

Nos. 22-1125, 22-1141

**United States Court of Appeals
for the Federal Circuit**

XR COMMUNICATIONS, LLC, DBA VIVATO TECHNOLOGIES,

Plaintiff-Appellant,

v.

ARRIS SOLUTIONS, INC., RUCKUS WIRELESS, INC.,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of California in Case Nos. 3:18-cv-02736, 3:18-cv-01992 (Hon. William H. Orrick)

**APPELLANT XR COMMUNICATIONS, LLC'S COMBINED PETITION
FOR PANEL REHEARING AND FOR REHEARING *EN BANC***

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June 20, 2023

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LANGUAGE OF PATENT CLAIM AT ISSUE

This appeal concerns claims 1–9 and 12 of U.S. Patent No. 6,611,231 (the “231 Patent”) (Appx136). Claim 1 recites the following, with the disputed “search receiver logic” in italics:

1. An apparatus for use in a wireless routing network, the apparatus comprising:

an adaptive antennas;

at least one transmitter operatively coupled to said adaptive antenna;

at least one receiver operatively coupled to said adaptive antenna;

control logic operatively coupled to said transmitter and configured to cause said at least one transmitter to output at least one transmission signal to said adaptive antenna to transmit corresponding outgoing multi-beam electromagnetic signals exhibiting a plurality of selectively placed transmission peaks and transmission nulls within a far field region of a coverage area based on routing information; and

search receiver logic operatively coupled to said control logic and said at least one receiver and configured to update said routing information based at least in part on cross-correlated signal information that is received by said receiver using said adaptive antenna.

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

CERTIFICATE OF INTEREST

Case Number 2022-1125 (lead); 2022-1141
Short Case Caption XR Communications, LLC v. Ruckus Wireless, Inc., et al.
Filing Party/Entity Appellant XR Communications, LLC

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 6/20/2023

Signature: /s/ Reza Mirzaie

Name: Reza Mirzaie

<p>1. Represented Entities. Fed. Cir. R. 47.4(a)(1).</p>	<p>2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).</p>	<p>3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).</p>
<p>Provide the full names of all entities represented by undersigned counsel in this case.</p>	<p>Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.</p> <p><input checked="" type="checkbox"/> None/Not Applicable</p>	<p>Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.</p> <p><input checked="" type="checkbox"/> None/Not Applicable</p>
<p>XR Communications, LLC</p>		

Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

None/Not Applicable Additional pages attached

Christian Conkle of Russ August & Kabat		
Kent N. Shum formerly of Russ August & Kabat		
Philip X. Wang of Russ August & Kabat		

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

None/Not Applicable Additional pages attached

XR Communications, LLC dba Vivato Technologies v. D-Link Systems, Inc., Case Nos. 8:17-cv-596, 21-cv-01063-DOC (C.D. Cal.)	XXR Commc'ns, LLC v. Cisco Sys., Inc., Case No. 2:17-cv-02951 (C.D. Cal.)	XR Commc'ns, LLC v. Belkin Int'l, Inc., Case Nos. 2:21-cv-04914, 8:17-cv-00674 (C.D. Cal.)
XR Commc'ns, LLC v. Extreme Networks, Inc., Case No. 2:17-cv-02953 (C.D. Cal.)	XR Commc'ns, LLC v. Aruba Networks, Inc., Case Nos. 2:21-cv-04912, 2:17-cv-02945 (C.D. Cal.)	XR Commc'ns, LLC v. Netgear, Inc., Case Nos. 2:21-cv-04942, 2:17-cv-02959 (C.D. Cal.)
XR Commc'ns, LLC v. Ubiquiti, Inc., Case Nos. 8:21-cv-01065, 2:17-cv-02968 (C.D. Cal.)	XR Commc'ns, LLC v. ASUS Comput. Int'l et al., Case No. 2:17-cv-02948(C.D. Cal.)	

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/Not Applicable Additional pages attached

TABLE OF CONTENTS

	Page(s)
CERTIFICATE OF INTEREST	ii
TABLE OF AUTHORITIES	vii
TABLE OF ABBREVIATIONS	viii
STATEMENT OF COUNSEL	ix
POINTS OF LAW OR FACT OVERLOOKED OR MISAPPREHENDED BY THE PANEL—FED. R. APP. P. 40(A)(2).....	xi
I. INTRODUCTION.....	1
II. ARGUMENT	2
A. <i>En Banc</i> Review Is Warranted Because the Panel’s Legal Standard for Applying Means-Plus-Function Treatment Conflicts with this Court’s Long-Standing Precedents.....	2
1. The panel’s legal standard contradicts <i>Dyfan’s</i> holding that the essential—and dispositive— inquiry for means-plus-function treatment is whether the claim term connotes a “sufficiently definite meaning as the name for structure.”	2
2. The panel decision also contradicts <i>Dyfan’s</i> holding that a term describing a “known class of structures” can be sufficient to avoid means-plus-function treatment.	5
3. Both <i>Williamson</i> itself and post- <i>Williamson</i> precedent conflict with the panel’s legal standard, under which sufficiently definite structures can invoke means treatment depending on their associated function.....	6
4. While the associated function can inform the structural character of the claim term, it cannot remove the structural character of a term that otherwise connotes sufficiently definite structure.	9

B.	Panel Rehearing Is Likewise Warranted	11
C.	Under the Correct Legal Standard, the Claim Term “Search Receiver Logic” Is Not a Means-Plus-Function Term.....	12
III.	CONCLUSION	15

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Dyfan, LLC v. Target Corp.</i> , 28 F.4th 1360 (Fed. Cir. 2022).....	passim
<i>Egenera Inc., v. Cisco Sys., Inc.</i> , 972 F.3d 1367 (Fed. Cir. 2020).....	xi, 4, 10, 11
<i>MTD Prods., Inc. v. Iancu</i> , 933 F.3d 1336 (Fed. Cir. 2019).....	11
<i>VDPP LLC v. Vizio Inc.</i> , 2022 WL 885771 (Fed. Cir. Mar. 25, 2022)	9
Statutes	
35 U.S.C. § 112(6).....	passim

TABLE OF ABBREVIATIONS

35 U.S.C. § 112(6)	§ 112(6)
'231 Patent	U.S. Patent No. 6,611,231
BB or Blue Br.	Principal Brief of Appellant XR Communications, LLC dba Vivato Technologies
GB or Gray Br.	Reply Brief of Appellant XR Communications, LLC dba Vivato Technologies
POSITA	Person of ordinary skill in the art
RB or Red Br.	Responsive Brief of Appellees Ruckus Wireless, Inc. and ARRIS Solutions, Inc.
Ruckus	Appellees Ruckus Wireless, Inc. and ARRIS Solutions, Inc.
Vivato	Appellant XR Communications, LLC dba Vivato Technologies

STATEMENT OF COUNSEL

Based on my professional judgment, I believe the panel decision conflicts with 35 U.S.C. § 112(6) and the following precedential decisions of this Court:

- *Dyfan, LLC v. Target Corp.*, 28 F.4th 1360 (Fed. Cir. 2022); and
- *Williamson v. Citrix Online, LLC*, 792 F.3d 1339 (Fed. Cir. 2015) (*en banc*)

Based on my professional judgment, I believe this appeal presents questions of exceptional importance:

- Whether means-plus-function treatment applies to a claim term that (a) does not recite “means,” (b) is not a nonce term, and (c) is a known term in the art as a name for structure.
- Whether the presumption against means-plus-function treatment can be overcome because the function for the known structure recited in the claim may not be a previously known function performed by that structure.
- Whether the presumption against means-plus-function treatment is always overcome unless there is evidence a POSITA would know *how* the recited structure can perform its corresponding function.

I also believe that answering these questions is necessary to secure uniformity of decisions by district courts and this Court in determining means-plus-function treatment under § 112(6). Without this guidance, courts will continue apply means-plus-function treatment in inconsistent ways and reach opposite conclusions. Answering these questions will also clarify the legal correct legal standard for means-plus-function treatment under § 112(6) and this Court's *en banc* decision in *Williamson*, as well as how that legal standard should be applied.

June 20, 2023

Respectfully submitted,

/s/ Reza Mirzaie

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**POINTS OF LAW OR FACT OVERLOOKED OR MISAPPREHENDED
BY THE PANEL—FED. R. APP. P. 40(A)(2)**

1. The presumption against the application of means-plus-function treatment under 35 U.S.C. § 112(6) is not overcome for a claim limitation that recites a term that has a sufficiently definite meaning as the name for structure as performing a recited function.

2. The presumption against the application of means-plus-function treatment under 35 U.S.C. § 112(6) is not overcome for a claim limitation that recites a known class of structures as performing a recited function.

3. The phrase “or else recites function without reciting sufficient structure for performing that function” in the quote from *Williamson* only permits an inquiry into whether the claim recites a sufficiently definite structure associated with the recited question and does not relate to the adequacy of recited structures to perform their recited functions.

4. The panel decision fails to reconcile the legal standard from *Dyfan* with the panel’s differing view of the legal standard based on *Williamson* and *Egenera*. As a precedential decision of this Court, the panel should have followed *Dyfan* or distinguished under principles of *stare decisis*, regardless of whether this decision was designated as precedential or non-precedential.

5. The panel failed to meaningfully acknowledge or address Vivato’s extensive evidence that the claim term, “search receiver logic,” connotes sufficient

structure to a POSITA to avoid means-plus-function treatment. This evidence included the Wyck communications dictionary definition of “search receiver”; and Dr. Vojcic testimony and opinions on class of structures to a POSITA, as well as that a POSITA, with the patent teachings in hand, would understand that “search receiver logic” describes a class of structures capable of performing the associated function of “updating routing information.”

I. INTRODUCTION

In this appeal, the panel affirmed the district court’s determination that the claim term “search receiver logic” in the ’231 Patent should be construed as a means-plus-function term under 35 U.S.C. § 112(6). The panel held that means-plus-treatment applied, even though: (1) the term “search receiver logic” did not recite “means”; (2) both sides experts agreed that it was *not* a nonce term; (3) both sides experts agreed that it conveys some structure as a name for structure; and (4) Vivato provided un rebutted evidence that that the term conveys a “known class of circuit structures” in the relevant field of wireless communications. Vivato is not aware of any prior case of this Court in which a claim term was found to invoke means-plus-function treatment in these circumstances. The panel’s decision is inconsistent with this Court’s long-standing precedent, as recently articulated and *Dyfan*, and warrants rehearing or reconsideration *en banc*.

Indeed, the only way the district court was able to reach its conclusion that means-plus-function claiming applied was by relying express misstatements of law.

As the district court proclaimed:

- “Vivato’s argument that ‘search receiver logic’ connotes structure and that [POSITA] would recognize a ‘search receiver logic’ as a class of structures used in wireless communications technology to detect, measure, or acquire information from signals, *is also premised on the wrong legal standard.*” Appx24.¹

¹ All emphasis added unless otherwise noted.

- “Vivato’s proposition that ‘search receiver logic’ is a known class of circuit structures for the general purpose of detecting and processing signals and the evidence it cites to support that proposition, including the numerous dictionaries and the testimony of its expert Dr. Branimir Vojcic, *is fundamentally flawed. A so-called ‘known class of circuit structures’ cannot be sufficient under the Williamson standard.*” Appx25.

The panel decision failed to correct these misstatements of law and even called them “unproblematic.” For this additional reason, *en banc* review is warranted.

II. ARGUMENT

A. *En Banc* Review Is Warranted Because the Panel’s Legal Standard for Applying Means-Plus-Function Treatment Conflicts with this Court’s Long-Standing Precedents

1. **The panel’s legal standard contradicts *Dyfan*’s holding that the essential—and dispositive—inquiry for means-plus-function treatment is whether the claim term connotes a “sufficiently definite meaning as the name for structure.”**

This Court’s precedential decision in *Dyfan, LLC v. Target Corp.*, 28 F.4th 1360 (Fed. Cir. 2022) makes clear that means-plus-function is *not* invoked if a claim recites a function and a sufficiently definite name for a structure associated with that function. *Dyfan* reaffirmed the bright line rule from *Williamson* that claims are either “structure-plus-function” claims or “means-plus-function” claims. *Id.* at 1365–66. Citing *Williamson*, *Dyfan* emphasized that the “essential inquiry” for deciding means-plus-function treatment is whether a claim term connotes to a POSITA a “sufficiently definite meaning *as the name for structure.*” *Id.* at 1365. This inquiry *alone* is “determinative” to avoid means-plus-function treatment. *Id.* (holding that

the term *circuit*, “by itself connotes some structure,” and thus the presumption against means-plus-function treatment was not overcome).

The critical distinction is if: (1) the claim term has *sufficiently definite meaning as the name for structure*, in which case means-plus-function does not apply; or (2) the term only vaguely conveys some possible generic structure (such as terms like “module”), which is tantamount to using the word “means” and thus fails to convey a sufficiently definite meaning as the name for structure. *Id.*; *see also Williamson*, 792 F.3d at 1350. Nowhere does *Dyfan* suggest that an inquiry into the associated function is necessary to determine whether means-plus-function treatment applies to the term in the first place. *Dyfan*, 28 F.4th at 1365–67 (“The means-plus-function analysis asks two questions. *First: Is the disputed claim limitation drafted in means-plus-function format?* Second, *if and only if the answer to the first question is ‘yes’*: What, if any, is the structure corresponding to the claimed function?”) (citing *Williamson*).

In sharp contrast to *Dyfan*, the panel decision held that means-plus-function treatment applies to a claim term (“search receiver logic”) *even if* the term does not receive “means” and is not a nonce term, and *even if* the term is known by POSITAs to have a sufficiently definite meaning as the name for structure. Panel Op. at 6–7. The panel acknowledged Vivato’s argument that under test articulated in *Dyfan* (which itself cited and applied *Williamson*), the district court should have asked

“whether a POSITA would have understood ‘search receiver logic’ as structure—period.” *Id.* at 6 (citing Red Br. at 3, 23, 27–28, 38; Gray Br. at 2).

But the panel “disagree[d]” with Vivato’s argument, stating that it “fails to meaningfully reckon with this court’s precedent, including *Williamson*’s *en banc* articulation of the legal standard and *Egenera*.” *Id.* The panel then held that the legal standard is: “whether a POSITA would understand the disputed term not just as structure, but as sufficient structure ‘for performing [the claimed] function.’” Panel Op. at 6 (citing *Williamson*, 792 F.3d at 1348–49).

But the panel’s “disagreement” with Vivato was itself a disagreement with *Dyfan*’s articulation and application of the test for determining means-plus-function treatment. Especially where both *Dyfan* and the panel decision cited *Williamson*, their conflicting interpretations of the legal test (and the opposite conclusions they reached) provides a compelling reason for *en banc* review. Granting review would clarify a question of exceptional importance that arises in hundreds of patent cases each year. And it is necessary to secure uniformity in district court decisions that might otherwise apply conflicting legal tests and reach opposite conclusions.

Indeed, despite the clear contrast between the legal standard from *Dyfan* and the one that the panel applied, the panel never attempted to reconcile the legal standard from *Dyfan* with the panel’s differing view of the legal standard based on *Williamson* and *Egenera*. Panel Op. at 6. *Dyfan* is a precedential decision of this

Court, and the panel is bound to follow or distinguish it under basic principles of *stare decisis*, regardless of whether the panel designates its own decision as precedential or non-precedential. That did not occur here.

Like the district court, the panel applied a newly created, different, and more exacting legal standard for avoiding means-plus-function treatment. In doing so, the panel rejected as irrelevant Vivato’s evidence that the disputed term (“search receiver logic”) has sufficiently definite meaning as the name for structure to a POSITA. The panel thus applied “means-plus-function” treatment to claims that it admits are “structure-plus-function.” Panel Op. at 7 (holding that “§ 112 ¶ 6 is [not] avoided by reciting something a POSITA would understand as structure”).

2. The panel decision also contradicts *Dyfan*’s holding that a term describing a “known class of structures” can be sufficient to avoid means-plus-function treatment.

The panel decision also relied on another misstatement of the law, which the district court decision was premised upon. The district court proclaimed that a “known class of circuit structures *cannot be sufficient* [to avoid means-plus-function treatment] under the *Williamson* standard.” Panel Op. at 6 (citing Claim Construction Order, 2021 WL 3918136, at *6). The panel approved of this erroneous statement of law, even though the opposite is true. Indeed, *Dyfan* reaffirmed longstanding precedent that a known “class of structures” *is* sufficient to avoid means-plus-function treatment under the *Williamson* standard. *Dyfan*, 28 F. 4th at

1366–68. In *Dyfan*, this Court reversed a district court order holding that the terms “system,” “code,” and “application” were subject to § 112 ¶ 6. *Dyfan*, 28 F.4th at 1365–69. In finding reversible error, this Court emphasized that claim terms “need not connote a single, specific structure” and may instead “describe a class of structures,” and nevertheless avoid invoking § 112 ¶ 6. *Id.* at 1366, 1368.

In the panel’s view, a term for a known class of structures can still receive means-plus-function treatment, even as to those terms “a POSITA would understand as structure.” Panel Op. at 7. According to the panel, whether such terms are means-plus-function depends on an inquiry into recited function and whether the structural term recited in the claim was known to perform the associated function. *Id.* But that is not what *Dyfan* holds. *Dyfan* did not engage that inquiry and made clear that such an inquiry is only appropriate after first determining that means-plus-function already applies. *See Dyfan*, 28 F.4th at 1365–67. And, as discussed below, the panel decision rested on a misinterpretation or misapplication of the *Williamson* standard.

3. Both *Williamson* itself and post-*Williamson* precedent conflict with the panel’s legal standard, under which sufficiently definite structures can invoke means treatment depending on their associated function.

According to the panel’s interpretation of *Williamson*, means-plus-function treatment applies to a claim that recites a definite or known structure associated with a function to be performed by that structure, so long as the challenger shows that recited structure is not understood to be “sufficient” to perform the function. Panel

Op. at 6–7. The panel thus advances a two-part test for determining the threshold inquiry of means-plus-function treatment. First, it asks what function the structure is to perform, and second, asks whether the structure is understood to be “sufficient” to perform that function. *Id.* at 6–7 (stating that a claim that “recites something a POSITA would understand as structure” invokes means treatment if “a POSITA wouldn’t understand it as sufficient structure *for performing the claimed function*”).

The panel believed it was correctly applying the legal standard in *Williamson*, based on the portion of the case that states the presumption against means-plus-function treatment can be overcome “if the challenger demonstrates that the claim term fails to recite sufficiently definite structure *or else recites function without reciting sufficient structure for performing that function.*” *Williamson*, 792 F.3d at 1348-49. The panel is misinterpreting the key holding of *Williamson*.

In *Williamson*, the phrase “*or else recites function without reciting sufficient structure for performing that function*” means only that the challenger can overcome the presumption by identifying a specific function in the claim and then proving that the claim fails to recite a *sufficient structure* associated with the recited function. *Williamson*, 792 F.3d at 1348–49. The word “sufficient” in the quote modifies the term “structure,” because the test requires a “sufficiently definite structure,” as opposed to a generic term that is only vaguely associated with some possible structure. *Id.* The test thus distinguishes terms that recite “sufficient structure”

(which are not means-plus-function) from nonce terms that are only vaguely associated with some possible structure (which are means-plus-function). *Id.*

The panel decision interpreted the quote from *Williamson* differently. It held that the “or else . . .” phrase requires asking not only whether the claim recites a sufficiently definite structure for performing its recited function, but also whether the recited structure in the claim is *sufficient* (meaning *adequate*) to perform its recited function. Panel Op. at 6–7. But that is not what “sufficient” in the “or else . . .” quote means.

The question in *Williamson* was not whether “distributed learning control module” structures in the art were “sufficient” to perform the claimed functions but rather whether the term “distributed learning control module” had a sufficiently definite meaning as the name for structure in the first place. That term did not, and so the claim failed to recite a sufficiently definite structure associated with the recited functions of the distributed learning control module. In fact, the term “sufficient structure” as used in the “or else . . .” portion of *Williamson*’s quote only requires “sufficiently definite” structure—it does not relate to the *adequacy* of the structure to perform its recited functions.

The panel decision misapplies *Williamson* by holding that the legal standard requires asking whether sufficiently definite structures in claims are *sufficient* to perform their recited functions, referring to the *adequacy* or *capability* of the recited

structures to perform their recited functions. That is not what *Williamson* held, and no decision since *Williamson* has interpreted it that way. *Dyfan*, of course, did not turn on the sufficiency of “application” or “code” to perform recited functions, but instead on the essential inquiry of whether these terms have sufficiently definite meaning as the name for structure. *Dyfan*, 28 F.4th at 1366. Likewise, in another decision issued one day after *Dyfan*, this Court recognized that the *adequacy* or *capability* of a structure to perform a recited function is *not even relevant* to step one of the means-plus-function inquiry. *VDPP LLC v. Vizio Inc.*, No. 2021-2040, 2022 WL 885771 (Fed. Cir. Mar. 25, 2022) (*non-precedential*).

4. While the associated function can inform the structural character of the claim term, it cannot remove the structural character of a term that otherwise connotes sufficiently definite structure.

The panel’s decision also contradicts *Dyfan* (as well as several other precedential decisions of this Court) by holding that an otherwise structural claim term becomes a “nonce” term depending on whether it is understood to be “sufficient” to perform its recited function. In this case, Ruckus did not dispute that the structural claim term (“search receiver logic”) is *not* a nonce term. Appx1526–1527. Ruckus’s expert also agreed that “search receiver logic” is not necessarily a *well-known* term, but it is nonetheless known as a term for structure. Appx1537 at 70:11–71:5. Because the structural claim term is not a “nonce” term, there was no legal basis for the panel’s decision that this structural term becomes a “nonce” term

based on competing expert testimony about the sufficiency of the structure to perform the recited function. Panel Op. at 3–7.

On this critical point, panel decision cites no relevant precedent. None of this Court’s prior decisions support analyzing the associated function to decide that an unambiguously structural term recited in the claim as performing that function is actually a “nonce” term subject to § 112 ¶ 6. For example, in *Egenera Inc., v. Cisco Sys., Inc.*, 972 F.3d 1367 (Fed. Cir. 2020), the Court decided that the term “logic” in that claim was a “nonce” term because “logic” failed to convey sufficiently definite meaning as the name for structure to a POSITA, since it could refer to any number of things and did not refer to a specific structure or class of structures. The *Egenera* panel then analyzed the function of the claimed “logic” to determine whether that function could *impart* structure or otherwise make up for the fact that “logic,” by itself, is a “nonce” term. But *Egenera* did not analyze the claimed function of the “logic” to decide whether the term “logic” is a “nonce” term in the first instance.

Indeed, consistent with *Egenera*, courts only analyze the claimed function to see if it can *impart* some structure in claims that do not otherwise recite a sufficiently definite structure associated with the function. In such instances, “even if the claims recite a nonce term followed by functional language, other language in the claim might inform *the structural character of the limitation in part or otherwise impart structure to the claim term.*” *MTD Prods., Inc. v. Iancu*, 933 F.3d 1336, 1342 (Fed.

Cir. 2019) (quoting *Williamson*). In other words, the claim’s function—and all other parts of the claim—can *impart structure*, but this analysis is only needed when the claim only recites a “nonce” term and fails to recite a term that conveys sufficiently definite meaning as the name for structure. Where a term uses structural language that *does* convey sufficiently definite meaning as a name for structure, the inquiry ends, and an analysis of the function is not necessary (or proper). But that is the exact reverse of what the panel did here. It analyzed the associated *function* to determine whether the structural term “search receiver logic” is a “nonce” term.

B. Panel Rehearing Is Likewise Warranted

For the same reasons, panel rehearing is warranted to correct the legal errors identified above. Vivato incorporates the above and summarizes the points of law or fact that it believes the panel overlooked or misapprehended. For example, the panel failed to reconcile the legal standard from *Dyfan* with the panel’s differing view of the legal standard based on *Williamson* and *Egenera*. The panel also failed to meaningfully address Vivato’s extensive evidence that the term, “search receiver logic,” connotes sufficient structure to a POSITA to avoid means-plus-function treatment, including that it *does* convey a class of structures capable of performing the associated function of “updating said routing information.”

C. Under the Correct Legal Standard, the Claim Term “Search Receiver Logic” Is Not a Means-Plus-Function Term

The claim of the '231 Patent at issue here recites both a function (“update said routing information”) and a known structure for performing that function (“search receiver logic . . . configured to update said routing information”). Thus, means-plus-function treatment only applies if Ruckus demonstrates that the claim fails to recite a sufficiently definite structure associated with the recited function. *Williamson*, 792 F.3d at 1348. It failed to.

The “essential inquiry” is whether the term “search receiver logic” would be understood by a POSITA to have a sufficiently definite meaning as the name for structure. Put another way, the question is whether the claim recites a sufficiently definite structure associated with the recited function of “update said routing information.” The claim clearly requires this function to be performed by the “search receiver logic.” So, the issue is whether “search receiver logic” would be understood by a POSITA to have a sufficiently definite meaning as the name for structure.

It does. Applying the correct legal standard, a POSITA would recognize the term “search receiver logic” to have sufficiently definite meaning as the name for structure. The panel decision does not meaningfully dispute this fact, nor could it. Search receivers are known structures in the field of wireless communications. Appx1471. Indeed, “search receiver” is a defined term in the Communications Standard Dictionary. Appx1570 (Weik, M., Communications Standard Dictionary,

2nd ed., defining “search receiver” as a “receiver that can be tuned over a relatively wide frequency band in order to detect, identify, or measure electromagnetic signals”). The ’231 Patent describes a “search receiver” using similar language to that appearing in the Communications Standard Dictionary. Appx128 at 13:18–29 (“Search receiver 164 in this example is configured to operate on the base band element data to extract information from received signals, such as, e.g., PCLP headers that are received from any direction, within the element pattern”); Appx1467–68; Appx1471. And contemporaneous patents in the field of wireless communications described the known structure of a “search receiver.” Appx1558.

These facts were not meaningfully disputed below. And the additional term “logic” in the phrase “search receiver logic” does not change these facts, as Ruckus agreed that the terms “search receiver” and “search receiver logic” are not “nonce” terms and that these terms would be known terms for structure to a POSITA (even if they are not *well-known* terms of art). Appx1526–1527 (Ruckus’s expert agreeing they are not nonce terms); Appx1537 at 70:11–71:5 (Ruckus’s expert agreeing that “search receiver logic” is not necessarily a *well-known* term, but it is nonetheless known as a term for structure). Ruckus also conceded that “search receiver” was known as a term for structure in related wireless communications fields, such as GPS and electronic warfare. Panel Op. at 3–4.

Apart from applying the wrong legal test, the panel (and the district court) further erred by only considering extrinsic evidence to decide the sufficiency of the claimed “search receiver logic” structure to perform its recited function. Panel Op. at 3–7. But it is unfair to demand that the patentee provide extrinsic evidence of a claimed structure performing its recited function, as this would force the patentee to surrender a contention that the claim limitation recites a novel function for a known structure. It was irrelevant to the panel that the inventors of the ’231 Patent taught that search receivers are sufficient to perform their recited functions.

Further, the panel never explained *why* the recited structure of a search receiver would be insufficient. Although the panel acknowledges Ruckus’s conclusory expert testimony that known search receiver structures would be insufficient to perform the claimed function, the Panel decision (like the district court) failed to explain *why* they are insufficient, and also failed to acknowledge the expert testimony by Vivato’s expert witness, Dr. Branimir Vojcic, that even under the panel’s incorrect legal standard, the search receiver logic structure described in the patent *would* be understood to be sufficient to perform the claimed function. Appx30 (no reference to Vojcic Decl. ¶ 43. (Appx1476), where Dr. Vojcic opined that the “search receiver logic would be understood to be capable of updating the routing information based at least in part on cross-correlated signal information that is received by the receiver using the adaptive antenna. This operation would be

understood to typically involve calculations, comparisons, and other computations that can be readily performed by the search receiver logic components”).

III. CONCLUSION

For the foregoing reasons, Vivato respectfully requests that the panel or this Court grant this petition, vacate the panel opinion affirming the district court, and reverse the district court judgment’s that the claim term “search receiver logic” is subject to means-plus-function treatment. If the panel or this Court reconsiders the decision in this appeal, Vivato respectfully requests reconsideration of the companion appeals² that rise and fall with the outcome of this appeal.

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² The companion appeals are Fed. Cir. Appeal Nos. 2022-1785, 2022-1787, 2022-1789, 2022-1790, 2022-1791, 2022-1792.