, 2009 U.S. Dist. Lexis 78459, *19 (E.D. Tex. June 23, 2009) (J. Love) (citing *Exxon Research Eng'g Co. v. United States*, 265 F.3d 1371 (Fed. Cir. 2001)). The definiteness requirement of § 112, ¶ 2 "focuses on whether the claims, as interpreted in view of the written description, adequately perform their function of notifying the public of the [scope of the] patentee's right to exclude." *Id.* Section 112, paragraph two also requires "that the claims be amenable to construction, however difficult that task may be." *Id.* Because a claim is presumed valid, a claim is indefinite only if the "claim is insolubly ambiguous, and no narrowing construction can properly be adopted." *Id.*; *see also Honeywell Int'l, Inc. v. Int'l Trade Comm'n*, 341 F.3d 1332, 1338-39 (Fed. Cir. 2003). Where "the meaning of the claim is discernable, even though the task may be formidable and the conclusion may be one over which reasonable persons will disagree, . . . the claim [is] sufficiently clear to avoid invalidity on indefiniteness grounds." *Exxon Research*, 265 F.3d at 1375. Accordingly, the claims of a patent need not be "plain on their face in order to avoid condemnation for indefiniteness." *Id.*

C. When a structural term has a reasonably well understood meaning in the art, analysis of claim language under 35 U.S.C. §112, ¶6 is not appropriate.

A claim term that does not employ the word "means," imposes a rebuttable presumption that § 112, ¶ 6 does not apply ("presumption of non-applicability"). *Personalized Media Commc'ns, LLC v. Int'l Trade Comm'n*, 161 F.3d 696, 704 (Fed. Cir. 1998). A party can rebut the presumption of non-applicability in one of two ways: by demonstrating that the claim terms fail to "recite sufficiently definite structure"; or demonstrating that a claim element recites a "function without reciting sufficient structure for performing that function." *Watts v. XL Sys., Inc.*, 232 F.3d 877, 880 (Fed. Cir. 2000).

As an aid in analyzing whether a claim term recites sufficient structure, the Federal Circuit has inquired as to whether "the term, as a name for a structure, has a reasonably well understood meaning in the art." *Id*. (quoting *Greenberg v. Ethicon Endo-Surgery, Inc*., 91 F.3d 1580, 1583 (Fed. Cir. 1996)). "[It] is sufficient if the claim term is used in common parlance or by persons of skill in the pertinent art to designate structure, even if the term covers a broad class of structures and even if the term identifies the structures by their function." *Lighting World, Inc. v. Birchwood Lighting, Inc.*, 382 F.3d 1354, 1360 (Fed. Cir. 2004) (finding sufficient structure in "connector"). *See also Linear Tech. Corp. v. Impala Linear Corp.*, 379 F.3d 1311, 1320 (Fed. Cir. 2004) (finding sufficient structure in "circuit"), *Personalized Media*, 161 F.3d at 705 (finding sufficient structure in "detector"). Additionally, a number of Courts have determined that § 112, ¶ 6 does not apply to claim terms that are directed to computer software because computer software, in itself, connotes sufficient structure to avoid the ambits of § 112, ¶ 6. *See Aloft Media v. Adobe Sys. Inc*., 570 F. Supp. 2d at 894-96 (concluding that the "computer code" elements referenced by the "wherein" clauses showing operation of the code recite sufficiently definite structure) (Ex. 5), *Beneficial Innovations*, 2010 U.S. Dist. LEXIS 35784 at

*42-46 (finding sufficiently definite structure in "programmatic elements") (Ex. 4), *Affymetrix*, 132 F. Supp. 2d at 1232 ("The Court finds that 'computer code' is not a generic term, but rather recites structure that is understood by those of skill in the art to be a type of device for accomplishing the stated functions.") (Ex. 6); *Trading Techs.*, 2006 U.S. Dist. LEXIS 80153 at *38-44 (finding that "computer code" recited sufficient structure) (Ex. 7).

VI. ARGUMENT

A. The "decision terms" are directed to computer software and are not indefinite

The disputed "decision terms" include the term "decision logic," found in independent claim 14 of the '898 patent, and the term "logic related to decision making," found in independent claim 110 of the '910 patent. Halliburton's motion relies in large part on its self-serving isolation of the "decision terms" from their usage in the claims. This isolation allows Halliburton to make arguments in the abstract in an effort to convert the device claims into subjective methods. Motion at 11.[8] The result is a jumble of extraneous concepts and limitations that are not even recited by the claims at issue in this case. Motion at 10-17. Once Halliburton's self-imposed confusion is removed, its motion boils down to the straightforward application of well-understood legal principles.

Focusing on the claim language, the asserted claims are directed to computer program products, and the use of the "decision terms" in the asserted claims is quite straightforward. When viewed in the context of the claims, it can be readily seen that the "logic" recited in the disputed claim terms further defines the capabilities of certain computer code that resides within

[8] Defendant Halliburton's Motion for Summary Judge of Invalidity for Indefiniteness (Dkt. No. 165) is cited herein as "Motion at __ ."

a computer software application. For example, independent claim 110 of the '910 patent recites, in pertinent part:

> 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 …

Ex. 2, '910 Patent, 22:40-44 (emphasis added).

Similarly, claim 14 of the '898 patent recites, in pertinent part:

> 14. A computer program product embodied on a tangible computer readable medium, comprising, comprising [sic]:
>
> computer code for causing execution of an application capable of performing ***decision logic*** …

Ex. 1, '898 Patent, 18:57-60 (emphasis added). One of ordinary skill in the art would view the "decision terms" in a manner that is consistent with their usage in the claims, which is further confirmed by the specifications of the patents-in-suit. Consistent with this approach, Aloft proposes the following construction for the term "decision logic":

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

Aloft's proposed construction is consistent with the term's use in the asserted claims in that it confirms that the application has computational capabilities that are related to the area of decision making. *See* Ex. 1, '898 Patent, claim 14. As used in the claims, the phrase "logic related to decision making" warrants similar treatment. However, it is Aloft's position that

construction of the phrase "logic related to decision making" is unnecessary in view of its proposed construction of "decision-making":[9]

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

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

1. Halliburton's indefiniteness argument relies on faulty assumptions

As described above, Halliburton's motion relies in large part on isolating the "decision terms" from their usage in the claims and then arguing in the abstract that the terms are overly broad and wholly subjective. Motion at 11. In doing so, Halliburton's argument strays from the language of the independent claims and relies on faulty assumptions to support its conclusion that the "decision terms" are indefinite. Without fully dissecting the complexities of Halliburton's argument, Aloft observes at least the following faulty assumptions upon which Halliburton's indefiniteness argument is premised:

- Halliburton appears to be of the mistaken view that the claims are directed to a method, as opposed to a computer program product. *See e.g.*, Motion at 11, 12 ("Yet, Aloft is not entitled to claim every method for making a decision.")

- Rather than focus on the requirements of the independent claims, Halliburton appears to have jumped to the mistaken conclusion that the claims require that a decision be reached. *See e.g.*, Motion at 13 ("[O]ne of skill in the art would not be able to determine *how* to reach a decision.")

[9] An alternative construction for "logic related to decision making" that parallels the proposal for "decision logic" would be "operations related to evaluating alternatives in the course of a decision process."

Halliburton's misplaced assumption appears to be premised on its extrinsic definition for "decision." Motion at 11 ("A decision is the passing of judgment on an issue.") Halliburton's definition incorrectly treats "decision" as a noun and ignores the term's use in the asserted claims as a modifier of logic. *See* '898 Patent, claim 14, *supra* ("decision logic"); *see also* '910 Patent, claim 110, *supra* ("logic related to decision making"). The use of "decision" in the asserted claims merely defines the subject area in which the capabilities of computer code are directed. The term does not suggest or require that an ultimate decision be reached.

- Halliburton wrongly asserts that the "decision terms" are limited to the Dialogue Decision Process, and thus must include the DDP *methodology* of framing, alternatives, analysis, and connection. *See e.g.*, Motion at 13-14 ("Under this narrow view, one of skill in the art would understand the claimed invention, and thus the decision terms, to be solely directed to the DDP.").

Halliburton's attempt to limit the independent claims to certain *methodologies* related to the Dialogue Decision Process is misplaced. The asserted claims are directed to computer program products, not methods. Furthermore, *computer code modules* related to framing, alternatives, analysis, and connection are recited by dependent claims. *See e.g.*, '898 Patent at claim 26 ("wherein the universal modules include the framing module").[10] In addition to Halliburton mischaracterizing these concepts as subjective, it is improper to import limitations from dependent claims into an independent claim. *See Retractable Techs. v. New Med. Techs.*, 2004 U.S. Dist. LEXIS 3855, *48-49 (E.D. Tex. Mar. 3, 2004) (J. Davis) (rejecting the defendant's attempt to import limitations from a dependent claim into an independent claim); *see also Varco, L.P. v. Parson Sys. USA Corp.*, 436 F.3d 1368, 1373 (Fed. Cir. 2006) (holding that it is improper to import limitations from the specification into the claims).

[10] *See also* '898 Patent at claim 27 ("alternatives module"); claim 28 ("analysis module"); claim 29 ("connection module") and '910 Patent at claim 120 ("framing module"); claim 121 ("alternatives module"); claim 122 ("analysis module"); claim 123 ("connection module").

- After attempting to burden the independent claims with non-existent limitations, Halliburton then proclaims the Dialogue Decision Process to be a subjective *methodology*. *See e.g.*, Motion at 14-17 ("Each step of the DDP methodology is subjective, depending on the opinions of the users or authors practicing the claimed invention, and this subjectivity renders the precise scope of the claimed invention indefinite.")

As described above, computer code modules directed to framing, alternatives, analysis, and connection are recited by dependent claims, not the independent claims. Halliburton's protestations that these modules should be imported into the independent claims and that they are subjective are both without merit. As is the case for the "decision terms," the use of framing, alternatives, analysis, and connection in the dependent claims defines the subject area in which the capabilities of the claimed computer code modules are directed.

Aloft disputes Halliburton's faulty assumptions and mischaracterizations of the asserted claims, particularly with respect to independent claim 14 of the '898 patent and independent claim 110 of the '910 patent. Halliburton cannot meet its clear and convincing burden to prove indefiniteness by relying on extraneous concepts and limitations. As shown below, the meaning of the "decision terms" is readily understood in view of their usage in the asserted claims and the disclosures of the patents-in-suit.

2. The "decision terms" are not complicated and are readily understood by one of ordinary skill in the art

As described in Aloft's Opening Markman Brief (Dkt. No. 162), conventional decision making tools were relatively expensive and sophisticated, thus restricting their use to experienced practitioners. *See* '898 Patent at 1:64-67. Furthermore, implementations of such conventional tools were ordinarily narrowly tailored to particular types of decision. *Id*. at 60-64. The inventions of the patents-in-suit address these shortcomings by disclosing and claiming a more flexible and easy to implement tool to support a more general field of problem solving. *Id. at* 1:58-60 and 4:1-2.

The asserted claims of the '898 and '910 patents are directed to computer program products, not "function[s] of the human mind based on subjective criteria." *See* Motion at 11. While the claimed computer program products are directed to the general field of decision making, and these claimed products are capable of supporting a decision making process, nothing in the asserted claims requires a subjective evaluation or the rendering of an ultimate decision.[11] Simply stated, the claimed computer program product is a tool for supporting a decision making process, not a roadmap, dictating "*how* to reach a decision." *See* Motion at 13. In this regard, the capabilities of the claimed computer program product are quite objective; claim 110 of the '910 patent is exemplary:

> 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.

Ex. 2, '910 Patent, 22:40-58 (emphasis added).

As demonstrated above, the disputed "decision terms" further describe the capabilities of certain computer code residing within an application. One of ordinary skill in the art would view

[11] *See* '898 Patent 1:17-19 ("The present invention relates to decision making logic, and more particularly to a computer-based platform which *supports* a decision making process." (emphasis added).

the "decision terms" in a manner that is consistent with their usage in the claims. From this perspective, it can be readily observed that the "decision terms" further describe the application as having computational capabilities that are related to the field of decision making. Indeed, this understanding is further confirmed by the disclosures of the patents-in-suit. For example, the FIELD OF THE INVENTION section in the patent specification characterizes the invention as follows:

> The present invention relates to ***decision making logic***, and more particularly to a computer-based platform ***which supports*** a decision making process.

Ex. 1, '898 Patent, 1:18-20 (emphasis added). This is consistent with Aloft's proposed construction for "decision logic" – "operations to execute a decision process." *Supra*. The specification of the patents further describes how such computer code, when executed, can support a decision making process:

> 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***. Note operation 110. It should be noted that the various steps set forth hereinabove may be carried out using universal modules capable of interfacing with different applications.

Ex. 1, '898 Patent, 1:16-34 (emphasis added).

As the Court may be aware, patents related to the '898 and '910 patents were the subject of a previous suit involving different defendants. *See* Case No. 6:08-CV-51 LED-JDL. This predecessor case concerned three related patents that share nearly identical specifications to the

patents-in-suit.[12] One of the disputed terms from the predecessor case was "decision logic." Claim 8 of the '393 patent is exemplary of the term's use in the asserted claims, which in pertinent part recites "executing an application capable of performing ***decision logic***" *See* Ex. 9, U.S. Patent No. 6,901,393 at 19:33-34 (emphasis added). It is informative to note that the defendants from the predecessor case did not share Halliburton's view that the term "decision logic" is "intractably ambiguous." Rather, the term was considered by all parties to be amenable to construction, and the parties' competing constructions for "decision logic" were nearly identical.[13]

Case No. 6:08-CV-051 LED-JDL Aloft's Proposed Construction	**Case No. 6:08-CV-051 LED-JDL Defendants' Proposed Construction**
operations to execute a decision process	Operations to execute the decision process

See Ex. 10, P.R. 4-3 (6:08-CV-051), Aloft's Ex. A at 3 and Defendants' Ex. B at 4. Aloft is advancing the same construction in the present case.

Halliburton has not met its burden to show by clear and convincing that the "decision terms" fail to "reasonably apprise those skilled in the art" of their scope. *Microprocessor Enhancement Corp. v. Tex. Instruments, Inc.*, 520 F.3d 1367, 1374 (Fed. Cir. 2008). To the contrary, the overwhelming evidence supports Aloft's proposed construction for "decision logic" and contention that "logic related to decision making" needs no construction in view of the proposed construction for "decision making."[14] Halliburton's attempt to divorce the "decision terms" from the language of the claims and intrinsic record should be rejected. Instead, the proper construction of a disputed term is ascertained by the Court through a careful analysis of

[12] Case No. 6:08-CV-51 LED-JDL involved U.S. Patent Nos. 6,901,393; 7,401,059; and 7,478,076. These patents, along with the patents-in-suit, all relate back to U.S. Provisional Application No. 60/163,984.

[13] Case No. 6:08-CV-51 LED-JDL settled shortly before the Markman hearing and was ultimately dismissed on March 17, 2010. *See* Dkt. No. 224.

[14] *Supra* at 9-10.

the language of the claims and the intrinsic record. When this analysis is undertaken for the "decision terms," Aloft respectfully submits that its proposed constructions are proper.

B. The term "potential feasible hybrid theme" is readily understood by one of ordinary skill in the art

The term "potential feasible hybrid theme" is recited in independent claim 14 of the '898 patent, as follows:

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

Ex. 1, '898 Patent, 19:5-8 (emphasis added). The term also appears in a similar manner in independent claim 110 of the '910 patent:

> 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***.

Ex. 2, '910 Patent, 22:54-58 (emphasis added). As this Court is aware, claim terms are interpreted from the point of view of a person of ordinary skill in the art who "is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005) (en banc). As is the case for other disputed terms, Halliburton seeks to divorce the term "potential feasible hybrid theme" from its contextual usage in the claims and the guidance provided in the patent specification. Indeed, Halliburton's indefiniteness argument is premised on an improper piecemeal extrapolation of certain extrinsic dictionary definitions. Motion at 7 and 10.

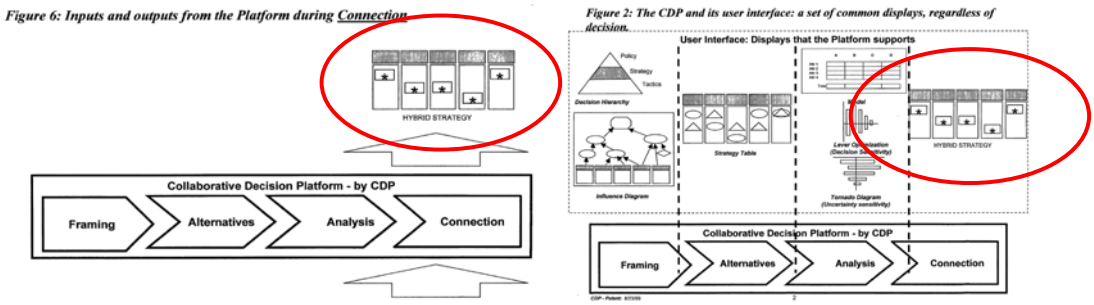
In the interest of minimizing the disputes between the parties and in view of the intrinsic record, Aloft has revised its proposed construction of "potential feasible hybrid theme" to the following:

potential feasible hybrid theme	
Aloft's Proposed Construction	**Defendants' Proposed Construction**
a representation of a potential hybrid strategy based on a unifying or dominant idea	Term is intractably ambiguous

Notwithstanding Halliburton's assertions the contrary (Motion at 7), the term "potential feasible hybrid theme" is addressed in the underlying provisional patent application, which is incorporated by reference into the disclosure of the patents-in-suit.[15] The example disclosed in the provisional application provides that a hybrid strategy is generated during "Connection" and that a potential feasible hybrid theme representing this strategy may be output in the form of a visual display:

> Lastly, during Connection, the platform requests the application to provide ***potential feasible hybrid themes*** which consist of the best of the outputs within each decision sensitivity option (profit center).

Ex. 8, Provisional Application No. 60/163,984 at 3 (second emphasis added). Figure 6 of the provisional application is an exemplary display of a potential feasible hybrid theme, generated in this example during an analytical procedure referred to as "Connection." *Id*. at 2 ("Figure 6: Displays enabled during Connection"); *see also Id.* ("Figure 2: Set of common displays enabled by the CDP").



[15] Both the '898 and the '910 patents claim priority to and incorporate by reference the disclosure of Provisional Application No. 60/163,984, which is attached hereto as Ex. 8. *See* '898 Patent at 1:10-14 and '910 Patent at 1:10-14.

Ex. 8, Provisional Application No. 60/163,984 at Figures 2 and 6 (circle emphasis added). As indicated above, Figures 2 and 6 illustrate an exemplary potential feasible hybrid theme that is generated during "Connection" and represents a possible hybrid strategy for a particular decision. *Id*. at 3.

As disclosed in the patents, a "hybrid strategy" is a compilation of decisions taken from alternative strategies. '898 Patent at 12:52-55. In the context of the invention, the alternative strategies are identified to capture the range of possibilities envisioned for addressing a particular decision. *Id.* at 11:29-32. One of skill in the art would understand that in generating a hybrid strategy, an optimal hybrid strategy may vary depending upon the unifying or dominant idea (i.e., "theme") in which the decision is being approached.[16] For example, the patents disclose an exemplary decision related to participation in an employer's stock purchase program. *Id*. at 13:21-25. One "theme" or dominant approach for addressing this decision might be maximizing principal growth, another exemplary "theme" might be minimizing exposure to principal loss, and another exemplary "theme" might be the timing of investments choices, etc. *Id*. at 13:52-60. Each of these "themes" represent a different hybrid strategy that is a possible alternative for addressing the employer's stock purchase decision. That is, it is easy to appreciate that the hybrid strategy themed on maximizing principal growth will include a decision compilation, selected from alternative strategies, that is different for a hybrid strategy that is themed on minimizing exposure to principal loss. Each of these possible "themes" for addressing the decision may be output, as exemplified in the Figures above, as a potential feasible hybrid theme, which as claim 110 of the '910 patent specifies may be presented as a display. '910 Patent,

[16] The term "theme" is employed in the claims and further described in the patents' specification in accordance with its ordinary meaning. *See e.g.*, Ex. 11, Dictionary.com (theme - "(1) a subject of discourse …. (2) a unifying or dominant idea."); *see also* Ex 12, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th Ed.) (1996) (theme – "(1) a subject or topic of discourse …. (2) a specific and distinctive quality, characteristic, or concern").

claim 110 ("computer code for generating a display … at least one display that is a … potential feasible hybrid theme.")

Another example is disclosed in the context of Figures 23a-c and Figure 26 of the patents-in-suit, along with the accompanying description from the patent specification. Figures 23a-c illustrate three alternative strategies "Momentum," "Low Cost," and "Increased Value" for addressing a decision related to customer relationship management (CRM) in a business-to-business example:

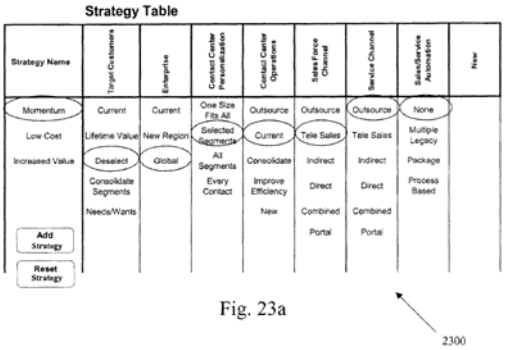


Fig. 23a

Ex. 1, '898 Patent at 16:38-43. As described above, one of skill in the art would understand that, for a majority of decisions, there is more than one potential "theme" or unifying or dominant idea for generating a hybrid strategy from the identified alternative strategies. Each of these "themes" would produce a different hybrid strategy, which may be output and presented in the form of a potential feasible hybrid theme. Figure 30 illustrates one such example:

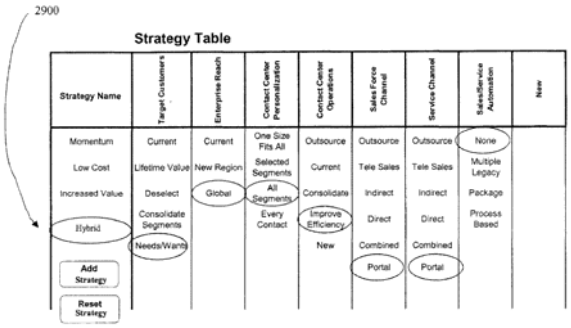


Fig. 29

Ex. 1, '898 Patent at 16:38-43.

Halliburton's attempt to characterize the term "potential feasible hybrid theme" as subjective is without merit. The asserted claims are directed to computer program products, not methods concerning any subjective intent or motivation of potential decision makers. Indeed, the claims are quite clear with respect their requirements. Generally, the claimed computer program products are capable of receiving first and second information and processing this data to generate at least one of several displays related to the field of decision making. Ex. 1, '898 Patent at claim 14; *see also* '910 Patent at claim 110. The claims do not require any consideration of the motivation or reasons behind the information that is received and ultimately processed. Halliburton's desire to burden the claims with non-existent limitations is a red-herring and should be rejected.

C. "Computer code for processing" recites sufficient structure to avoid the ambits of § 112, ¶ 6, and is therefore not indefinite.

Each of the independent claims at issue recites the disputed phrase "computer code for processing." For example, claim 14 of the '898 patent recites, in pertinent part:

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

See Ex. 1, '898 Patent at 19:3-4 (emphasis added). Claim 110 of the '910 patent includes a similar computer code element, which recites in pertinent part:

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

See Ex. 2, '910 Patent at 22:52-53 (emphasis added). Halliburton asserts that the phrase "computer code for processing" should be construed in accordance with § 112, ¶ 6 and that under this analysis the term is indefinite because "processing" is not linked to an algorithm disclosed in the patent specification. Motion at 17-26. It is Aloft's position that:

- "computer code for processing" is a straightforward term that does not require construction;

- legal precedent clearly dictates that § 112, ¶ 6 is not applicable to this term; and
- as such, there is no requirement that "processing" be linked to an algorithm in the patent specification. The parties' competing positions are as follows:

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

Halliburton's argument that § 112, ¶ 6 governs the construction of this term is contrary to the way the patentee and the Patent Office understood the asserted claims. *See* Ex. 13, '910 Prosecution History at 48 ("It should be noted that no claims [of the '910 Patent] are intended to be construed under 35 U.S.C. 112, paragraph 6."); *see also* Ex. 14, '898 Prosecution History at 12 ("It should be noted that no claims [of the '898 Patent] are intended to be construed under 35 USC 112, paragraph 6."). Throughout the prosecution of the patents-in-suit, the Patent Office never asserted or intimated the applicability of § 112, ¶ 6 to the asserted claims or challenged the patentee's stated intent of avoidance.

Significantly, the term "computer code for processing" does not recite the words "means" thus giving rise to a "strong" presumption that § 112, ¶ 6 does not apply. *Personalized Media Communs.*, 161 F.3d at 703-04; *see also Lighting World*, 382 F.3d at 1358 ("The presumption flowing from the absence of the term 'means' is a strong one that is not readily overcome.") (citations omitted). Halliburton acknowledges that the presumption against § 112, ¶ 6 is a fatal shortcoming in its argument by artfully attempting to recast the term "computer code for processing" into "means for processing." *See* Motion at 20 ("[T]he term 'computer code for processing' is a restatement of 'means for processing'"). Halliburton then tactically refers to its

redrafted "means for" claim language throughout its argument. *See e.g.*, Motion at 21, 22, 23.[17] Unfortunately for Halliburton, the disputed claim term is directed to "computer code," which is a structure that has a well-understood meaning in the art. The term "computer code" is not a generic term such as the "means for" language that has become the touchstone for § 112, ¶ 6 claim drafting. *See Greenberg*, 91 F.3d at 1584 ("[T]he 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 a different formulation generally does not.").

With respect to the term "computer code for processing," the presumption against § 112, ¶ 6 applicability is confirmed, thus ending the inquiry, because the term "computer code" recites sufficient structure to firmly entrench the term outside of § 112, ¶ 6 scrutiny. Indeed, this Court has already considered this exact issue in a previous case and concluded that "computer code" recites sufficiently definite structure to avoid analysis under § 112, ¶ 6. *Aloft Media v. Adobe*, 570 F. Supp. 2d at 897-98 (E.D. Tex 2008) (Ex. 5). Specifically, this Court analogized "computer code" to a "circuit" and found that the defendants failed to rebut the presumption that §112, ¶ 6 did not apply.[18] In doing so, this Court relied on an IEEE technical definition of "code" as confirming that it connotes well-known structure in the art.[19]

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[17] Halliburton's reliance on *NetMoneyIN* to support its claim redrafting sleight-of-hand is misplaced. Motion at 18. In *NetMoneyIN*, the claim term at issue was "means for generating an authorization indicia." *NetMoneyIN, Inc. v. VeriSing, Inc.*, 545 F.3d 1359, 1365 (Fed. Cir. 2008) (emphasis added). The court agreed with defendants that "bank computer" was not sufficient structure to rebut the means-plus-function presumption because "the bank computer is not linked in the claim as the 'means' for generating an authorization indicia" and that "bank computer is recited as 'including' those means." *Id*. at 1366 & 1364.

[18] Aloft does not agree with the defendants' characterization of this Court's analysis in *Aloft Media v. Adobe*. Instead, Aloft's interpretation of this Court's analysis more appropriately comports with Judge Ward's interpretation. *See Beneficial*, 2010 U.S. Dist. LEXIS 35784 at *49 (citing Aloft Media, 570 F. Supp. 2d at 894-96).

[19] *See Aloft Media v. Adobe*, 570 F. Supp. 2d at 898, n. 9 (*citing* IEEE 100: THE AUTHORITATIVE DICTIONARY OF IEEE STANDARDS TERMS 182 (7th ed. 2000) (defining "code" as "[i]n software engineering,

This Court's analysis and approach to computer software claims has been adopted by other courts in the District and conforms with the approach taken in other judicial districts as well. For example, in *Beneficial*, a court in the District was asked to construe "programmatic elements for . . ." pursuant to §112, ¶ 6. *Beneficial*, 2010 U.S. Dist. LEXIS 35784 at *42-46 (Ex. 4). Equating the term to computer or program code, the court determined that "one of ordinary skill in the art would understand the term . . . to recited sufficient structure and to have a reasonably well understood meaning to one of skill in the art." *Id*. Facing a similar issue, a Central District of California court, in *Affymetrix*, concluded that a disputed term, "computer code that generates," was "not a generic term." *Affymetrix*, 132 F. Supp. 2d at 1232 (Ex. 6). Instead, the court analogized "computer code" to terms like "detent mechanism" and "digital detector" – terms previously found by the Federal Circuit to denote sufficiently definite structure to avoid analysis under § 112, ¶ 6. *Id*. In yet another example, a Northern District of Illinois court also concluded that the term, "program code," recited sufficiently definite structure to avoid analysis under § 112, ¶ 6. *Trading Techs. Int'l*, 2006 U.S. Dist. LEXIS 80153 at *37-42 (Ex. 7). In *Trading Technologies International, Inc.*, the court analogized "program code" to "circuitry"; determined that "program code" recited sufficient structure; and concluded by indicating that, the "defendants . . . have failed to rebut that presumption [that § 112, ¶ 6 does not apply]." *Id*.

Above and beyond the fact that "computer code" recites sufficient structure to avoid analysis under § 112, ¶ 6, Halliburton does not (and cannot) cite to a case that stands for the proposition that the term, "processing," must be linked to an algorithm in the patent's specification to avoid indefiniteness. In fact, Halliburton's Motion is riddled with references to

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computer instructions and data definitions expressed in a programming language or in a form output by an assembler, compiler, or other translator.")) (attached as Ex. 15).

cases inapposite to the issue at hand—each beginning their analysis with the presumption that § 112, ¶ 6 applied and ended with a search for an elusive algorithm.[20] To the contrary, a proper analysis in this case begins with the presumption that § 112, ¶ 6 does **not** apply and proceeds with an analysis of whether "computer code" recites sufficiently definite structure—indeed, as explained by the Federal Circuit and District Courts alike, there is no requirement that the Court proceed to hunt for an algorithm where a claim discloses "computer code" or similar limitation.

D. **The Examiner understood the scope of the disputed claim phrases**

"Embedded in the presumption that an issued patent is valid is the premise that 'one or more examiners who are assumed to have some expertise in interpreting the references and to be familiar from their work with the level of skill in the art and whose duty it is to issue only valid patents,' has performed that duty." *Aloft Media v. Adobe*, 570 F. Supp. 2d at 901-02 (quoting *PowerOasis, Inc. v. T-Mobile USA, Inc.*, 522 F.3d 1299, 1304 (Fed. Cir. 2008)).

During correspondence with the applicants during prosecution of both of the patents-in-suit, examiner Michael Holmes chose to employ each of the purportedly "indefinite" terms. For example, in his Notice of Allowability, examiner Holmes stated as follows:

> Claims 16-130, 132-134 & 136-385 are considered allowable since when reading the claims in light of the specification, . . . none of the references of record alone or in combination disclose or suggest the combination of limitations specification in the independent claim(s). . . . The limitations recited in independent claim 16 " . . . an application capable of performing logic related to decision-making, . . . computer code for processing the first information and the second information utilizing the logic; . . . or a potential feasible hybrid theme.

[20] Significantly, Halliburton does not cite a single case where a software claim element not employing the word "means" was construed pursuant to § 112, ¶ 6 – a distinction aptly noted by both the Central District of California and the Northern District of Illinois in their analyses under similar circumstances. *See, e.g.*, *Affymetrix,*, 132 F. Supp. 2d at 1232 ("[The defendant] has cited no cases to support this proposition [that computer code lacks any structure]. Moreover, [the defendant's] proposition improperly would subject every software patent and many electronic patents to §112, P 6."); *Trading Technologies Intern.*, 2006 U.S. Dist. LEXIS 80153, at *41 ("[The defendants'] use of *Altiris, Inc. v. Symantec Corp*. is of no assistance to their argument in this case. In *Altiris*, the claim included the language 'means of,' and therefore the court began with the presumption of means-plus-function. Such is not the case here." (internal citation omitted)).

Ex. 12, '910 Prosecution History at 3-5 (emphasis added). *See also id*. at 51-52 & 55 (employing the terms, "decision logic" and "computer code for processing," in an office action); Ex. 14, '898 Prosecution History at 22 (employing the term, "decision logic," in an office action). Examiner Holmes also examined the applications for U.S. Patent Nos. 7,401,059; 6,876,991; and 7,478,076 – patents that are related and each derived from the same application. "[W]hen multiple patents derive from the same initial application, the prosecution history regarding a claim limitation in any earlier patent applies with equal force to subsequently issued patents containing the same claim limitation." *Nutrition21, LLC v. Gen. Nutrition Corp.*, 2006 U.S. Dist. LEXIS 58002, *7 (E.D. Tex. Aug. 17, 2006) (J. Davis) (citing *Elkay Mfg. Co. v. Ebco Mfg. Co.*, 192 F.3d 973, 980 (Fed. Cir. 1999)). As with the patents-in-suit, examiner Holmes employed each of the allegedly indefinite terms during prosecution of these related patents.[21]

Although ignored by Halliburton, this acknowledgement and use by examiner Holmes of the supposed indefinite claim terms significantly undermines Halliburton's argument that these terms are beyond any reasonable interpretation. *See, e.g., Aloft Media v. Adobe*, 570 F. Supp. 2d at 901-02 (considering similar evidence in finding a claim to be not indefinite). It is unlikely that the examiner would base a non-indefiniteness rejection or a notice of allowance on an aspect of the claims that has no discernable meaning – a required conclusion if Halliburton is correct.

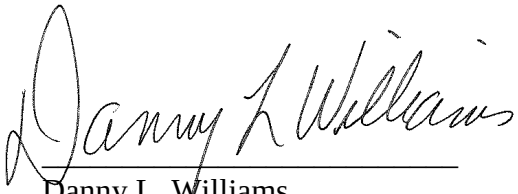
VII. CONCLUSION

For all of the above reasons, each of the purportedly indefinite terms – "decision logic," "logic related to decision making," "computer code for processing," and "potential feasible

[21] *See, e.g.*, Ex. 16, '059 Prosecution History at 3, 7, 11-13 (employing the terms, "decision logic" and "computer code for processing," in office actions); Ex. 17, '991 Prosecution History at 3 (employing the terms, "decision logic" and "computer code for processing," in the notice of allowability) and 8-9, 15-21 (employing the terms, "decision logic," "computer code for processing," and "potential feasible hybrid themes" in office actions); Ex. 18, '076 Prosecution History at 7-8 (employing the terms, "decision logic," "computer code for processing," in an office action).

hybrid theme" – are capable of being understood by one of ordinary skill in the art and are amenable to construction by this Court. Furthermore, Halliburton has not met its clear and convincing burden of proving otherwise. Accordingly, Aloft respectfully requests that the Court recommend the denial of Halliburton's motion (Dkt. No. 165).

Respectfully submitted this 21 day of December, 2010.



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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 December 21, 2010.

/s/Mark Dunglinson
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