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**IN THE UNITED STATES DISTRICT COURT
FOR DISTRICT OF NEW JERSEY**

INTERNATIONAL DEVELOPMENT
LLC

Civil Action No. 3:09-CV-02495-
GEB

Plaintiff,

v.

SIMON NICHOLAS RICHMOND AND
ADVENTIVE IDEAS, LLC

Defendants.

DEFENDANTS' OPENING CLAIM CONSTRUCTION BRIEF

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I. INTRODUCTION.

Defendants Adventive Ideas LLC and Simon Nicholas Richmond (collectively, “Defendants”) submit this brief in support of the proper construction of the disputed terms of the claims of U.S. Patent Nos. 7,196,477 (“‘477 patent”) and 7,429,827 (“‘827 patent”) and in response to the contentions on claim interpretation currently presented by Plaintiff International Development LLC (“Plaintiff” or “IDC”). It is respectfully submitted that Defendants’ proposed constructions are proper and well-supported by the claim language itself, the patent specification and prosecution history, and extrinsic evidence that may be freely consulted, such as ordinary and technical dictionaries, where appropriate.

It is respectfully submitted that IDC’s request for consideration of expert testimony should not be granted. However, Defendants respectfully request the opportunity to submit such testimony in rebuttal, if any such expert testimony is offered by IDC.

II. BACKGROUND.

The ‘477 and ‘827 patents disclose and claim solar powered garden light assemblies that produce light of varying colours of the spectrum. The varying colours are produced by gradually increasing and decreasing (“ramping up” and “ramping down”) the intensity of light generated by multiple differently coloured light generating devices (usually light emitting diodes -- commonly called

“LEDs”) using a control circuit. Ex. 1, ‘477 patent, col. 6, lines 1-9. At least one switch to control the delivery of power to the lamps, disposed so as to provide for access thereto by a user, is also provided. Ex. 1, ‘477 patent, Figs. 3-5 and 9, col. 5, lines 22-25 and col. 8, lines 62-66.

As pointed out on page one of the specification of the ‘477 Patent, and well-known to the Examiner in the Patent Office during prosecution, light devices that employ light emitting diode (LED) systems to produce variable colours were not new *per se* at the time of the invention.¹ Ex. 1, ‘477 patent, col. 1, lines 12-20. Solar powered garden lights such as U.S. Patent No. 5,062,028 to Frost (“Frost”), attached as Exhibit 6, were also known and disclosed during prosecution of the patent. *See* Ex. 1, ‘477 page 1 (citing Frost) and col. 1, lines 12-14 (discussing prior art). Outdoor lights that alternate multiple coloured lamps on and off, such as

¹ Electronic processor controlled LEDs to produce colour changing effects in a consumer product are disclosed in U.S. Patent No. 7, 064,498 to Dowling (“Dowling”), col. 2, lines. 59-67 (attached hereto as Exhibit 5). Dowling describes that “several LED’s 4 with different spectral output may be used. Each of these colours may be may be driven through separate controllers 3. . . . By controlling the LED’s 4 independently, colour mixing can be applied for the creation of lighting effects.” Ex. 5, Dowling, col. 5, lines 42-52). “By mixing several hues of LED’s, many colours can be produced that span a wide gamut of the available spectrum. Additionally, by varying the relative intensity of LED’s over time, a variety of colour-changing effects can be produced.” Ex. 5, Dowling, col. 6, lines 17-21. Dowling did not, however, disclose providing such a varying colour function in a solar powered garden light.

Dowling was cited and considered by the Examiner during prosecution of the ‘477 and ‘827 patents. Ex. 1, ‘477 Patent, page 1 (listing Dowling), and ‘477 prosecution history, Information Disclosure Statement (initialed by Examiner). Ex. 3, ‘477 File History at 40. Indeed, the Assistant Examiner of the ‘477 patent, Minh Dieu A., was same Assistant Examiner responsible for prosecution of Dowling, and he simultaneously examined both applications. *See* Ex. 1, ‘477 patent, page 1; Ex. 5, Dowling, page 1.

Christmas lights, were also well-known.² In a solar light, however, such flashing can be misperceived regarded by a user as flickering, indicating abnormal operation, leading to unnecessary returns. Furthermore, flashing is perceived as not conducive to harmonious relaxing nighttime ambience. However, solar powered garden lights that provide light of “varying colours,” as that term is used in the ‘477 and ‘827 patents, i.e., by gradually increasing and decreasing the intensity of multiple coloured lamps to cycle through the light spectrum, were unknown – until Mr. Simon Nicholas Richmond’s invention disclosed and claimed in the ‘477 and ‘827 patents.

To make his invention, Mr. Richmond had to overcome the special challenges posed by the outdoor environment where solar powered garden lights operate. Outdoor lights do not have ready access to a convenient source of electricity. Furthermore, because outdoor lights tend to receive little maintenance

² IDC’s Four Seasons solar light, a version of which IDC contends is prior art, is an example of such “on/off” alternating lights. *See*, literature for Four Seasons light, attached as Exhibit 8 at IDC001782. (“Choose the desired color setting by positioning the switch located on the underside of the top section. Choose MULTI if *alternating* colors are desired. Or, choose a single color, GR for green, RD for red or AM for amber.”) (Emphasis added). Whether or not this is prior art, such alternating colors, as in flashing Christmas lights, does not provide the “fading” characteristic of the “varying colour[s]” of the ‘477 and ‘827 patents, i.e., a “constantly changing lighting effect that cycles through the light spectrum by ramping up and ramping down the intensity of the light displayed by the LEDs 34A, 34B, and 34C.” Ex. 1, ‘477 patent, col. 6, lines 3-9. (Emphasis added). Also, the Four Seasons light, with only the colours red, green and amber, cannot “cycle through the spectrum” since the colour blue is missing. *Compare*, Ex. 1, ‘477 patent, col. 5, lines 48-49 (“In this example, the first LED 34A is blue, the second LED 34B is green and the third LED 34C is red.”).

or attention, reliance on batteries alone is impractical. Outdoor lights such as garden lights can be powered by a solar cell, but the available power is inherently limited by the small size and high cost of the solar cell. The power limitations generally result in solar powered garden lights producing weak light. The problem of weak light is compounded by the high light absorption characteristics of the surfaces typical in the outdoor environment, such as grass and dirt, and by uncontrolled extraneous light conditions of the outdoor environment such as streetlights, passing automobile headlights and the like. These conditions of the outdoor environment exacerbate the problems imposed by the inherent power limitations of solar powered garden lights, making it difficult to perceive the gradual change of varying colours. Still further, the control circuit required to ramp up and ramp down the intensity of multiple differently coloured lamps imposes additional power requirements in a situation where power is already inherently limited.

As a result of all of these challenges, prior to the invention of Mr. Richmond, there were no practical solar powered garden light capable of survival in the outdoor environment and having the ability to produce light of varying colours of the spectrum by gradually increasing and decreasing the intensity of multiple differently coloured lamps to continuously cycle through the spectrum in a way that could reasonably be perceived in the outdoor environment, while

allowing the user to conveniently control the operation of the light with an accessible switch. Mr. Richmond was the first to overcome these challenges, combining the power-hungry varying spectral colour-changing LED technology, such as disclosed in the Dowling patent, into power-limited solar garden lights, a feat never before accomplished, in a practical design providing at least one switch on the solar garden light that was accessible to the user to permit control of delivery of electric power to the LED lamps. The innovation of Mr. Richmond was appropriately recognized by the United States Patent and Trademark Office as deserving of patent protection – *twice* -- by issuance of the ‘477 patent (with 29 claims) and then the ‘827 patent (with 35 claims).³

III. PRINCIPLES OF CLAIM CONSTRUCTION.

“Claim construction is the judicial statement of what is and is not covered by the technical terms and other words of the claims.” *Netword, LLC v. Central Corp.*, 242 F.3d 1347, 1352 (Fed. Cir. 2001). Just like the interpretation of statutes, claim construction is a question of law to be resolved by the court. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 390 (1996). Because “[i]t is a bedrock principle of patent law that the claims of a patent define the invention to which the patentee is entitled the right to exclude,” the claims must be read to

³ IDC infringes, directly and/or pursuant to the doctrine of equivalents, at least claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 13, 14, 15, 16, 20, 21, 22 and 26 of the ‘477 patent and at least claims 27, 28, 29, 30, 31, 32, 33, 34, and 35 of the ‘827 patent.

define the proper scope of the claimed invention. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (*en banc*).

Courts must give the claims the meaning they would have to one of ordinary skill in the art who has read the claims terms “in view of the specification, of which they are a part.” *Id.* at 1315. In doing so, however, the Court must also be wary of “the cardinal sin of patent law – reading a limitation from the written description into the claims.” *Id.* at 1320 quoting *Scimed Life Sys., Inc. v. Advanced Cardiovascular Sys., Inc.*, 242 F.3d 1137, 1340 (Fed. Cir. 2002). Furthermore, the patent’s prosecution history “can often inform the meaning of the claim language.” *Phillips*, 415 F.3d at 1317.

Dictionaries are always available to the court to aid in the task of determining meanings that would have been attributed by those of skill in the relevant art to any disputed terms used by the inventor in the claims. *See, Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1584 (Fed. Cir. 1996) (“[T]echnical treatises and dictionaries . . . are worthy of special note. Judges are free to consult such resources at any time . . . and may also rely on dictionary definitions when construing claim terms . . .”); *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1459 (Fed. Cir. 1998) (*en banc*) (citing *Vitronics* for the proposition that a court is free to consult dictionaries, encyclopedias, and treatises at any time to help determine the meaning of claim terms). In some cases, construction may require

nothing more than reference to dictionaries explaining the technology. *Phillips*, 415 F.3d at 1319; *Super Guide Corp. v. DirecTV Enters., Inc.*, 358 F.3d 870, 874-75 (Fed. Cir. 2004); *PC Connection Solutions, LLC v. Smart Disk Corp.*, 406 F.3d 1359, 1363 (Fed. Cir. 2005).

“[E]xtrinsic evidence in general, and expert testimony in particular, may be used only to help the court come to the proper understanding of the claims; it may not be used to vary or contradict the claim language. [Citations omitted.] Nor may it contradict the import of other parts of the specification. Indeed, where the patent documents are unambiguous, expert testimony regarding the meaning of a claim is entitled to no weight.” *Vitronics*, 90 F.3d at 1583.

A “court in its discretion may admit and rely on prior art proffered by one of the parties, whether or not cited in the specification or the file history. . . . Such art may make it unnecessary to rely on expert testimony and may save much trial time. As compared to expert testimony, which often only indicates what a particular expert believes a term means, prior art references may also be more indicative of what all those skilled in the art generally believe a certain term means.” *Id.* at 1583.

With these principles in mind, the proper construction of the disputed terms of the ‘477 and ‘827 patents is discussed below.

IV. CONSTRUCTION OF THE '477 PATENT CLAIMS.

A. “at least two lamps of different colours to produce a desired colour including a varying colour.”

The foregoing phrase has been parsed into three portions, which will be discussed separately below.

A1. “*at least two lamps of different colours.*”⁴

Defendants submit that this simple phrase simply means what it says; “at least two lamps that each generate a different colour,” and that the term “lamp” is simply used in its ordinary sense as “a device that generates light.” Ex. 15, Joint Statement Under L.Pat.R. 4.3, Ex. A at 2; Ex. 10, Defendants’ L.Pat.R. 4.2 definitions at 25.

By contrast, IDC proposes the following convoluted construction:

At least two lighting device packages, each capable of producing a single colour of light that is different from that which is produced by any other of said lighting device packages.

Ex. 15, Joint Statement Under L.Pat.R. 4.3, Ex. A at 2.

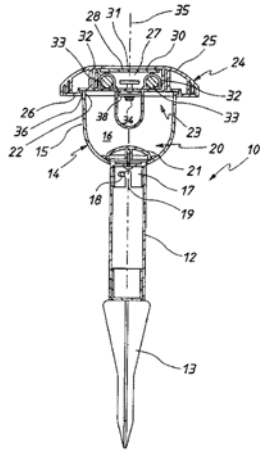
It is respectfully submitted that Defendants’ simple and well-supported construction is proper and IDC’s convoluted construction is not.

⁴ Because the ‘477 and ‘827 patents were based upon an Australian patent application, 2003271383 (AU), filed December 23, 2003, and Mr. Richmond is originally from Australia, the ‘477 and ‘827 patents use the British/Australian spelling of “color” as “colour.” For consistency, that spelling will be retained herein.

As used in the ‘477 patent, the term “lamp” does not presuppose any particular configuration, size, technology or “packaging.”⁵ See, for example, Ex. 1, ‘477 patent, col. 1, lines 18-20 and 60-61, col. 3, lines 6-9, col. 5, lines 18-20; 22-25; 40-50, and col. 6, lines 3-9.

IDS’s proposal to engraft an extraneous limitation on the meaning of “lamp” requiring that in addition to generating a colour of light, each “lamp” must be isolated in its own separate “package,” is at odds with the ordinary meaning of “lamp” as simply a “device that generates light” and finds no support in the intrinsic evidence. The term “package” *does not even exist* in either the ‘477 or ‘827 patent nor is there any disclosure in the ‘477 patent showing the “lamps” or “LEDs” isolated in a separate “package.” In fact, IDC’s proposed “package” limitation is directly contrary to the ‘477 patent, since the “at least two lamps” disclosed in the ‘477 and ‘827 patents, *i.e.*, LEDs 34A, 34B and 34C, are depicted in Figs. 2 and 3 as a *single element* “34.”

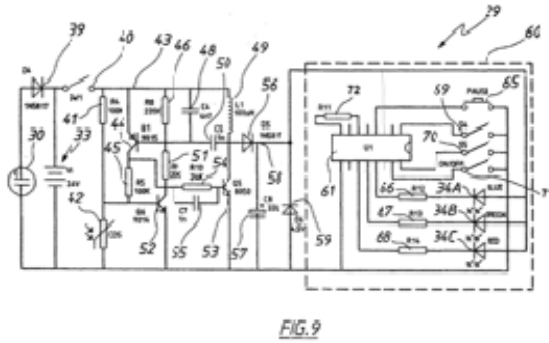
⁵ In the ‘477 patent, the preferred “lamp” is a light emitting diode, often abbreviated “LED.” See, *e.g.*, Ex. 1, ‘477 patent, col. 5, lines 16-50.



Ex. 1, '477 patent, Fig. 2; col. 3, lines 41-43 and col. 5, lines 16-35.

To attempt to create a separate “package” limitation where there is none, IDC purports to rely upon the circuit diagram of Fig. 9 and the description of it in the specification which states that the “circuit includes three lamps, each one of a different colour” (see Ex. 1, '477 patent, col. 1, lines 60-61) and that “[i]n the embodiments shown, the IC 61 is a 16-pin, three colour LED IC for controlling first, second and third light emitting diodes (LEDs) 34A, 34B and 34C.” Ex. 1, '477 patent, col. 5, lines 18-20.

IDC's argument is unavailing. As shown below, Fig. 9 merely depicts a example circuit diagram of an embodiment of the invention using standard *symbolic* representations of the circuit elements, including depicting the respective blue, green and red LEDs 34A, 34B and 34C, using the standard symbolic representation of a diode as a triangle and line.



The representation of the LEDs in Fig. 9 is symbolic, not physical, and in no way confines each of the LED's 34A, 34B and 34C to its own separate and singular physical "package," isolated from the other light generating lamps. Rather, if each of LED's 34A, 34B and 34C were required to be isolated in its own separate "package," Fig. 9 would have been drawn with separate boxes surrounding each of the LEDs 34A, 34B and 34C. The fact that Fig. 9 does *not* show any such representation requiring or suggesting physical segregation of LED's 34A, 34B and 34C belies IDC's attempt to artificially limit the meaning of "lamps" as requiring separate "packages."⁶ And that fact that Figs. 2 and 3, in fact, show item 34, having LED's 34A, 34B and 34C, as a *single element*, sounds the death knell for IDC's artificially limited construction.

⁶ The conclusion that the term "lamps" are simply "light generating devices," without being limited to any particular "package" configuration is consistent with prior art of record, including the Dowling patent that was considered by the Examiner during prosecution of the '477 patent. See Ex. 1, '477 patent, col. 2, lines. 59-67. In particular, the Dowling patent states that the term "LED" may refer to a single light emitting diode package having any type semiconductor dies that are individually controlled. It should also be understood that the term "LED" does not restrict the package type of LED. The term 'LED' includes packaged LED's, non-packaged LED's, surface mount LED's, chip on board LED's and LEDs of all other configurations." Ex. 5, Dowling, col. 4, lines 23-30.

IDC cites to deposition testimony of Richmond given in *International Development Corporation v. Simon Nicholas Richmond and Adventive Ideas, LLC*, Civil Action No. 4:08-CV-111-RAS (2008) (the “Texas Case”), in which Richmond responded to a hypothetical question of: “Is it possible to have a colour changing solar powered garden light using only one LED?” by responding that he “d[id] not know,” because he “Because I was under the impression that the diode only emitted one kind of range of spectrum.” Ex. 14, Richmond Dep., 113:16-22; IDC 0023000. That testimony says nothing about whether the term “lamp” used in the claims requires that each differently-coloured light source be in a separate “package” and is, thus, irrelevant to claim meaning.⁷

For the foregoing reasons, IDC’s contention that each LED or “lamp” must be limited to a single LED in a separate physical “package” is unsupported by intrinsic evidence and, indeed, is flatly contrary to the intrinsic evidence. Rather, the term “lamp” simply means what it says in accordance with its ordinary meaning: a “device that generates light.” Accordingly, under the proper construction, it makes no difference to the claims whether the multiple lamps are physically grouped together, physically separated in separate “packages,” put in no “packages” at all or put in any other physical configuration, as long as the “at least

⁷ As disclosed in Dowling, however, it is, of course, possible to put multiple LEDs in the same “package,” since the same term “LED” is used for each coloured light source, regardless of “packaging” configuration. Ex. 5, Dowling, col. 4, lines 23-30.

two lamps” produce light of “different colours,” as stated in the claims.⁸

For the foregoing reasons, it is respectfully submitted that Defendants’ construction should be adopted.

A2. “to produce a desired colour.”

Defendants proposed construction is simply that the “desired colour” means “a colour that is desired by the user or intended by the designer.” This construction is well-supported by the specification. *See* Ex. 1, ‘477 patent, col. 6, lines 24-27 (“In the embodiment shown in FIG. 9, the battery 33 powers the light circuit 60 during the night to produce light of varying colours and the user can optionally select a desired colour by pushing the push button 65.”)

By contrast, IDC proposes to add a host of limitations to this simple phrase, proposing that “to produce a desired colour” should be “construed” as:

The at least two lamps of different colors illuminate simultaneously, resulting in the mixing of different colors such that in combination, they produce a desired color.

Ex. 15, Joint Statement Under L.Pat.R. 4.3, Ex. A at 5-6.

IDC’s proposal should not be adopted. Although the condition of different colors illuminating substantially simultaneously as different LED’s ramp up and

⁸ The dispute over whether each “lamp” must be in a separate “package” aside, as to the portion of this claim term referring to the “lamps” being “of “different colours,” the parties generally agree that the term “different colours” means that each of the “at least two lamps” can generate a different colour of light. *Compare*, Defendants’ definition (“each [lamp] generates a different colour”) with IDC’s definition (each lamp is “capable of producing a single color or light that is different from that which is produced by any other of said [lamps]”). Ex. 15, Joint Statement Under L.Pat.R. 4.3 at 2-3.

down, to result in perceived mixing of colors, is not precluded by the language of the claims, there is nothing in the intrinsic or extrinsic evidence that mandates that a “desired colour” must *only* be a mixed colour. Furthermore, the ‘477 and ‘827 patents disclose some embodiments where “the switches 69, 70, 71 [that] correspond to the LEDs 34A, 34B, and 34C [can be used] to enable or disable a particular colour range.” Ex. 1, ‘477 patent, col. 5, lines 22-25, Ex. 1. IDC’s proposed construction would also produce the unreasonable result of precluding operation of two of switches 69, 70 and 71 simultaneously to disable two of LEDs 34A, 34B, and 34C (leaving only one LED of one colour in operation), though the remaining LED is clearly the colour “desired” by the user.

For the foregoing reasons, it is respectfully submitted that Defendants’ proposed construction should be adopted.⁹

A3. “*including a varying colour.*”

Defendants contend that, in the context of the invention of the ‘477 patent, the term “varying colour” means:

[V]ariation of the intensity [in] one or more of the lamps with time produces a light which appears to gradually change colour over time. This can produce a different desired colour than either of the two lamps individually, as in mixing blue and red light to produce a perceived purple light, which colour can change with time.

⁹ IDC’s proposed construction would be acceptable, however, if it stated instead:

The at least two lamps of different colors *can* illuminate simultaneously, resulting, *at times*, in the mixing of different colors such that in combination, they produce a desired color *that, at times, can be a mixed color*. (Additions italicized).

Ex. 15, Joint Statement Under L.Pat.R. 4.3, Ex. A at 7.

IDC contends that “varying colour” has a “plain and ordinary meaning,” but does not suggest what it contends that “plain and ordinary meaning” meaning is.

Id. IDC also does not cite any intrinsic nor extrinsic evidence in support of what that undisclosed meaning might be.¹⁰

It is respectfully submitted that the meaning proposed by Defendants properly captures the meaning of the term “varying colour” within the context of the invention disclosed and claimed in the ‘477 patent and is well-supported by the intrinsic evidence. For example, col. 6, lines 24-27 of the ‘477 patent states: “In the embodiment shown in FIG. 9, the battery 33 powers the light circuit 60 during the night to produce light of varying colours and the user can optionally select a desired colour by pushing the push button 65.” Ex. 1, ‘477 patent, col. 6, lines 24-

¹⁰ IDC’s present contention in the L.Pat.R 4.3 Joint Statement that there is a “plain and ordinary” meaning for “varying colour” (even though IDC will not reveal what that is) is substantially different from IDC’s contention in its L.Pat.R. 4.2 Disclosure that “varying colour” was *indefinite*. Ex. 12, IDC L.Pat.R. 4.2 Disclosure, May 11, 2010 at 2.

IDC’s position in its L.Pat.R. 4.2 Disclosure was, in turn, substantially different from IDC’s position in the Texas Case, where IDC proposed to construe “varying colour” to mean that “at least two of said lamps are configured to illuminate simultaneously and by ramping up and ramping down the respective intensities of the lights of said at least two lamps so that they produce a desired colour in combination, including a varying colour.” It should be noted, however, that IDC’s *original* construction of “varying colour” in the Texas Case is encompassed, at least in part, by Defendants’ construction. Ex. 13, IDC E.D.Tex. P.R. 4-2, dated January 26, 2009.

However, none of IDC’s various arguments regarding the meaning of “desired colour including a varying colour,” including its argument *de jour* that it should be accorded a “plain and ordinary” (though undisclosed) meaning, should be adopted.

27. Furthermore, col. 6, lines 3-9 of the '477 patent explains how the colours are varied in the invention as follows:

The integrated circuit varies the frequency and intensity of light emitted by the LEDs 34A, 34B, and 34C to produce a constantly changing kaleidoscopic effect. *The light device 10 displays a constantly changing lighting effect that cycles through the light spectrum by ramping up and ramping down the intensity of the light displayed by the LEDs 34A, 34B, and 34C.*

Ex. 1, '477 patent, col. 6, lines 3-9. (Emphasis added).

IDC's proposed construction (in the Texas Case) that the "desired colour including a varying colour" must *always* be a different colour than any of the separate lamps, is not supported by the intrinsic or extrinsic evidence. As the intensity of the light displayed by the LEDs 34A, 34B, and 34C gradually raises and lowers, if two or more of the LED's are ramping up and/or down at the same time, the colours will mix to create perceived colours different than the colours of the individual LEDs 34A, 34B, and 34C taken separately. However, the discussion in the '477 patent quoted above does not state that mixing of the colours during ramping up and ramping down is mandatory at all times. Rather, as the intensity of the light displayed by the LEDs 34A, 34B, and 34C ramps up and down, at least at some times, only one of LEDs 34A, 34B, and 34C may be generating light of gradually increasing or decreasing intensity. IDC's proposed construction would produce the result that a "desired colour including a varying colour" could *never* be the individual colour of any of the LEDs themselves, a nonsensical construction

that would leave gapping holes in the spectrum of colours that may be provided by the constantly “varying colours.”

Thus, although the term “varying colour” encompasses a creation of mixed-colours of the spectrum during the ramping up and down of the intensity of the lamps, at least when two or more lamps are ramping up or down simultaneously, it also encompasses the condition, at least at some times during the ramping up and down of intensity, that only one of LEDs is operating.¹¹

Contrary to IDC’s contention, Defendants’ proposed construction is consistent with the Deposition of Simon Richmond. In that Deposition, Mr. Richmond testified:

A. This example of a colour changing solar light had three diodes that emit light. And they turned on and off – well, they increased and decreased in brightness at different times. And *at some point in time*, there was at least two of those light sources on at one time so that the colours interacted with one another.”

Ex. 14, Richmond Dep. at IDC002263. (Emphasis added).

Of course, having “*at some point in time*, at least two of those light sources on at one time so that the colours interacted with one another” (emphasis added) does not preclude the condition where at “another point in time,” only one colour lamp or LED is gradually increasing and decreasing in brightness, i.e., “ramping

¹¹ Of course, there is no contention that the term “varying colour” encompasses merely alternating or switching colours “on” and “off;” rather a gradual change in the intensity of each colour is required, i.e., a “ramping up” and “ramping down.” See Ex. 1, ‘477 patent, col. 6, lines 3-9.

up” or “ramping down” in intensity. *See, also*, Ex. 14, Richmond Dep. at IDC 002374-76 (“[Y]ou increase the brightness of one and then decrease the brightness of the other . . . it might be red and then they see it red and then they seen (sic.) it changing to green.”)

IDC’s proposed construction is no construction at all and is unsupported in any event. Therefore, it is respectfully submitted that Defendant’s construction of “desired colour including a varying colour” should be adopted.

B. “solar cell mounted on a surface so as to be exposed to light.”

Claims 1 and 20 of the ‘477 patent recite that a solar cell is mounted on “a surface of an assembly so as to be exposed to light.”¹² Defendants’ proposed construction is consistent with the common and ordinary meaning of “expose:” “to subject or allow to be subjected to an action, influence, or condition.” Ex. 15, Joint Statement Under L.Pat. 4.3, Ex. A at 7-8. Thus, “exposed to light” simply means: “subjected to, or allowed to be subjected to the influence of light.” *Id.*

IDC, by contrast, contends that this simple phrase is indefinite. *Id.* Thus, IDC does not propose a meaning for this phrase.¹³

¹² The language that appears in the printed ‘477 patent had an error, and was corrected by Certificate of Correction, dated July 22, 2008.

¹³ In IDC’s Motion for Leave to Amend its Complaint at 6, (Doc. 47) IDC contended that the surface upon which the solar cell is mounted must be an “exposed” surface in the sense of being an external surface, excluding positioning under a transparent cover. Accordingly, this potential construction by IDC will also be addressed.

IDC's contention in its May 18, 2010 Motion to Amend its Complaint (Doc. 47) that the solar cell can only be "exposed" to light if the surface upon which it is mounted is an *external* surface of the assembly, which would exclude the solar cell from being mounted on a surface that is covered by a light transmitting material such as a lens, even though light inherently passes through such material to "expose" the solar cell to light, is unjustified and inconsistent with the intrinsic evidence.

In the context of the present invention, the solar cell must, of course, be "exposed" to light from the sun (or other external source) in order to generate electricity. *See* Ex. 1, '477 patent, col. 7, lines 7-8 ("The solar cell 30 would be mounted so as to be exposed to sunlight"). The '477 patent specification, at col. 4, lines 10-16, also states:

When the solar cell 30 is exposed to sufficient light, the solar cell converts some of the solar energy to electrical energy and creates a current that passes through the diode 39 to charge the battery 33. Thus, during the day the solar cell 30 converts energy *from the sun* to charge the battery 33.

Ex. 1, '477 patent, col. 4, lines 10-16 (emphasis added).

Of course, light inherently passes through transparent materials. Thus, a solar cell will still be "exposed" to sunlight notwithstanding an intervening cover element that is sufficiently transparent to allow light to pass through. In describing one exemplary embodiment, the '477 patent states the "solar cell [is] mounted on an exposed surface of the assembly." Ex. 1, '477 patent, column 1 at lines 48-49;

Figs. 3 and 6 of the 19 ‘477 patent (emphasis added). IDC’s attempt to import an example from the specification into the claims is clearly improper. *Scimed Life Sys.*, 242 F.3d at 1340 (“the cardinal sin of patent law [is] reading a limitation from the written description into the claims.”) In any event, the *claims* of the ‘477 patent are clearly *not* limited to a solar cell mounted on an external surface of the assembly, so long as the solar cell is mounted on a surface where it is “exposed to light” to permit generation of electricity by the solar cell – the purpose of the solar cell.

The prosecution history of the ‘477 patent does not support construing the claims to require placement of the solar cell on an external surface. In particular, claim 1 of the ‘477 patent, as originally filed, recited “a solar cell mounted on an *exposed surface of the assembly . . .*” Ex. 3 at 174, ‘477 Prosecution History, Preliminary Amendment dated February 26, 2004, page 2. (Emphasis added). However, in response to the First Non-Final Office Action of Sept. 7, 2005 (Ex. 3 at 97-103), which had allowed claim 1 with its original wording, claim 1 was *broadened* in an Amendment and Response to the Non-Final Office Action filed January 30, 2006, to *remove* the “exposed surface” language, replacing it instead with the present language reciting that a solar cell is mounted on “a surface of an assembly *so as to be exposed to light . . .*”¹⁴ Ex. 3 at 84, ‘477 Prosecution History.

¹⁴ Independent claim 20 was broadened in a similar manner. *Id.* at 87.

(Emphasis added). In the next Office Action of May 20, 2006, which was a non-final Office Action, claim 1 with its new language was again allowed. Ex. 3 at 72, ‘477 Prosecution History. IDC’s contention that a “surface exposed to light” must be an external surface would ignore the January 30, 2006 Amendment that brought the claims to their current form as though it never happened.

Finally, with reference to Fig. 10, the ‘477 specification states that “the solar cell would be mounted so as to be exposed to sunlight” (Ex. 1, ‘477 patent, col. 7, lines 7-8), but the solar cell is not visible in Fig. 10. The only part shown in Fig. 10 that is inherently capable of passing light from the sun to the solar cell while at the same time concealing the solar cell in the figure is the spherical lens 75. *Id.* The solar cell is not explicitly depicted in Fig. 10. *Id.* However, since the solar cell is described as being “mounted so as to exposed to sunlight,” yet is not visible in Fig. 10, the logical inference is that the solar cell is mounted under the transparent spherical lens 75. *Id.* As such, IDC’s proposed addition of an extraneous “no transparent cover” limitation would exclude Defendants’ Fig. 10 embodiment, which is presumptively unreasonable. “[W]e should not normally interpret a claim term to exclude a preferred embodiment.” *See, Vitronics*, 90 F.3d at 1583 (stating a construction that excludes the preferred embodiment “is rarely, if ever correct and would require highly persuasive evidentiary support.”) Thus,

although IDC purports to rely on Fig. 10 and col. 7, lines 7-8, they defeat IDC's argument.

In summary, the language of claims 1 and 20 requiring a solar cell that is mounted on "a surface of an assembly so as to be exposed to light" simply means what it says: that the surface must be "exposed to light." Since light inherently passes through transparent and translucent material, the "exposed to light" language encompasses a structure where the light is transmitted to the solar cell through a transparent or translucent cover, lens or globe.

C. "the switch being exposed to provide for access thereto."

Defendants respectfully submit that the correct construction of "the switch being exposed to provide for access thereto" is that "the switch is made visible to the user or deprived of shelter or protection to make it available to the user for use, without the need for tools or destruction."¹⁵

IDC contends that the limitation of claims 1 and 20 of a "switch being exposed to provide access thereto by a user" requires that "the switch is immediately accessible to a user without the need to disassemble any component of the lighting device," by which IDC presumably means that the switch can only

¹⁵ This meaning is based upon the common and ordinary meaning of "exposed." Ex. 15, Joint Statement Under L.Pat.R. 4.3, Ex. A at 8-10; Ex. 10, Defendants' L.Pat.R. 4.2 definitions at 20-23 (definitions of "expose"). The additional clarification that this exposure be accomplished "without the need for tools or destruction" is included by necessary implication since, of course any internal part of anything can be "exposed" by means of tools or by destroying the device.

be mounted on an external surface. Again, IDC's proposed construction inappropriately imposes an extraneous limitation that is not required by the plain meaning of the words of the claim, the specification or the prosecution history and, as such, is not correct.

IDC purports to rely on one embodiment in '477 patent described as having "[t]he switch 40 and/or switch 65 . . . mounted on the base 26 so as to be on a downwardly facing external surface of the base 26. This enables a user to control the device via readily accessible switches, without the need to remove the cap assembly 24." Ex. 1, '477 patent, col. 8, lines 62-66. That possible construction is, of course, one example of where a switch can be positioned such that it is "exposed" to a user so as to "provide for access thereto by a user." However, the embodiment where the cap assembly lifted off is just one example of how to "provide for access thereto by a user," and it is improper to import the limitation "without the without the need to remove the cap assembly 24" from the one example in the specification. *Scimed Life Sys., Inc.*, 242 F.3d at 1340 (the court must be wary of "the cardinal sin of patent law – reading a limitation from the written description into the claims.")

IDC fails to acknowledge that the '477 patent *also* discloses switches 69, 70 and 71 that "control delivery of electric power from the battery to operate said circuit" that, in some embodiments, can be made "accessible to a user." Ex. 1,

‘477 patent, col. 5, lines 31-32, and Fig. 9. Yet, none of switches 69, 70 and 71 is depicted or described as being on any external surface of the device. Fig. 4 shows the top external surface of the cap assembly 24 and Fig. 5 shows the bottom external surface of the cap assembly 24; neither shows any of switches 69, 70 or 71 on an external surface. *Id.* In view of this, it is respectfully submitted that the phrase “being exposed to provide access thereto by a user” does not require that the switches be disposed on an external surface of the device, since such construction would be inconsistent with the fact that none of switches 69, 70 and 71 (which can also be made “accessible” to a user) is depicted as being mounted on an external surface. Thus, just like the solar cell can mounted under a transparent cover and still be “exposed” to light, the switch can be “exposed” in the sense of “providing access thereto by a user,” as stated in the claims, even it is not mounted on an external surface, providing that anything covering it is readily removable by a user, without tools or destruction. It is respectfully submitted that this meaning is properly expressed by Defendants’ proposed construction of “exposed:” “That the at least one switch is “made visible to the user or deprived of shelter or protection to make it available to the user for use, without the need for tools or destruction.”¹⁶

¹⁶ Defendants’ construction is also consistent with the ordinary dictionary definitions of “expose,” which are to “make visible” or “to deprive of shelter or protection.” Ex. 15, Joint Statement Under L.Pat.R. 4.3, Ex. A at 8-10; Defendants’ L.Pat.R. 4.2 definitions at 20-23.

Defendants' construction is consistent with how this language was used and understood during prosecution of the '477 patent. For example, in the Non-Final Examiner's Action of September 7, 2005, claim 1, including the above limitation at issue, was allowed over cited prior art including U.S. Patent No. 6,120,165 to Shalvi ("Shalvi"). Ex. 3 at 99-101, '477 patent Prosecution History. Shalvi was deemed by the Examiner to disclose "the switch being exposed to provide for access thereto by a user." Ex. 3 at 99, '477 Prosecution History. (citing to figures 1-3, col. 1, lines 40-67 to col. 3, lines 1-28 of Shalvi). Shalvi teaches that "[a] *power switch 31* is used to connect the battery 19 to the rest of the circuit [that is] *is normally hidden or not immediately accessible* from outside the housing 13 *to prevent switching ON and OFF by an unauthorized person.*" Ex. 7, Shalvi, column 2, lines 31-3. (Emphasis added). Shalvi does not, however, depict the location of switch 31, and particularly does not disclose whether it is on an external surface of the light. *Id.* However, Shalvi makes clear that the location for the switch must be such that "any intruder is *unable* to dis-arm or turn off the solar lamp by operating the switch 31, or some other manual switch on the solar lamp." Ex. 7, Shalvi, col. 3, lines 1-10. (Emphasis added). To render an intruder *unable* to turn off the solar lamp, the switch must be essentially inaccessible. This inaccessibility is important to the invention disclosed in Shalvi, which is "bright illumination [] normally or primarily used for security purposes to alert a

householder of the proximate presence of a possibly unwelcome intruder,” since an accessible switch would allow an intruder to turn off the light. Ex. 7, Shalvi, col. 1, lines 60-66. This requirement precludes use of a switch that is readily accessible to such an intruder anywhere on the light assembly, whether or not the switch is covered by a part that is readily removable.

However, in the invention of the ‘477 patent, which is a decorative garden light rather than a security light, inaccessibility of the switch is not necessary. In fact, in the ‘477 patent, a switch positioned “to provide for access thereto by a user” is desirable because it facilitates convenient control of power to the multiple coloured LEDs by a user, which is important in a power-limited decorative colour changing solar powered garden light. However, such a switch does not need to be on an external surface “to provide for access thereto by a user” or to distinguish from the “inaccessible” switch of Shalvi; rather, as long as it is sufficiently exposed “to provide for access thereto” by a user, in the words of the claims.

IDC contends that the applicant’s amendment of January 30, 2006 distinguishing Shalvi as having a “switch that is ‘normally hidden or not *immediately* accessible’ to a user” requires imposing a limitation that the switch is “‘immediately accessible to a user without the need to disassemble any component of the device,” which IDC presumes requires that the switch be located exclusively on an external surface of the lamp, uncovered by anything. IDC’s contention is

incorrect. The word “immediately” in the context of positioning is often used to mean “near or close by.” Ex. 11, Wordnet, A lexical database for English, Trustees of Princeton University (2010)(def. 2). Accordingly, use of the term “immediately” in the applicant’s argument in that Amendment simply means that the Shalvi’s switch was not “immediately” accessible because it was not being “near or close by.” But this distinction does not require that switch of the ‘477 patent claims be limited to a location on an external surface of the lamp, uncovered by even a cover readily removable by a user, in order to “provide for access thereto by a user.”

D. The Correct Construction of the ‘447 Patent Claims is Not Altered by the ‘827 Patent.

IDC’s contention that the ‘827 patent supports its proffered construction of the ‘477 patent is meritless. The ‘827 patent matured from U.S. Patent Application No. 11/102,229, filed on April 7, 2005, and was a continuation-in-part of the patent application that matured into the ‘477 Patent. As a continuation-in-part application, by definition, the ‘827 patent includes additional disclosure beyond that included in the ‘477 patent. *See* U.S. Patent & Trademark Office, Manual of Patent Examining Procedure § 201.08 (8th ed., 7th rev. 2008). That additional disclosure encompassed a new embodiment where the switch, solar cell and LEDs are all disposed within the same globe, as depicted in Figs. 11-13 (which are the new drawings added in the ‘827 patent). That new disclosure does not change the

correct meaning of a “switch being exposed to provide for access thereto by a user” as used in the original specification and claims of the ‘477 patent, which did not have Figs. 11-13, and which has different claim language from the ‘827 patent claims.

In view of the foregoing, it is respectfully submitted that Defendant’s construction of “exposed to provide for access thereto by a user” is consistent with the ordinary meaning of the words and the intrinsic evidence. As such, it is respectfully urged that Defendants’ construction should be adopted.

E. “Operatively associated.”

Defendants propose that in the context of the ‘477 patent, “operatively associated” simply denotes an operating functional connection link between two elements of the claim language. In the case of claim 1, the “operatively associated” link is between connections to the solar cell and the connections to charge the battery. This is also true for claim 32 and 35.

Defendants’ meaning of “operatively associated” is consistent with the ordinary meaning of the words.¹⁷ This meaning is also consistent with how the term “operation” is used in the ‘477 patent: “The switches 40 and 65 are each *operable* to control delivery of electric power from the batteries to the LEDs 34A,

¹⁷ “Operative” means “[b]eing in effect; having force; operating” and “associate” means “[t]o connect together; combine.” Ex. 15, Joint Statement Under L.Pat.R. 4.3, Ex. A at 11-12; Ex. 10, Defendants’ L.Pat.R. 4.2 definitions at 44-46.

34B and 34C. The circuit 29 is only rendered *operative* when there is insufficient light, that is, by *operation* of a light sensitive switch, i.e. the diode 43 (*sic.* 42.)”
See Ex. 1, ‘477 patent, col. 6, line 42 to col. 7, line 3. (Emphasis added.)

IDC contends that “operatively associated” has a “plain and ordinary” meaning, though IDC does not suggest what that might be.¹⁸

The Federal Circuit has also held that “the claim term ‘operatively connected’ . . . is a general descriptive term frequently used in patent drafting to reflect a functional relationship between claimed components [that] means the claimed components must be connected in a way to perform a designated function.”) *Innova/Pure Water Inc. v. Safari Water Filtration System, Inc.*, 381 F.3d 1111, 1117-20 (Fed. Cir. 2005) “In the absence of modifiers, general descriptive terms are typically construed as having their full meaning.” *Id.* at 1118. Therefore, in the claims of the ‘477 patent, the term “operatively associated” properly takes the full breadth of its ordinary meaning.

Since IDC has presented no suggested meaning for “operatively associated” at all, and Defendants’ proposed meaning is well-supported by dictionary definitions, the intrinsic evidence, and Federal Circuit authority, it is respectfully submitted that Defendants’ meaning should be adopted.

¹⁸ IDC’s current contention of a “plain and ordinary” meaning for “operatively associated” is a substantial change from IDC’s contention in its L.Pat.R. 4.2 Disclosure that “operatively associated” was indefinite. Ex. 12, IDC L.Pat.R. 4.2 Disclosure, Ex. A, at 7. Of course, the term “operatively associated” is not indefinite.

F. “securing means.”

The parties agree that “securing means” is a “means plus function” element within the meaning of 35 U.S.C. 112, subparagraph six, and that, therefore, it should be construed to encompass the disclosed embodiments and equivalents thereof. Those embodiments include use of mechanically engageable flange segments, and equivalents thereof. Ex. 1, ‘477 patent, col. 3, lines 46-55:

The base 26 has radially inward projecting flange segments 36 that engage with radially outward extending flange segments 37 of the rim 22 to be secured thereto. By angular movement of the cap assembly 24 about the axis 35, the segments 36 and 37 engage or disengage to secure or to release the assembly 24 with respect to the lens 15. As can be noted from FIG. 5, the flange segments 27 have end abutments portions 38 against which these segments 36 engage when the assembly 24 is secured to the lens 15.

V. CONSTRUCTION OF THE ‘827 PATENT

A. “two lamps of different colours *to produce a varying colour.*”

It is respectfully submitted that the construction of this clause is the same as the similar clause, “two lamps of different colours to produce a desired colour including a varying colour” as found in the claims of the ‘477 patent, as discussed above, and for the same reasons.

B. “activation sub-circuit.”

Defendants propose to construe “activation sub-circuit” in accordance with

the plain and ordinary meaning of the terms.¹⁹ Defendants respectfully submit that their plain and ordinary meaning is consistent with the specification of the ‘827 patent, describing, for example, the “light operated circuit” of the ‘827 patent, Ex. 2, at col. 5, lines 7-12 and 30-44 and col. 7 lines 57-65.

IDC also contends that the “activation sub-circuit” has a “plain and ordinary” meaning, but it has not disclosed what that “plain and ordinary” meaning might be, nor has it cited any supportive intrinsic or extrinsic evidence.

Since Defendants’ construction is well-supported and IDC has not presented one, it is respectfully submitted that Defendants’ construction should be adopted.

C. “diode.”

Defendants propose to construe “diode” in accordance with the plain and ordinary meaning of the term.²⁰

IDC also contends that “diode” has a “plain and ordinary” meaning, but it has not disclosed what that “plain and ordinary” meaning might be, nor has it cited any supportive intrinsic or extrinsic evidence.

Defendants respectfully submit that they have given a “plain and ordinary”

¹⁹ Those definitions are: “Activate:” “to set in motion; make active or more active;” “sub:” “forming a subdivision or subordinate part of a whole;” and “circuit:” “A configuration of electrically or electromagnetically connected components or devices.” Ex. 15, Joint Statement Under L.Pat.R. 4.3, Ex. B, 13-15; Ex. 10, Defendants’ L.Pat.R. 4.2 definitions, at 5, 8 and 67-68.

²⁰ The ordinary definition of “diode” is: “an electronic device that restricts current flow chiefly to one direction.” Ex. 15, Joint Statement Under L.Pat.R. 4.3, Ex. B at 21-22; Ex. 10, Defendants’ L.Pat.R. 4.2 definitions, at 15.

meaning to the above claim element, and Defendants have stated what the meaning is. Defendants' meaning is also consistent with how "diode" is used in specification of the '827 patent. For example, the '827 patent describes "three colour LED IC for controlling first, second and third light emitting diodes (LEDs)." Ex. 2, '827 patent, col 6, lines 30-33.

Since Defendants' construction is well-supported and IDC has not presented any construction, it is respectfully submitted that Defendants' construction should be adopted.

D. "the switch being accessible by a user."

Defendants' construction of "being accessible by a user" is simple: "The switch [is] available to the user for use, without the need for tools or destruction." Ex. 15, Joint Statement Under L.Pat.R. 4.3, Ex. B at 15-17. It is respectfully submitted that Defendants' proposed construction is consistent with the ordinary meaning of "accessible" and consistent with how the term is used in the '827 patent.²¹

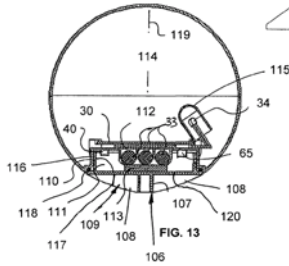
IDC, on the other hand, asks this Court to "construe" the limitation "switch being accessible by a user" by *rewriting the claim with new limitations*. Under IDC's "construction," the limitation "switch being accessible by a user" becomes

²¹ The definition of "switch" is: "A device used to break or open an electric circuit or to divert current from one conductor to another." Ex. 15, Joint Statement Under L.Pat.R. 4.3, Ex B at 15-17; Ex. 10, Defendants' L.Pat.R. 4.2 definitions at 69.

“switch [being] *immediately* accessible to a user *without the need to disassemble any component of the lighting device.*”²² Ex. 15, Joint Statement Under L.Pat.R. 4.3, Ex. B at 15-17. (New limitations IDC proposes to add to the claim being emphasized in italics). Rather than being a “construction” of this claim clause, IDC’s proposal simply adds extraneous limitations (shown in italics) that are *not* in the claims, which approach is flatly contrary to claim construction doctrine. *See, Scimed Life Sys.*, 242 F.3d 1137 at 1340 (“the cardinal sin of patent law” is “reading a limitation from the written description into the claims.”).

IDC’s contention that the switch must be “*immediately* accessible to a user *without the need to disassemble any component of the lighting device*” (extraneous limitations emphasized) would exclude the preferred embodiment described in the Figs. 11-13. These figures were newly added in the ’827 patent. In Figs. 11-13, switches (40, 65) are depicted as mounted on a battery compartment (110) such that they are only accessible to a user after removing a closure member (109) that acts as a cap or lid. ’827 Patent, Ex. 2, col. 8 at line 33 to col. 9 at line 8. Fig. 13 showing this is reproduced below:

²² It should be noted that the language of the ’827 claims as regards the location of the switch being “accessible” is different than the language of the ’477 patent claims wherein the switch is described as being “exposed.” Accordingly, IDC’s arguments for inappropriately limiting the meaning of “exposed” as used in the ’477 patent claims do not even apply to the ’827 patent claims, which do not use the same language.



A construction that excludes a preferred embodiment is presumptively unreasonable. *NeoMagic Corp. v. Trident Microsystems, Inc.*, 287 F.3d 1062, 1074 (Fed. Cir. 2002) (“It is elementary that a claim construction that excludes the preferred embodiment ‘is rarely, if ever correct.’”) (citing *Vitronics*); *Vitronics*, 90 F.3d at 1583 (a construction that excludes the preferred embodiment “is rarely, if ever correct and would require highly persuasive evidentiary support”); *Abraxis Bioscience, Inc. v. Navinta, LLC*, 640 F.Supp.2d 553, 564 (D.N.J. 2009) (“Claims should not be construed so as to exclude preferred embodiments.”).

For the foregoing reasons, it is respectfully submitted that Defendants’ construction of “switch being accessible by a user” should be adopted.

E. “independently control delivery of power to each of said lamps so as to vary intensity of light emitted over time to produce a continuous colour changing cycle.”

Defendants proposed to construe the words in the foregoing claim limitation in accordance with their plain and ordinary meanings, as supported by the dictionary definitions for those words.²³

²³ Those plain and ordinary meanings are as follows:

Defendants' proposed construction is consistent with how the operation of the colour changing cycle is described in the '827 patent (which is common disclosure with the '477 patent):

The integrated circuit 61 controls each of the first, second and third LEDs 34 A, 34 B, and 34 C to produce a changing light effect for the light device 10. The integrated circuit varies the frequency and the intensity of the light emitted by the LEDs 34A, 34 B, and 34 C to produce a constantly changing kaleidoscopic effect. The light device 10 displays a constantly changing lighting effect that cycles through the light spectrum by ramping up and ramping down the intensity of light displayed by the LEDs.

Ex. 3, '827 patent, col. 7, lines 10-18.

"Independently:" Independent: 'not determine or influenced by someone or something else (def 3.)' ("independently" is the adverbial form of "independent").

"Delivery:" "the act of giving or transferring or the state of being given or transferred."

"Power:" "the rate at which electrical energy is fed into or taken from a device or system. It is expressed, in a direct-current circuit, as the product of the effective values of the current and voltage and the cosine of the phase angle between them. It is measured in watts."

"Lamp:" "A device that generates light."

"Delivery of power to each of said lamps:" Transferring electrical energy from a power source to each of the lamps connected to the circuit.

"Intensity:" "The amount of degree or strength of electricity, light heat, or sound per unit area or volume."

"Continuously:" "Uninterrupted in time, sequence substance or extent as perceived by an observer; not perceived as flashing." "Continuously' adverbial form"

"Cycle:" "An interval of time during which a characteristic, often regularly repeated event or sequence of events occurs."

Ex. 15, Joint Statement Under L.Pat.R. 4.3, Ex. B, at 17-20; Ex. 10, Defendants' L.Pat.R. 4.2 definitions, at 11-14, 24, 17, 49-55, 25 and 10.

IDC proposes a “construction” of this claim limitation as follows:

The light sub-circuit delivers power independently to each of the at least two lamps of different colours so that said lamps illuminate simultaneously at varying intensities over time, resulting in the mixing of different colours such that in combination, they produce a continuous colour changing cycle through the light spectrum.

Ex. 15, Joint Statement Under L.Pat.R. 4.3 at 17.

IDC’s currently-presented construction is modified from its L.Pat.R. 4.2 construction, where it contended that it must cycle through “the *entire* light spectrum” rather than merely the “light spectrum” (emphasis added), as is currently stated in the parties’ Joint Statement Under L.Pat.R. 4.3. *Compare*, Ex. 15, Joint Statement Under L.Pat.R. 4.3 at 17 with Ex. 12, IDC L.Pat.R. 4.2 Disclosure at 8). However, either of IDC’s constructions amounts to rewriting the claim using different words than are in the claim and adding extraneous limitation that that are not in the claims and, as such, should not be adopted.

First of all, as discussed in connection with the ‘477 patent claims, the term “lamps” does not require that each of the light generating devices be isolated in a separate “package.” Furthermore, although the correct meaning of the claim term encompasses times when at least two lamps of different colours are simultaneously illuminated as the respective lamps ramp up and down in intensity, thus resulting in perceived mixing of the colours, the correct construction also encompasses times when such mixing of different colours does not occur, as when a single LED

is ramping up or ramping down.²⁴ As such, IDC's proposed construction amounts to a rewriting of the claim include words, phraseology and limitations that the claim does not have. This is improper. *See U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1568 (Fed. Cir. 1997) (The purpose of claim construction is not to take simple terms and replace them with complex and potentially confusing phrases); *Vitronics*, 90 F.3d at 1320 ("cardinal sin of patent law [is] reading a limitation from the written description into the claims.").

For the foregoing reasons, it is respectfully submitted that Defendants' construction should be adopted.

VI. TESTIMONY BY IDC'S EXPERT, DR. LAURENT, IF OFFERED, SHOULD NOT BE PERMITTED.

IDC has stated that it may offer extrinsic evidence by way of testimony from an expert, Dr. Duane G. Laurent. If IDC offers any opinions of Dr. Laurent on claim interpretation, Defendants will object to such testimony under Fed. R. Evid. 702 and *Daubert v. Merrill Dow Pharms.*, 509 U.S. 579 (1983).

In his Curriculum Vitae, Dr. Laurent professes expertise "focused . . . in the areas of software and circuit modeling, analysis and investigation" and in "the

²⁴ IDC's "construction" would be acceptable, however, if it stated instead:

The light sub-circuit delivers power independently to each of the at least two lamps of different colours so that, *at times*, said lamps illuminate simultaneously at varying intensities over time, *at times*, resulting in the mixing of different colours such that in combination, they produce a *substantially* continuous colour changing cycle through the light spectrum. (Additional language shown in italics.)

modeling and simulation of semiconductor presses, devices and circuits, the fabrication, design and test of embedded DRAM macrocells, and the support and development of commercial-grade software written in multiple programming languages on multiple computing platforms.” Ex. 12, IDC L.Pat.R. 4.2

Contentions, Exhibit C, Curriculum Vitae of Duane G. Laurent, at p. 1. This expertise in highly technical and esoteric areas of electrical engineering analysis is not experience in the relevant field of art -- solar powered garden lights. In this connection, it is respectfully pointed out that the *inventor* of the inventions claimed in the ‘477 and ‘827 patents has a Bachelor of Commerce degree from the University of New South Wales (in Australia), taking mostly business and accounting courses, a Master in Business Administration from New York University, and is essentially self-taught in the relevant technology through experience. Ex. 14, Richmond Dep., 9:13 – 10:21, 15:11 to 16:12, 23:3-13; IDC 002195-7; IDC 002202-3; IDC 002209. *See Bausch & Lomb, Inc. v. Barnes-Hines/Hydrocurve, Inc.*, 796 F.2d 443 (Fed. Cir. 1986), *cert. denied*, 484 U.S. 823 (1987), *on remand*, 10 USPQ2d 1929) (though not conclusive, the educational level of the inventor is a factor in determining the level of skill in the art).

Since Dr. Laurent does not have the necessary relevant experience in the pertinent art of solar powered garden lights to qualify him as an expert in that field, his opinions on how a person skilled in solar powered garden lights would

understand terms in the claims (whatever those currently-undisclosed opinions might be) would not be helpful and should not be admitted or given any weight.

V. CONCLUSION.

For the foregoing reasons, it is respectfully submitted that Defendants' constructions of the disputed claim terms should be adopted.

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who 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) on this 20th day of July, 2010. Any other counsel of record will be served by first class mail on this same date.

/s/ Donald J. Cox, Jr.
Donald J. Cox, Jr.