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 SUR-REPLY IN SUPPORT OF ITS 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 reply is saturated with disregard and mischaracterizations of Aloft's position concerning the disputed terms, of which Halliburton relies on to form the majority of its argument. Instead of substantively furthering its argument, Halliburton turns to an ill-advised re-hash of already misguided reasoning. Halliburton's argument continues to appear unconcerned with the language of the claims, the intrinsic record, or legal precedent that directly supports Aloft's position.

Indeed, Aloft's has succinctly demonstrated that Halliburton has failed to show by clear and convincing evidence that each of the terms identified by Halliburton in its motion are indefinite. Specifically, Halliburton has not successfully refuted the following points, addressed in Aloft's responsive brief:

- when read in the context of the claim language as a whole, the decision terms are directed to computer software and do not disclose a subjective component—the claimed computer program product is a tool for facilitating a decision making process, **not** a method for *how* to reach the decision;

- the intrinsic evidence supports Aloft's argument that the term "potential feasible hybrid theme" is capable of being understood by one of ordinary skill as a representation of a potential hybrid strategy—similar to the decision terms, the use of this term in the claims does not require a subjective component; and

- as supported by this and other Courts, "computer code" recites sufficiently definite structure, and Halliburton has not rebutted the attendant presumption that the term should not be construed pursuant to 35 U.S.C. § 112, ¶ 6.

To re-focus the Court, Halliburton's motion identified four terms as allegedly being indefinite—"decision logic," "logic related to decision making," "computer code for processing," and "potential feasible hybrid theme." Motion at 4.[1] Halliburton has simply failed

[1] In its response to Aloft's opening claim construction brief, Halliburton identified six additional terms as being indefinite. Halliburton contends that its argument regarding the indefiniteness of "decision logic" and "logic related to decision making" "applies equally" to three of these six terms – "decision making," "capable of performing logic related to decision making," and "capable of performing decision logic." Reply at 4. Regarding

to show by clear and convincing evidence that these terms are indefinite. Accordingly, the Court should reject Halliburton's desire to burden the claims with non-existent limitations and extraneous notions of subjectivity. Simply stated, the asserted claims of the patents-in-suit are not subjective merely because Halliburton wants them to be.

II. ARGUMENT

A. decision terms

Halliburton's Motion (Dkt. No. 165) identifies two decision terms as allegedly being indefinite – "logic related to decision making" and "decision logic." *See e.g.*, Motion at 1, 4, 10. Halliburton has now indicated that it also intends to challenge two additional phrases that merely incorporate and append the preceding claim language "capable of performing" to the already identified terms.[2] Reply at 4, fn. 2. Halliburton also appears intent on challenging, in isolation, the term "decision making" from the larger phrase "logic related to decision making." *Id.*[3] Regardless of how Halliburton chooses to spin these terms, when viewed in the context of the claims and the overall intrinsic record, the decision terms are readily understood as further defining the subject area in which the capabilities of the claimed computer code is directed – not subjective methodologies. *See* e.g., Ex. 1, '898 Patent at claim 14 ("computer code for causing execution of an application capable of performing *decision logic*"); *see also* Ex. 2, '910 Patent at

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the other three terms, the parties now agree that the terms, "collaborative decision platform," "value," and "sources of value" do not need construction. *See* P.R. 4-5(d) Chart, attached herein as Ex. 19.

[2] In its Reply brief, Halliburton asserts that the decision terms now include "*capable of performing* logic related to decision making" and "*capable of performing* decision logic" Reply at 4, fn. 2 (emphasis added).

[3] In addition to being used in the previously identified phrase "logic related to decision making," the term "decision making" appears only in one additional dependent claim of the '898 patent, claim 46, which is no longer at issue because of the pending settlement between Aloft and FICO. *See* Dkt. No. 186.

claim 110 ("computer code capable of performing *logic related to decision-making*, the computer code belonging to an application") (emphasis added).[4]

Like its opening brief, Halliburton's reply is premised on faulty assumptions, mischaracterizations, and disregard for well-settled legal precedent. As this Court is aware, issued patents are presumed valid, and a defendant party, such as Halliburton, bears a clear and convincing burden to prove otherwise. Halliburton's Reply appears to misunderstand this requirement. *See* Reply at 5 ("Halliburton has challenged Aloft to meet the definiteness requirement for software process claims"). The Patent Office has already examined the asserted claims to ensure they meet all requirements of patentability, including those related to definiteness. Indeed, the examiner, Michael Holmes, employed the purportedly indefinite terms in his Notice of Allowability, thus significantly undermining Halliburton's argument. *See* Ex. 12, '910 Prosecution History at 3-5; *see also* Ex. 14, '898 Prosecution History at 22; *Aloft Media, LLC v. Adobe Systems Inc.*, 570 F. Supp. 2d 887, 901-02 (E.D. Tex. 2008) (considering similar evidence in finding a claim to be not indefinite).

Surprisingly, Halliburton criticizes Aloft for focusing its analysis of the decision terms on the language of the claims. *See e.g.*, Reply at 4 ("Aloft attempts to hide behind the form in which the claims were drafted."). Halliburton's intent to isolate the disputed terms from their usage in the claims is flawed because the "context in which a term is used . . . can be highly instructive" to the meaning of the term. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1314 (Fed. Cir. 2005). Here, the language of the claims unmistakably refutes Halliburton's contention that the decision terms "*must* be limited to the DDP" and that this imported limitation renders the decision terms "wholly subjective." *See* Reply at 5-6. Plainly, the asserted independent claims

[4] Unless otherwise noted, all exhibits referenced herein are those attached to Aloft's Response in Opposition to Defendants' MSJ for Indefiniteness (Dkt. No. 174).

are directed to computer program products, not certain methodologies related to the Dialogue Decision Process. This understanding is further confirmed by dependent claims that are directed to computer code modules related to framing, alternatives, analysis, and connection. *See e.g.*, Ex. 1 at claims 26-29. Halliburton's contentions that these computer code modules should be treated as subjective methodologies and imported into the independent claims is entirely off-base and violates well-settled principles of claim construction.[5]

Halliburton mistakenly asserts that "Aloft does not point to any intrinsic evidence to refute the subjectivity of the decision terms." Reply at 5. This is simply not the case. *See* Response at 8-10 and 12-14. Indeed, the language of the claims themselves is dispositive of this issue. The claims are directed to a computer program product that is capable of supporting a decision process; the claims do not require the consideration of subjective judgment or the rendering of an ultimate decision. Rather, the claimed computer program product is a tool for supporting decision making, not a blueprint mandating *how* to reach a decision.[6] While the claims recite computer code that is capable of "receiving information from a user utilizing a user interface," there is nothing in the claim that requires consideration of any subjective intent or motivation behind the data being received. Rather, the claimed computer code is only required to receive information from a user interface, not ascertain or evaluate any subjective reason behind why the information is being provided. Generally, the claimed computer program products are capable of receiving first and second information and processing this data to

[5] Even assuming *arguendo* that the specification of the patents-in-suit is limited solely to the DDP (which it is not), the Federal Circuit has routinely cautioned against limiting claims to a preferred embodiment. *See Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 906 (Fed. Cir. 2004); *Phillips v. AWH Corp.*, 415 F.3d 1303 at 1323 (Fed. Cir. 2005) (noting the Federal Circuit's express rejection of "the contention that if a patent describes only a single embodiment, the claims of the patent must be construed as being limited to that embodiment".).

[6] *See e.g.*, Ex. 1, '898 Patent 1:17-19 ("The present invention relates to decision making logic, and more particularly to ca computer-based platform which *supports* a decision making process." (emphasis added); *see also* Response at 14.

generate at least one of several displays related to the field of decision making. Halliburton's attempt to infect the claims with gratuitous nonexistent limitations should be rejected.

Halliburton's contention that the asserted claims are "overly broad to the point of invalidity" is without merit. Reply at 6 ("the claims cover the use of software to implement decision making processes within the prior art"). Simply because Halliburton contends the claims are anticipated or obvious does not render the decision terms indefinite. *See 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.") Indeed, if this were true, virtually every asserted claim in a patent case would be indefinite because rare is the case that a defendant does not plead invalidity defenses under § 102 and § 103.

Halliburton's contention that the decision terms are insolubly ambiguous is overwhelmingly refuted by the intrinsic evidence, including, most significantly, the contextual use of the decision terms in the claims as relating to capabilities of claimed computer code. Indeed, as noted in Aloft's Response brief, sophisticated litigants in a prior case arrived at nearly identical constructions for the term "decision logic."[7] This bears mentioning because it is Halliburton's position that "decision logic" as well as the other decision terms at issue are "intractably ambiguous and not amenable to construction." *See* Ex. 3, P.R. 4-3 Statement, Defendants' Ex. B (emphasis added). The constructions proposed in Case No. 6:08-CV-51 indicate that the meaning of the decision terms can be discerned and are not intractably

[7] *See* Ex. 10, P.R. 4-3 Statement (Case No. 6:08-CV-051 LED-JDL), Aloft's Ex. A at 3 ("operations to execute a decision process") and Defendants' Ex. B at 4 ("Operations to execute the decision process").

ambiguous. Aloft respectfully submits that the Court should reject Halliburton's argument that the decision terms are intractably ambiguous and enter Aloft's proposed constructions.[8]

B. "potential feasible hybrid theme"

Contrary to the intimations of Halliburton, Aloft does not equate "hybrid theme" with "hybrid strategy"; the claims do not require a subjective component; and the examples provided in the patents' specification are wholly supportive of Aloft's position. As before, much of Halliburton's argument regarding this term is based on faulty assumptions.

First, Aloft does not suggest that "hybrid theme" is synonymous with "hybrid strategy." However, while not synonymous, the express language of the claims and other intrinsic evidence clearly demonstrate the existence of a relationship between a "potential feasible hybrid theme" and "hybrid strategy." For example, dependent claims 188, 189, and 191 are illustrative of this point:

> 188. The computer program product as recited in claim 186, wherein the ***potential feasible hybrid theme*** includes a hybrid strategy.
>
> 189. The computer program product as recited in claim 188, wherein the ***hybrid strategy*** combines a plurality of alternative strategies.
>
> 191. The computer program product as recited in claim 186, where the ***potential feasible hybrid theme*** is associated with at least one strategy.

Ex. 2, '910 Patent, 26:31-42 (emphasis added). Consistent with the term's use in the claims and the intrinsic record, Aloft proposes that the Court construe "potential feasible hybrid theme" as, "a representation of a potential hybrid strategy based on a unifying or dominant idea."

Aloft's proposed construction for "potential feasible hybrid theme" is firmly rooted in the intrinsic record and the plain and ordinary meaning of the words employed by the term. By way

[8] *See* Ex. 3, P.R. 4-3 Statement, Ex. A (**decision logic** – operations to execute a decision process; **capable of performing decision logic** – no construction necessary; **decision making** – evaluating alternatives in the course of a decision process; **logic related to decision making** – no construction necessary; **capable of performing logic related to decision making** – no construction necessary)

of background, the specification of the patents-in-suit provides that a "hybrid strategy" is a compilation of decisions taken from initially identified alternative strategies. '898 Patent at 12:52-55. The alternative strategies are initially identified to encompass a range of possibilities for addressing a decision area. *Id*. at 11:29-32. Each alternative strategy includes one or more decisions that make up the particular strategy. *Id*. at 11:56-59. In one example, Figure 23a shows three alternative strategies ("Momentum," "Low Cost," and "Increased Value") related to the decision area of customer relationship management:

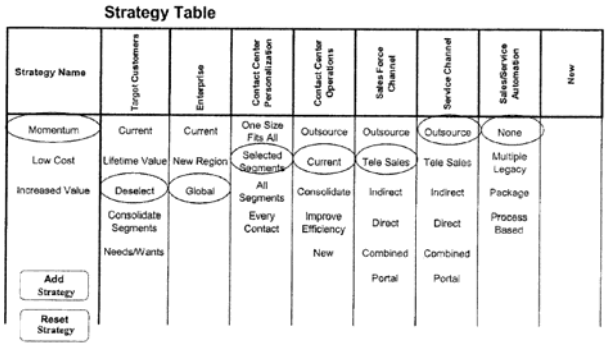


Fig. 23a

Ex. 1, '898 Patent, Figure 23a; *see also* '898 Patent at 16:17-23, 38-43. Each column in Figure 23a represents a decision relevant to the decision area of interest, and in this example, the circles identify the decisions for the "Momentum" strategy. *Id*. at 11:56-59.

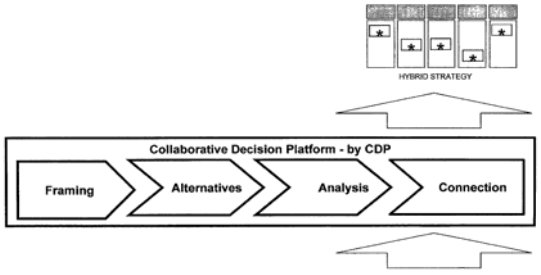
When evaluating alternative strategies in the course of a decision process (i.e., decision making), the patents teach that there is typically more than one "theme" or dominant idea for approaching a particular decision area. For example, in an employer's stock purchase plan, potential alternative "themes" may include maximizing growth, minimizing risk, timing of investments, etc. Ex. 1, '898 Patent at Figures 8a-i; 14:5-13. It is understood from the teaching of the patents that each of these themes may produce different but equally viable hybrid strategies for addressing a particular decision area. In this regard, the patents disclose that a

"potential feasible hybrid theme" is an output representing a potential hybrid strategy that is generated in accordance with a dominant or unifying idea (i.e., "theme"). As one example, the provisional application provides as follows:

> 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). Each of the potential hybrid themes are "feasible" in that that are generated from decisions previously identified with the alternative strategies, thus rendering a viable decision compilation (i.e., hybrid strategy). *Id.*; *see also* Ex. 1, '898 Patent at 12:51-55, 14:5-8, 16:65-17:4.

Although a "potential feasible hybrid theme" bears a relationship to a "hybrid strategy," the two terms are not coextensive. More appropriately, "potential feasible hybrid theme" is a *representation* of a hybrid strategy, whereas a "hybrid strategy" is a compilation of decisions taken from identified alternative strategies. In short, a "potential feasible hybrid theme" is an output that permits a potential hybrid strategy to be displayed and understood.[9] As one example, the specification provides that one representation of a hybrid strategy or theme may be in the form of a "strategy name." '898 Patent, Fig. 4a. As disclosed in the patents, exemplary "potential feasible hybrid themes" are shown below:



Ex. 8, Prov. App. 60/163,984, Figure 6

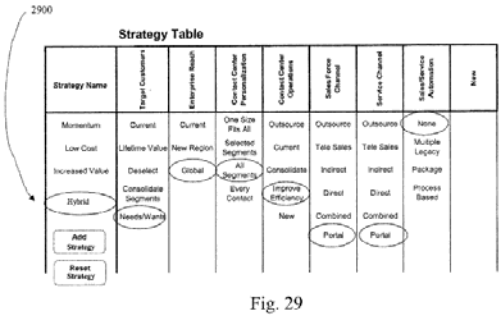


Fig. 29

Ex. 1, '898 Patent, Figure 29

[9] *See* Ex. 2, '910 Patent, claim 110 ("computer code for generating a display, the display including at least one … ***potential feasible hybrid theme***") (emphasis added).

Second, there is no subjective component to "potential feasible hybrid theme." As with the decision terms, the claims contemplate the generation of "potential feasible hybrid theme." Even assuming *arguendo* that generation of a "potential feasible hybrid theme" requires user input, there is no recitation or requirement in the asserted claims that is concerned with the subjective motivation behind the input. Rather, the claims specify that information is received from a user interface without any consideration of any subjective motivation behind why the information is being provided. Halliburton's continued assertion that the term is wholly subjective is without reason and ignores the language and breadth of the claim as a whole.

C. "computer code for processing"

Disregarding legal precedent, Halliburton continues to wrongly contend that the term, "computer code for processing," should be construed pursuant to § 112, ¶ 6 and found indefinite for failure to recite definite structure. Considering the cases directly on-point and the burden attendant to rebutting the presumption that § 112, ¶ 6 is inapplicable, it should be beyond legitimate dispute that the term, "computer code," recites sufficient structure to avoid the ambits of §112, ¶ 6. *See Aloft Media v. Adobe*, 570 F. Supp. 2d at 894 (E.D. Tex. 2008); *Beneficial Innovations, Inc. v. Blockdot, Inc.*, 2010 U.S. Dist. LEXIS 35784, at *43-46 (E.D. Tex. Apr. 12, 2010); *Affymetrix, Inc. v. Hyseq, Inc.*, 132 F. Supp. 2d 1212, 1232 (N.D. Cal. 2002); *Trading Techs. Intern., Inc. v. eSpeed, Inc.*, 2006 U.S. Dist. LEXIS 80153, at *38 (N.D. Ill. 2006).[10,11]

[10] Furthermore, Aloft's statement that, "computer code . . . is described in terms of its functionality," does nothing to further Halliburton's argument. Reply at 9. A structural component ("computer code"), followed by functional language ("processing . . ."), is a fundamental method of claiming, and Halliburton's attempt at proving

Further, assuming that the Court rejects Halliburton's attempt at construing the term pursuant to § 112, ¶ 6, there is no axiom of claim construction that requires that the term "processing" be linked to a specific algorithm in order to survive an indefiniteness challenge.

The disputed "computer code" claim element recites sufficient structure that is capable of "processing the first information and the second information utilizing the decision logic." '898 Patent, Cl. 14.[12] As aptly suggested by this Court, in *Aloft v. Adobe*, "when the structure-connoting term 'computer code' is coupled with a description of the computer code's operation, . . . sufficient structural meaning is conveyed to persons of ordinary skill in the art." *Aloft Media v. Adobe*, 570 F. Supp. 2d at 898; *accord Beneficial Innovations*, 2010 U.S. Dist. LEXIS 35784, at *43-46; *Affymetrix*, 132 F. Supp. 2d at 1232; *Trading Techs. Intern.*, 2006 U.S. Dist. LEXIS 80153, at *38.

III. CONCLUSION

For all of the foregoing reasons, Halliburton has failed to meet is burden by clear and convincing evidence to show that the terms, "decision logic," "logic related to decision making," "computer code for processing," and "potential feasible hybrid theme," are indefinite. Accordingly, Aloft respectfully requests that the Court deny Halliburton's motion for summary judgment of indefiniteness (Dkt. No. 165).

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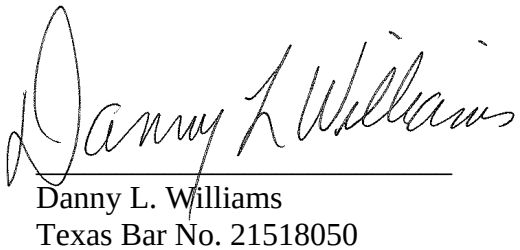
otherwise is of no moment. *See, e.g., Lighting World, Inc. v. Birchwood Lighting, Inc.*, 382 F.3d 1354, 1359-63 (Fed. Cir. 2004).

[11] Two additional opinions from Courts of this district have issued since the filing of Halliburton's reply, and both squarely support Aloft's position regarding the term, "computer code for processing." *See Clear with Computers, LLC v. Hyundai Motor America, Inc.*, No. 6:09-CV-479, slip op. at 14-18 (E.D. Tex. Jan. 5, 2011) ("Computer code and data structures are understood to connote structure and exclude the term 'selection device' from application of section 112, paragraph 6." (quoting *Aloft Media, LLC v. Adobe Sys., Inc.*, 570 F. Supp. 2d 887 (E.D. Tex. 2008))) (attached hereto as Ex. 20); *Convolve, Inc. v. Dell, Inc.*, No. 2:08-CV-244, slip op. at 30, 32-33 (E.D. Tex. Jan. 5, 2011) ("Although Defendants argue that 'code' is not structure, the Court concludes that, here, 'code' does connote structure.")) (attached hereto as Ex. 21).

[12] *See also* '910 Patent, Cl. 110. (Disclosing, "processing the first information and the second information.").

Respectfully submitted this 10th day of January, 2011.



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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 January 10, 2011.

/s/ Mark Dunglinson

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