

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

ALOFT MEDIA, LLC.,

Plaintiff,

vs.

ORACLE CORP., ET AL.

Defendants.

Case No. 6:09-CV-304

**ALOFT'S REPLY IN SUPPORT OF ITS
CLAIM CONSTRUCTION BRIEF (Dkt. No. 162)**

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I. INTRODUCTION

Placing the indefiniteness issues aside,¹ the *Markman* briefing in this case distills down to two terms: “decision hierarchy display” and “universal module.” The defendants contend that each of these terms is specifically defined in the specification. But the passages cited by the defendants do not serve to clearly assign a special meaning to these terms. Instead, the passages cited by the defendants merely describe a preferred embodiment of the invention. As such, it is improper to limit these terms as the defendants contend. *See, e.g., CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366-67 (Fed. Cir. 2002).²

Moreover, the defendants fail to appreciate the true scope and application of claim differentiation law. For example, the defendants fail to recognize that claim differentiation is “clearly applicable” when the limitation at issue is the only meaningful difference between a particular claim and one of its dependent claims. *See Wenger Mfg Inc. v. Coating Machinery Sys., Inc.*, 239 F.3d 1225, 1233 (Fed. Cir. 2001). Such is the case with the “decision hierarchy display” term, where the defendants’ proposed construction serves as the only meaningful difference between claims 110 and 171 of the ‘910 patent. The defendants’ overly-limiting construction should therefore be rejected in view of the “extremely strong” presumption that

¹ The defendants did not address the claim terms “per the application” and “assessing uncertainties” in either their *Markman* brief (Dkt. No. 166) or their indefiniteness brief (Dkt. No. 165). As such, the defendants appear to have conceded their indefiniteness position for these terms, and now view the terms in accordance with their plain and ordinary meaning. Although the defendants’ *Markman* brief argues for the indefiniteness of the claimed “value,” “collaborate decision platform,” and “decision making” terms, their indefiniteness brief fails to include a discussion of these terms. *See e.g.*, Defendants’ Motion for Summary Judgment of Invalidity for Indefiniteness at 4 (Dkt. No. 164) (“The disputed terms subject to this motion are ‘decision logic,’ ‘logic related to decision making,’ ‘computer code for processing,’ and ‘potential feasible hybrid theme.’”). As such, it appears that the defendants have abandoned their indefiniteness position for terms not addressed in their indefiniteness brief (Dkt. No. 165), in favor of Aloft’s proposed constructions.

² “Generally speaking, we indulge a ‘heavy presumption’ that a claim term carries its ordinary and customary meaning. . . . An accused infringer may overcome this ‘heavy presumption’ and narrow a claim term’s ordinary meaning, but he cannot do so simply by pointing to the preferred embodiment” *See CCS Fitness*, 288 F.3d at 1366 (citations omitted).

different claims have different scopes. *See, e.g., Retractable Techs. v. New Medical Techs.*, No 4:02-CV-034, 2004 U.S. Dist. LEXIS 3855, at *21-22 (E.D. Tex. Mar. 1, 2004).

The defendants' misunderstanding of claim differentiation law is also evident from their discussion of the "universal module" term. As part of their discussion, for example, the defendants contend that Aloft's analysis of the this term (as contained in its opening brief) is rooted in claim differentiation principles. *See* Response at 13.³ The defendants' position reveals their misunderstanding of the law. Aloft's analysis of the "universal module" term is not based in claim differentiation because it does not rely on the differences *between separate claims*. Instead, Aloft's analysis was rooted in the contextual language within a *single claim*. This type of analysis stems from the principle that the "context in which a term is used . . . can be highly instructive" to the meaning of the term. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1314 (Fed. Cir. 2005) (en banc).⁴ Despite this well-known principle, the defendants' attempt to aggregate distinct limitations within a single claim, and their construction should therefore be rejected. *See* '898 Patent, cl 15 ("The computer program product . . . using *universal modules capable of interfacing with different applications . . .*").

II. ARGUMENT

1. The defendants' claim construction positions contravene Federal Circuit jurisprudence.

The defendants' claim construction positions are based on a misapplication of the Federal Circuit's claim construction jurisprudence. For example, each of the defendants' two proposed claim constructions attempt to improperly limit the claims to a preferred embodiment of the

³ Defendants' Corrected Response to Plaintiff's Opening Brief Regarding Claim Construction (Dkt. No. 166) is cited herein as "Response at ___."

⁴ "To take a simple example, the claim in this case refers to 'steel baffles,' which strongly implies that the term 'baffles' does not inherently mean objects made of steel." *See Phillips*, 415 F.3d at 1314.

specification. As the Court is aware, the Federal Circuit has routinely counseled against such practice, even where the specification describes only a single embodiment. *See Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 906 (Fed. Cir. 2004).⁵ In view of the prevailing law, a claim term carries its plain and ordinary meaning, except where the patentee dictates otherwise by way of a clear disavowal of such meaning. *See, e.g., Retractable Techs.*, 2004 U.S. Dist. LEXIS 3855, at *6.⁶

In addition to unnecessarily limiting the claims to a described embodiment, the defendants also disregard the plain language of the claims. Specifically, the defendants attempt to discount differences in claim language by contending that claim differentiation is disfavored and subject to a rebuttable presumption. The defendants' argument fails to appreciate the full scope of claim differentiation law. As this Court knows, claim differentiation is based on the principle that *different claims* are presumed to have a *different scope*. Although this presumption is rebuttable, the defendants fail to acknowledge that the presumption (in favor of claim differentiation) is "especially strong where the limitation under consideration is the only meaningful difference between the independent and dependent claim and a party argues that the limitation in the dependent claim should be read into the independent claim." *See id.* at *21-22 (internal quotations omitted) (citation omitted).

Additionally, the defendants fail to appreciate that their attempt to narrow the claims to preferred embodiments is refuted by the plain language of the claims. The Federal Circuit has

⁵ "Even when the specification describes only a single embodiment, the claims of the patent will not be read restrictively unless the patentee has demonstrated a clear intention to limit the claim scope using words or expressions of manifest exclusion or restriction." *See Liebel-Flarsheim Co.*, 358 F.3d at 906 (internal quotations omitted) (citation omitted).

⁶ "While an accused infringer may overcome the heavy presumption of ordinary meaning and narrow a claim term's ordinary meaning, he cannot do so simply by pointing to the preferred embodiment or other structures or steps disclosed in the specification or prosecution history." *See Retractable Techs.*, 2004 U.S. Dist. LEXIS 3855, at *6 (internal quotations omitted) (citation omitted).

cautioned against such disregard, stating that the “context in which a term is used in the asserted claim can be highly instructive” to the meaning of the term. *Phillips*, 415 F.3d at 1314. One of the claims at issue in *Phillips*, for example contained the term “steel baffles.” According to the Circuit, the patentee’s use of the word steel when describing the claimed baffles “strongly implies that the term ‘baffles’ does not inherently mean objects made of steel.” *See id.* As such, it would be improper to require a “baffle” to be made of “steel.” *See id.*

2. The term “decision hierarchy display” refers to “a display that indicates the precedence of decisions⁷ in a decision process.”

The defendants’ proposed construction for this term improperly limits its scope to a preferred embodiment of the invention. Specifically, the defendants attempt to limit this term to a display that shows “policies, decisions *and* tactics.” In support of their argument, the defendants contend that “each example” of a decision hierarchy display in the written description “includes policies, decisions, and tactics.” *See* Response at 10 (emphasis original). But the defendants fail to show any clear disavowal of the natural meaning of this term that justifies their proposed limitation.

In fact, the specification does not limit the claims as defendants contend. For example, the written description of the asserted patents describes an embodiment where three types of decisions can be included in a “decision hierarchy display.” According to this embodiment,

[d]ecisions that have already been made are referred to as “policy, a set of one or more decisions of immediate interest are referred to as “strategy” or “strategic decisions” or just “decisions,” and decisions that can be deferred until later are referred to as “tactics.”

See ‘898 Patent at 11:7-12. This embodiment goes on to contemplate the ability of a user to “confirm or *modify* . . . the policies, decisions and tactics” that are initially included within the

⁷ In an effort to narrow issues for the Court, Aloft has replaced the word “parameters” in its proposed construction to “decisions.”

hierarchy display. See '898 Patent at 11:12-13 (emphasis added). But absent from this discussion is any requirement that the "hierarchy display" include all three types of decisions. Instead, the description of this embodiment contemplates a user's manipulation of the hierarchy display, such as to remove all types of decisions within a particular decision type, i.e. policy.

Aloft's view of the decision hierarchy term is also support by the claims of the patents, which specifically contradict defendants' proposed construction. For example, claim 171 of the '910 patent requires the "decision hierarchy display" of independent claim 110 to include "policies, decisions, and tactics." See '910 Patent, cl 171. This express description of a particular hierarchy display is the only meaningful distinction between the "decision hierarchy display" term of claim 110 and claim 171. As such, claim 171 provides "especially strong" evidence that the "decision hierarchy display" of claim 110 is broader than a display that includes "policies, decisions, *and* tactics." See *Retractable Techs.*, 2004 U.S. Dist LEXIS 3855, at *21-22.

In arguing against the plain differentiation among the claims, the defendants attempt to discount the cannon of claim differentiation by contending that it is disfavored (by being subject to a rebuttable presumption). But the defendants fail to acknowledge the type of claim differentiation at issue here, which is at the core of the doctrine. Specifically, the "presumption [in favor of claim differentiation] is especially strong when the limitation in dispute is the only meaningful difference between an independent and dependent claim, and one party is urging that the limitation in the dependent claim should be read into the independent claim." See *Sunrace Roots Enter. Co., Ltd. v. Sun Victory Trading Co., Inc.*, 336 F.3d 1298, 1303 (Fed. Cir. 2003) (citation omitted). In view of the type of claim differentiation at issue here, the defendants cannot (and have not) overcome the presumption favoring application of the claim differentiation

cannon. *See O.I. Corp. v. Tekmar Co. Inc.*, 115 F.3d 1576, 1582 (Fed. Cir. 1997) (requiring “clear” evidence to rebut the presumption in favor of claim differentiation) (citation omitted). This is especially true here, where the specification confirms the differences in claim scope between the independent and dependent claims. As such, the defendants’ construction should be rejected in favor of Aloft’s proposed “decision hierarchy display” construction.

3. The term “universal module” refers to “a reusable software component for carrying out certain functionality.”

The defendants’ proposed construction for this term improperly limits the term to a preferred embodiment of the invention. Specifically, the defendants attempt to limit this term to “a module that is capable of interfacing with different applications.” The defendants lift this definition out of the written description, which describes an embodiment where universal modules are “capable of interfacing with different applications.” *See* ‘898 Patent at 3:54-55. Tellingly, the defendants fail to cite any portion of the specification that limits this multi-application capability across *all* embodiments of the invention. As such, the defendants’ proposed limitation is nothing more than an improper attempt to limit the claims to a preferred embodiment. *See Liebel-Flarsheim*, 358 F.3d at 906 (“Even when the specification describes only a single embodiment, the claims of the patent will not be read restrictively unless the patentee has demonstrated a clear intention to limit the claim scope using words or expressions of manifest exclusion or restriction”) (internal quotations omitted) (citation omitted).

Moreover, the claims of the patents inherently reject the defendants’ proposed construction. For example, claim 15 of the ‘898 patent recites the universal module separately from the module’s multi-application interfacing capability. Specifically, asserted claim 15 requires a portion of the computer code from claim 14 to be carried out with “universal modules capable of interfacing with different applications adapted for applying the universal modules

differently.” *See* ‘898 Patent, cl 15. This claim language is “highly instructive” to the matter at hand. *See Phillips*, 415 F.3d at 1314. For example, the claim separately calls for a universal module apart from the capability of the module to interface with multiple applications. This difference in claim language, then, “strongly implies” that the term “universal module” does not “inherently” include this separately claimed functionality, and the defendants’ proposed construction should be rejected. *See id.*

The defendants also attack Aloft’s use of the word “reusable” in its proposed construction of this term. But the defendants go on to acknowledge that a “universal module” can be “repeatedly used over and over with the same application.” *See* Motion at 13. This is the precise attribute that the patents’ specification contemplates for a universal module. For example, the patents discuss the use of object oriented programming techniques in the implementation of the invention. As discussed in Aloft’s opening brief, these software components are “reusable” within a software architecture. *See* ‘898 Patent at 4:63-5:8 (“OOP, therefore, views a computer program as a collection of largely autonomous components, called objects, each of which is responsible for a specific task. . . . A component integration architecture is a set of architecture mechanisms which allow software modules in different process spaces to utilize each other’s capabilities or functions.”). In view of this disclosure, Aloft’s construction of a “universal module” as “a reusable software component for carrying out a certain functionality” should be entered by the Court.

- 4. The defendants appear to concede that the “value” terms are not indefinite by failing to address these terms in their motion for summary judgment of invalidity for indefiniteness.**

The defendants did not address the terms “value” and “sources of value” in their indefiniteness motion.⁸ *See* Dkt. No. 165 at 4. (“The disputed terms subject to this motion are ‘decision logic,’ ‘logic related to decision making,’ ‘computer code for processing,’ and ‘potential feasible hybrid theme.’”). As such, it appears that the defendants no longer believe that the “value” terms are indefinite, opting instead to construe the terms according to their plain and ordinary meaning.

Similar to their argument regarding the “decision terms,” the defendants’ original indefiniteness position with respect to the “value” terms incorrectly isolated these terms from the claims as a whole. Dependent claim 42 of the ‘898 patent is exemplary of the patents’ use of the “value” terms and discloses as follows:

42. The computer program product as recited in claim 41, wherein the decision sensitivity display compares a **value** of a first strategy with alternatives and identifies **sources of value**.

(emphasis added). As such, one of skill in the art would view this computer product claim as requiring computer code for generating a decision sensitivity display. Pursuant with the claim, the display compares a first strategy with alternative strategies. Defendants’ contention that one of ordinary skill in the art would be unable to discern the differences in meaning between the two uses of “value” in the claim is without merit. *See* Motion at 20. Plainly, the first use of “value” in the claim above signifies an attribute or characteristic related to the first strategy, whereas the second use of “value” in the claim connotes something that may be considered desirable or advantageous. The two uses of the term “value” are straightforward and in accordance with their well-understood meaning. Defendants’ contentions that the two uses of the term renders the claim “insolubly ambiguous” should therefore be rejected.

⁸ It appears that this omission is intentional, given that the defendants’ motion for summary judgment was three pages short of the permitted page limit.

Furthermore, the claim is not subjective. The claim specifies that a decision sensitivity display compares a first strategy with alternative strategies. This comparison necessarily will reveal advantages and disadvantages of the strategies, thus identifying sources of value. The fact that an interpretation of the comparison may vary depending upon the decision being address does not alter the fact that the display identifies sources of value. The claim does not require any subjective analysis to ascertain what is or is not considered a source of value. In this regard, the relative evaluation of this computer generated results is well known in the art, and would therefore be readily understood by one of skill in the art. As such, the defendants have failed to discharge their burden of proving the indefiniteness of claim by clear and convincing evidence.

5. The defendants appear to concede that the term “decision making” is not indefinite by failing to address this term in their motion for summary judgment invalidity for indefiniteness.

Defendants did not assert that the term “decision making” is indefinite in their indefiniteness motion (Dkt. No. 165), thus apparently conceding to Aloft’s proposed construction.⁹ Defendants’ general opposition to these terms appears to be the use of the word “decision.” Responses at 7 (“‘Decision making’ is indefinite for the same reasons discussed in Defendant’s Motion for Summary Judgment and described above in the discussion of ‘decision logic.’”). Aloft’s argument in favor of the term “decision logic” and “logic related to decision making” is contained in its Response in Opposition (Dkt. No. 174) to defendants’ motion, and Aloft will not burden the Court with a rehash of the same arguments here. What is appropriate, however, is to address defendants’ erroneous assertion that “Aloft’s proposed construction for ‘decision making’ finds no support in the intrinsic evidence.”

⁹ See Defendants’ Motion for Summary Judgment of Invalidity for Indefiniteness at 4 (Dkt. No. 164) (“The disputed terms subject to this motion are ‘decision logic,’ ‘logic related to decision making,’ ‘computer code for processing,’ and ‘potential feasible hybrid theme.’”).

Aloft proposes that “decision making” should be construed to mean “evaluating alternatives in the course of a decision process.” *See* Opening Brief at 4. Defendants argue that Aloft’s proposed construction is “puzzling in that the phrase ‘evaluating alternatives’ is found nowhere in the patent. Response at 8-9. It appears, however, that defendants failed to appreciate the portion of the patent specification *cited in their brief*, which amply support Aloft’s proposed construction:

One of the first recorded *decision making processes* was proposed in the 18th century when Benjamin Franklin suggested a process by which one of two decision alternatives could be selected through *listing advantages of the alternatives side by side* and canceling out advantages or groups of advantages judged to be equal on both sides. Subsequently many decision processes have been proposed and are in use today. These include popular ones, such as Kepner-Tregoe where criteria for making the decision are listed *and the alternatives are assessed* (on a scale from 1 to 10) as to how they perform on each of the criteria. The criteria are also weighted on a similar scale and the *best alternative is judged* to be the highest dot product of the criteria weights and the *respective assessments for the alternative against the criteria*. Various modifications to this basic process in order to take into account complexities of having *multiple decision makers, refining the assessment process* through pair-wise comparison, etc., have resulted in many other such decision processes such as Value Management, Analytic Hierarchy Process, and others. There are also several methodologies (such as decision analyses using decision trees and probability methods) aimed at *assisting a decision-maker think through the options one has in making a decision* and potential outcomes of each option. However many of these decision processes are in fact not processes, but only individual *tools to compare pre-defined alternatives* within a pre-specified problem frame.

Response at 8; *see also* ‘898 Patent at 1:23-49 (emphasis added). Plainly, even looking only to the portion of the specification cited by defendants, Aloft’s proposed construction for “decision making” enjoys full support.

III. CONCLUSION

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

Respectfully submitted this 23rd 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 23, 2010.

/s/ Mark Dunglinson

Litigation Paralegal