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**UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

2013-1130

RICHARD A. WILLIAMSON,  
Trustee for At Home Bondholders Liquidating Trust,  
*Plaintiff-Appellant,*

v.

CITRIX ONLINE, LLC, CITRIX SYSTEMS, INC.,  
MICROSOFT CORPORATION, and ADOBE SYSTEMS, INC.,  
*Defendants-Appellees,*

and

WEBEX COMMUNICATIONS, INC., CISCO WEBEX, LLC,  
and CISCO SYSTEMS, INC.,  
*Defendants-Appellees,*

and

INTERNATIONAL BUSINESS MACHINES CORPORATION,  
*Defendant-Appellee.*

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Appeal from the United States District Court for the Central District  
of California in Case No. 11-CV-2409, Judge A. Howard Matz

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**APPELLANT'S CORRECTED RESPONSE TO APPELLEE'S  
PETITION FOR REHEARING EN BANC**

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## **CERTIFICATE OF INTEREST AND STATEMENT OF RELATED CASES**

Counsel for Plaintiff-Appellant certifies the following:

1. We represent Plaintiff-Appellant Mr. Richard A. Williamson, who commenced this action on behalf of and as Trustee for At Home Bondholders Liquidating Trust (“BHLT”).
2. BHLT is the real party in interest.
3. Appearing on behalf of Richard Williamson in the district court action were Brett J. Williamson<sup>1</sup> and Geoffrey H. Yost of O’Melveny & Myers LLP; William Norvell, Jr., Scott D. Marrs, Brian Thomas Bagley, and Andrew B. McGill of Beirne, Maynard & Parsons, L.L.P.; and Alan Tse and Michael L. Myers, formerly of O’Melveny & Myers LLP.<sup>2</sup> Appearing on behalf of Richard Williamson in this appeal are Brett Williamson, Mr. Norvell, Mr. Marrs, and Mr. Bagley, as well as Timothy D. Byron of O’Melveny & Myers LLP.
4. No other appeal in or from the civil action on appeal in this matter was previously before this Court or any other appellate court. Richard Williamson informs the Court of two district court cases, currently stayed pending this appeal, in which he alleges infringement of U.S. Patent No. 6,155,840: *Dimdim, Inc. v.*

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<sup>1</sup> There is no relation between Appellant Richard Williamson and Brett J. Williamson, Appellant’s counsel in this action.

<sup>2</sup> A notice of appearance of Michael G. Yoder of O’Melveny & Myers LLP was mistakenly entered in the district court action. A7398-99, A7476.

*Williamson*, No. 2012-cv-3403-RS (N.D. Cal., filed July 2, 2012; stayed Jan. 22, 2013), and *Williamson v. Blackboard Inc.*, No. 1:12-cv-1305 (RMC) (D.D.C., filed May 21, 2012, stayed Oct. 12, 2012).

Respectfully submitted,

Date: December 29, 2014

By: /s/ Brett J. Williamson  
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## INTRODUCTION

Defendants’ petition for rehearing *en banc* raises a single issue—one which implicates no conflict in authority, and one which Defendants have never before raised in this proceeding. It is also not an issue that will resolve this dispute, as Defendants do not challenge the Panel’s decision to vacate judgment of non-infringement for claims 1-7 and 17-24 of U.S. Patent No. 6,155,840 (“the ’840 Patent”). *See Op.* at 16-17. Defendants’ petition concerns 35 U.S.C. § 112 ¶ 6 (now § 112(f)), which reads, in its entirety:

An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.

Section 112 ¶ 6 is a rule of patent claim drafting that permits the patentee to elect between two wholly distinct interpretive regimes—each with its own benefits and risks. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1311, 1317 (Fed. Cir. 2005) (en banc). Whereas the scope of a claim generally extends to the “ordinary and customary meaning” of the claim’s language, claim language that is expressed as a means or step for performing a specified function and without the recital of structure, material, or acts in support thereof is limited in scope to the “corresponding structures disclosed in the specification and their equivalents.” *Id.* at 1311.

Because the decision to evoke § 112 ¶ 6 can have profound effects on claim scope (and therefore infringement) and exposure to prior art (and therefore invalidity), patentees and the U.S. Patent and Trademark Office need clear guidance on *how* one evokes § 112 ¶ 6. For more than fifty years, this Court and its predecessors have provided such guidance by applying § 112 ¶ 6 in a manner consistent with its language: a patentee who uses means-plus-function claim language is presumed to evoke § 112 ¶ 6, and a patentee who does not use means-plus-function language is presumed to *not* evoke § 112 ¶ 6. *Personalized Media Commc'ns, LLC v. Inter. Trade Comm.*, 161 F.3d 696, 703-04 (Fed. Cir. 1998). Consistent with this well-established case law, the Panel in this action reversed the district court's determination that the term "distributed learning control module" was subject to § 112 ¶ 6 and that the claims that included this term were consequently invalid as indefinite.

Defendants ask this Court to set aside decades of legal precedent and hold that all "functional claim language" be interpreted under § 112 ¶ 6. The Court should reject this request for two reasons. First, there is no conflict of authority. The sole Federal Circuit case cited by Defendants as evidence of a conflict is doctrinally consistent with the Panel's opinion: indeed, although Defendants decry this Court's "strong presumption" against application of § 112 ¶ 6 when the claim language does not use the phrase "means for," the case upon which Defendants



rely acknowledges this “strong presumption.” *Robert Bosch, LLC v. Snap-On Inc.*, 769 F.3d 1094, 1099 (Fed. Cir. 2014). Additionally, both *Robert Bosch* and the Panel’s opinion in this case instruct courts to look to surrounding claim language and to the specification to determine whether this presumption is overcome. *Id.*; Op. at 12-16.

There is also no support in the law for Defendants’ contention that Congress intended § 112 ¶ 6 to apply to all “functional claiming.” Instead, as this Court has expressly noted, “defining a particular claim term by its function is not improper and is not sufficient to convert a claim element containing that term into a means for performing a specified function within the meaning of 35 U.S.C. § 112(6).” *Hill-Rom Services, Inc. v. Stryker Corp.*, 755 F.3d 1367, 1374-75 (Fed. Cir. 2014) (internal formatting omitted); *In Re Swinehart*, 439 F.2d 210, 212-13 (C.C.P.A. 1971) (“nothing intrinsically wrong” with “functional” claiming—i.e., “to define something . . . by what it does rather than by what it is”).

Second, Defendants’ petition should be denied because it asks the Court to address an issue that Defendants have never before raised in this proceeding. Rather, Defendants have consistently acknowledged that claim language that does not use the words “means for” “raises a rebuttable presumption that § 112 ¶ 6 does not apply.” RB at 33. Now, for the first time in this action, Defendants make an untimely challenge to whether *any* presumption applies. Petition at 1.

For these reasons, the Court should deny Defendants' petition for review en banc.

## **BACKGROUND**

Williamson represents the bondholders of the former At Home Corporation ("At Home"), a pioneering high-speed Internet service provider. *See* AOB at 6. Among At Home's innovations was a distributed-learning platform that provided a virtual classroom environment for instructors and students that required only a web browser and an Internet connection. At Home was awarded U.S. Patent No. 6,155,840 ("the '840 Patent"), but it went bankrupt before the full-scale commercial launch of its distributed-learning platform. *Id.*

Williamson commenced this action against Defendants, alleging that certain of their online collaboration products infringe the claims of the '840 Patent. *Id.* In a claim construction order, the district court construed claim terms in claims 1-7 and 8-24 requiring a "graphical display" of a classroom to require a "pictorial map." *Op.* at 8. The court construed the term "distributed learning control module" in claims 8-16 to be a means-plus-function term subject to § 112 ¶ 6. It found claims 8-16 to be indefinite on the grounds that the '840 Patent "does not disclose the algorithm used to perform the module's functions." A33 (D.I. 353). In light of the district court's invalidation of claims 8-16, and because it was

undisputed that none of Defendants' accused products included such a "pictorial map," the parties stipulated to judgment of non-infringement. *Id.*

The Panel reversed. It held that the district court incorrectly construed the "graphical display" limitations to require a "pictorial map," Op. at 10, a holding that Defendants do not challenge in their *en banc* petition. The Panel also held that the district court erred in concluding that "distributed learning control module" was a means-plus-function claim term, and thus the district court erred in invalidating claims 8-16. *Id.* at 11-14. The Panel noted that because the term did not use the word "means," there was a rebuttable presumption that § 112 ¶ 6 did not apply. *Id.* at 12. It noted three specific errors in the district court's determination that this presumption was overcome: (1) the district court failed to appreciate that the word "module" has a number of dictionary meanings with structural connotations; (2) the district court placed "undue emphasis on the word 'module' separate and apart from the claimed expression 'distributed learning control module'"; and (3) the district court failed to give proper weight to the context provided by surrounding claim language and the supporting text of the specification in concluding that the drafter employed means-plus-function claiming. *Id.* at 14-15.

## ARGUMENT

### I. Defendants' Petition Should Be Denied Because It Does Not Involve A Question Of "Exceptional Importance" Or Implicate A Conflict In Authority

"An *en banc* hearing or rehearing is *not* favored and ordinarily will not be ordered unless: (1) *en banc* consideration is necessary to secure or maintain *uniformity of the court's decisions*; or (2) the proceeding involves a question of *exceptional importance*." Fed. R. App. P. 35. (emphasis added).

Defendants' petition does not raise an issue of "exceptional importance." Defendants blithely assert otherwise, Petition at 1, but provide no basis for this assertion.

Nor do Defendants identify a conflict between the Panel's application of § 112 ¶ 6 and any applicable authority. Defendants cite several Supreme Court decisions as allegedly providing a conflict. *See* Petition at 1-2. These decisions cannot conflict with the Panel's interpretation of § 112 ¶ 6 for the simple reason that they all predate Congress's enactment of § 112 ¶ 6 in 1952. The most recent of these cases, *Halliburton Oil Well Cementing Co. v. Walker*, 329 U.S. 1 (1946), merely prohibited *certain* use of means-plus-function language—namely, it held that means-plus-function claim language "could not be employed *at the exact point of novelty in a combination claim*." *In re Donaldson Co., Inc.*, 16 F.3d 1189, 1194 (Fed. Cir. 1994) (emphasis added). *Halliburton's* precise holding was

undisputedly overruled by Congress when it enacted § 112 ¶ 6 in 1952 as part of a significant overhaul of the Patent Act. And this Court's predecessor has noted that "any concern over the use of functional language at the so-called 'point of novelty'" is "irrelevant" and "misplaced" because "it is elementary that the mere recitation of a newly discovered function or property, inherently possessed by things in the prior art, does not cause a claim drawn to those things to distinguish over the prior art." *In Re Swinehart*, 439 F.2d at 212-13. Defendants have not and cannot identify a single Supreme Court case that interprets § 112 ¶ 6 any different than the long established line of Federal Circuit cases interpreting it, or that even remotely suggests a flaw in this Court's jurisprudence.

Contrary to Defendants' representation otherwise, there is no conflict between the Panel's opinion in this action and a different panel's decision by this Court in *Robert Bosch*. See Petition at 2. While *Robert Bosch* found that § 112 ¶ 6 applied to claim language that did not use the word "means," it applied the same standard the Panel applied: both cases acknowledge a "strong" presumption against application of § 112 ¶ 6 to non-means language, and both acknowledge that in determining whether this presumption is overcome, the court should look to the claim language, read in light of the specification. *Robert Bosch*, 769 F.3d at 1098-99; Op. at 11-16.

*Robert Bosch* and the Panel in this action came to different conclusions not because of uncertainty or lack of uniformity in the law, but for the simple reason that the two cases involved different patents, different claims, and different allegedly “functional” claim language. Indeed, when viewed in context of the surrounding claim language, the difference between the two terms is clear. The surrounding claim language in *Bosch* provides no structure for the terms “program recognition device” and “program loading device”:

a ***program recognition*** and ***program loading device***, wherein a program version contained in a connected control unit is queried and recognized by means of the ***program recognition device***, and, if the program available in the motor vehicle and recognized via the diagnostic/test plug is not stored there in a latest and most current version, a respective most current version is loaded by the program loading device into a ***program storage device*** of the pertinent control unit of the motor vehicle, wherein the external diagnostic tester automatically establishes communication with a central dat[a] base in order to check the program version and, if necessary, to obtain the current program version that applies for the control unit connected to the diagnostic tester and to store it there.

769 F.3d at 1096.

Conversely, as the Panel recognized, the term “distributed learning control module” in the ’840 Patent “is claimed as part of the definite structure ‘distributed learning server’ and ‘receive[s] communications transmitted between the presenter and the audience member computer systems,’ ‘relay[s] the communications to an

intended receiving computing system,’ and ‘coordinat[es] the operation of the streaming data module.’” Op. at 15-16. And as Williamson explained in his briefing, the surrounding claim language provides sufficient structure because it describes the inputs, outputs, and objectives of the distributed learning control module. See AOB at 50; Reply at 30-33; see also *MIT v. Abacus Software*, 462 F.3d 1344, 1355-56, 1359-60 (Fed. Cir. 2006); *Inventio AG v. ThyssenKrupp Elevator Ams. Corp.*, 649 F.3d 1350, 1357-58 (Fed. Cir. 2011).

No other cases cited by Defendants give rise to a conflict in authority. Defendants allege there are two separate standards—one applying a “presumption” and a second applying a “strong presumption,” with the latter having erroneously “crept” into this Court’s evolving jurisprudence.<sup>3</sup> This is a false conflict, because

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<sup>3</sup> See Transcript (MP-3) of Oral Hearing, September 12, 2013, discussion between Chief Judge Rader and Mr. Glitzenstein, counsel for Defendants:

**Mr. Glitzenstein:** So on that threshold question, which is really a legal question, this language of strong presumption.

I know *Preckin* and the *Lighting World* case, but I know precedent such as the *CCI* case, if I’m remembering that correctly, that the *Lighting World* cites for that proposition, actually doesn’t use the words “strong presumption” at all. It doesn’t matter, though, on these facts.

**Chief Judge Rader:** These things don’t creep in.

**Mr. Glitzenstein:** I misspoke, Your Honor.

regardless of whether this Court has labeled it a “strong presumption” or simply a “presumption,” both of these labels refer to a single test: whether “skilled artisans after reading the patent, would conclude that [the] claim limitation is so devoid of structure that the drafter constructively engaged in means-plus-function claiming.” Op. at 12-13 (citing *Inventio*, 649 F.3d at 1357). *Inventio*, in turn, cited *MIT*, 462 F.3d at 1354, as precedent for applying this test. In turn, *MIT* relied upon the holding in *Phillips*, 415 F.3d at 1315. Likewise, *Phillips* relied on a plethora of aged authority, including cases of the Court of Customs and Patent Appeals, as well as the Supreme Court, going back to 1848. ***This is the real test.***

As in so many appeals, the applicable law is entirely consistent, and known, but the facts applied to the law differ, sometimes resulting in different outcomes. The application of the presumption is simply one of individual case-by-case analysis of the facts, not one of application of differing legal tests.

Even the two cases cited by Defendants in their Petition for the proposition that there is a split in this Court’s panels clearly show that the two cases used the very same test to determine whether claim language not expressed in means-plus-

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Thus, at oral hearing, Defendants specifically withdrew their argument—which they never made in their briefing or before the district court below—that the use in *Lighting World* of the phrase “strong presumption,” rather than just “presumption,” matters in this case. Yet, in their Petition, Defendants attempt to revive this argument, suggesting some difference has emerged between this Court’s use of the phrases “presumption” and “strong presumption.”



function format is subject to § 112 ¶ 6. *See Robert Bosch*, 769 F.3d at 1099 (acknowledging “strong presumption” against § 112 ¶ 6 not rebutted “if the claim language, read in light of the specification, recites sufficiently definite structure”); *Ranpak Corp. v. Storopack, Inc.*, No. 98-1009, 1998 WL 513598, at \*2 (Fed. Cir. July 15, 1998) (non-precedential) (“To invoke [35 U.S.C. section 112 paragraph 6], the alleged means-plus-function claim element must not recite a definite structure which performs the described function.”). Furthermore, this Court’s published precedents regularly find the presumption to have not been rebutted. *E.g., Personalized Media*, 161 F.3d at 704 (Fed. Cir. 1998) (presumption not rebutted by intrinsic or extrinsic evidence); *Depuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.* 469 F.3d 1005, 1023 (Fed. Cir. 2006) (presumption not rebutted after looking to the claims, the specification, the prosecution history and expert evidence).

In another attempt to manufacture a conflict of authority where none exists, Defendants confuse the test for rebutting the presumption against applying § 112 ¶ 6 with a completely different test—the test for interpreting a claim (and evaluating whether it is invalid as indefinite) that courts apply only *after* determining that the claim language is subject to § 112 ¶ 6. *See* Petition at 5 (citing *Aristocrat Techs. Austral. PTY Ltd. v. Int’l Game Tech*, 521 F.3d 1328, 1333 (Fed. Cir. 2008)).

There is also no conflict between the Panel’s application of § 112 ¶ 6 and the language of the statute. As Defendants concede, § 112 ¶ 6 is a rule of claim drafting. *See* Petition at 4. By its plain language, it applies to claim language “expressed as a *means* or *step* for performing a specified function,” and only when the language is used “without the recital of structure, material, or acts in support thereof.” *Id.* (emphasis added). The presumption against applying § 112 ¶ 6 to claim language that is *not* expressed as a means or step for performing a specific function applies because it is the patentee’s choice as to whether to evoke § 112 ¶ 6 and accept its “quid pro quo.”

There is no support whatsoever for Defendants’ suggestion, made explicit by Amicus Electronic Frontier Foundation (“EFF”), that “Congress’s purpose in enacting Section 112, ¶ 6 was to allow functional claiming, but subject to strict conditions.” EFF Amicus Brief at 2-3. This Court, and its predecessors, have repeatedly held otherwise. Indeed, this Court has expressly noted that while “functional language in a means-plus-function format is explicitly authorized by statute,” functional language may also be employed “*without using the means-plus-function format.*” *Microprocessor Enhancement Corp. v. Texas Instruments Inc.*, 520 F.3d 1367, 1375 (Fed. Cir. 2008) (emphasis added); *see also In re Hauserman, Inc.*, 892 F.2d 1049 (Fed. Cir. 1989) (acknowledging propriety of

“functional language” and clarifying that such language is “not to be confused with ‘means plus function’ language under 35 U. S.C. § 112, ¶ 6”).

Furthermore, for at least the last 33 years it has been “well settled that there is nothing intrinsically wrong in defining something by what it does rather than by what it is.” *In re Hallman*, 655 F.2d 212, 215 (C.C.P.A. 1981); *Bettcher Indus., Inc. v. Bunzl USA, Inc.*, 661 F.3d 629, 653-54 (Fed. Cir. 2011) (acknowledging propriety of “choosing to define an element functionally, i.e., by what it does”); *K-2 Corp. v. Salomon S.A.*, 191 F.3d 1356, 1363 (Fed. Cir. 1999) (rejecting argument that functional language in claim required construction that was limited to disclosed embodiment); *In re Schreiber*, 128 F.3d 1473, 1478 (Fed. Cir. 1997) (“A patent applicant is free to recite features of an apparatus either structurally or functionally.”).

If Congress had wanted § 112 ¶ 6 to apply to all functional claiming rather than just claims expressed in “means” or “steps” language, it has had many opportunities to make this change—including very recently. Although renumbered as § 112 (f), the language of former § 112 ¶ 6 was not changed in the America Invents Act.

## **II. Defendants’ Petition Should Be Denied Because It Seeks Resolution Of An Issue Never Raised Before By Defendants**

As an independent grounds for denial of the petition, Defendants’ arguments have been waived. Never before in this proceeding have Defendants disputed the

presumption against application of § 112 ¶ 6 to claim language not written in means-plus-function language. “[C]ourts have consistently concluded that the failure of an appellant to include an issue or argument in the opening brief will be deemed a waiver of the issue or argument.” *Pentax Corp. v. Robison*, 135 F.3d 760, 762 (Fed. Cir. 1998); *Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999); *see also United States v. Fogelman*, 592 F.2d 786, 787 (5th Cir. 1979) (holding that it could dismiss arguments advanced for the first time in a petition for rehearing *en banc* as waived).

## CONCLUSION

For the reasons set forth above, Defendants’ Petition for *En Banc* Reconsideration should be denied.

Date: December 29, 2014

Respectfully submitted,

By: /s/ Brett J. Williamson  
Brett J. Williamson  
William Norvell, Jr.  
Attorneys for Appellant  
Richard A. Williamson

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on December 29, 2014, I electronically filed the foregoing document using the Court's CM/ECF filing system. Counsel was served via CM/ECF which constitutes service, pursuant to Fed. R. App. P. 25(c)(2), Fed. Cir. R. 25(a), and the Court's Administrative Order Regarding Electronic Case Filing 6(A) (May 12, 2012), to all registered CM/ECF users.

Respectfully submitted,

Date: December 29, 2014

By: /s/ Brett J. Williamson  
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