

Last month at

The Federal Circuit



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A PATENT IS NOT A HUNTING LICENSE WRITTEN DESCRIPTION MUST SHOW POSSESSION OF CLAIMED INVENTION

Because the patent at issue did not provide any guidance that would allow a person of ordinary skill in the art to identify or synthesize compounds that could be used in the claimed method of treatment, the patent was invalid for failing to satisfy the written description requirement. *Univ. of Rochester v. G.D. Searle & Co.*, No. 03-1304 (Fed. Cir. Feb. 13, 2004)1

STATEMENTS IN SPECIFICATION AND PROSECUTION HISTORY LIMIT THE INVENTION AND CLAIM SCOPE

Federal Circuit cannot construe claims to cover subject matter broader than that which the patentee itself regarded as comprising its invention and represented to the PTO. *Microsoft Corp. v. Multi-Tech Sys., Inc.*, No. 03-1139 (Fed. Cir. Feb. 3, 2004)2

CONFLICTING RECORD ON DOE WAIVER TRIGGERS RECONSIDERATION AND REMAND

Unclear orders concerning motion in limine on DOE following *Festo* requires reconsideration of waiver and estoppel on remand. *Sulzer Textile A.G. v. Picanol N.V.*, No. 02-1410 (Fed. Cir. Feb. 17, 2004)2

UNAMBIGUOUS CLAIMS DO NOT COVER ONLY DISCLOSED EMBODIMENTS WITHOUT A CLEAR AND UNMISTAKABLE DISCLAIMER

In the absence of a clear and unmistakable disclaimer in the specification or prosecution history, district courts cannot limit the scope of unambiguous claim terms to disclosed embodiments, even to preserve their validity. *Liebel-Flarsheim Co. v. Medrad, Inc.*, No. 03-1082 (Fed. Cir. Feb. 11, 2004)3

MEANS-PLUS-FUNCTION LIMITATION FOR ULTRASOUND DEVICE INCLUDES TABLE-MOUNT STRUCTURE FROM SPECIFICATION

Accused ultrasound device lacking table-mount structure does not literally infringe and is not after-developed technology under DOE. *Nomos Corp. v. Brainlab USA, Inc.*, No. 03-1364 (Fed. Cir. Feb. 4, 2004)5

“REGULARLY RECEIVED TELEVISION SIGNAL” INCLUDES BOTH OLDER ANALOG AND NEWER DIGITAL SIGNALS

Evidence suggested that those skilled in the video-broadcast arts knew about the use of digital video as well as traditional analog at the time of filing. *SuperGuide Corp. v. DirecTV Enters., Inc.*, No. 02-1561 (Fed. Cir. Feb. 12, 2004)6

A NONSENSICAL RESULT OF CLAIM CONSTRUCTION DOES NOT REQUIRE COURT TO REDRAFT CLAIMS

Federal Circuit construes claims as written, not as patentees wish they had written them. *Chef Am., Inc. v. Lamb-Westin, Inc.*, No. 03-1279 (Fed. Cir. Feb. 20, 2004)6

EDITED BY | VINCE KOVALICK

A Patent Is Not a Hunting License Written Description Must Show Possession of Claimed Invention

Jeffrey Abraham

[Judges: Lourie (author), Bryson, and Dyk]

In *University of Rochester v. G.D. Searle & Co.*, No. 03-1304 (Fed. Cir. Feb. 13, 2004), the Federal Circuit affirmed the district court's grant of SJ that U.S. Patent No. 6,048,850 ("the '850 patent") was invalid for failing to comply with the written description requirement of 35 U.S.C. § 112.

The '850 patent, owned by the University of Rochester ("Rochester"), generally relates to compounds that inhibit the activity of cyclooxygenases. Cyclooxygenases catalyze the production of prostaglandins, which perform various functions in the body. The '850 patent claims a method for selectively inhibiting prostaglandin H synthase-2 (PGHS-2) activity in a human host by administering a "non-steroidal compound that selectively inhibits activity of the PGHS-2 gene product," but it does not disclose such a compound.

The district court held that the patent claims were invalid for lack of written description and concluded that the patent does not provide any suggestion as to how a compound, as recited in the method, could be made or otherwise obtained other than by trial and error.

The Federal Circuit agreed and held that a patent specification must set forth enough detail to allow a person of ordinary skill in the art to understand what is claimed and to recognize that the inventor invented what is claimed. According to the Court, the method claimed in the '850 patent depended upon finding a compound that selectively inhibits PGHS-2 activity, as it would be impossible to practice the claimed method of treatment without such a compound. The Court found that the '850 patent did not contain any language, generalized or detailed, that described compounds that would achieve the claimed effect. The Court also ruled that Rochester did not present any evidence that a person of ordinary skill in the art would be able to identify any com-

pound usable in the present invention based solely on the term "non-steroidal compounds that selectively inhibit activity of the PGHS-2 gene product." In fact, even Rochester's own expert admitted that one of skill in the art could not understand what compound or compounds would be suitable to practice the claimed invention without trial and error.

Rochester argued that no written description requirement exists independent of the enablement requirement and that, since it contained an enabling disclosure, the '850 patent was not invalid. Rochester contended that cases finding a written description requirement separate from the enablement requirement were either distinguishable or wrong. The Defendants argued that the written description requirement is separate from the enablement requirement, and that a patent fails to satisfy the written description requirement if it claims a method of achieving a biological effect without disclosing a compound that can achieve the result.

The Federal Circuit reviewed both the Supreme Court's and its own precedents and concluded that the written description requirement is separate and distinct from both the enablement and best mode requirements. The Court recognized that while there may be significant overlap between the three requirements of § 112, the written description requirement is indeed independent and serves as a teaching function in which the public is given "meaningful disclosure in exchange for being excluded from practicing the invention for a limited period of time." *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 323 F.3d 956, 970 (Fed. Cir. 2002).

The Federal Circuit stated that generalized language will not satisfy the written description requirement if it does not convey the detailed identity of an invention. Although some courts have held that a description of the exact chemical components within the claimed range is not necessary to comply with § 112, the patentee is still required to provide a sufficient description to show one of skill in the art that the inventor possessed the claimed invention at the time of filing.

The Federal Circuit agreed with the district court's conclusion that the inventors did not have possession or knowledge of the com-

pounds necessary to practice the claimed methods as of the filing date, and concluded that in the chemical arts, simply having the three-dimensional structures of enzymes, such as cyclooxygenases, does not necessarily allow one of ordinary skill in the art to predict what compounds might bind to and inhibit them.

Rochester also challenged the district court's ruling that the patent was invalid on SJ, arguing that a patent cannot be held invalid for lack of written description on its face, given the questions of fact the issue raises. The Federal Circuit disagreed and pointed to cases in which it held a patent was invalid for failing to meet the written description requirement based solely on the language of the specification. The Court concluded that since the specification of the '850 patent did not disclose which compounds have the desired characteristic of selectively inhibiting PGHS-2, the claimed method could not be practiced, even when considering the knowledge of one skilled in the art.

Statements in Specification and Prosecution History Limit the Invention and Claim Scope

Vince Kovalick

[Judges: Lourie (author), Bryson, and Rader (dissenting)]

In *Microsoft Corp. v. Multi-Tech Systems, Inc.*, No. 03-1139 (Fed. Cir. Feb. 3, 2004), the Federal Circuit affirmed several claim-construction rulings and a final judgment of noninfringement on three patents owned by Multi-Tech Systems, Inc. ("Multi-Tech").

This opinion reviewed rulings on three patents directed to personal computer-based systems and methods for simultaneously transmitting voice and/or computer data to a remote site over a telephone line. The opinion focuses on the construction of the terms "sending," "transmitting," and "receiving" data packets, and whether these limitations are restricted to communications over a telephone line or whether they may encompass communications over a packet-switched network such as the Internet.

The Federal Circuit reviewed the intrinsic evidence and concluded that the claims must be limited to the telephone-line operation, not just because that was described as a preferred embodiment, but because it was broadly described throughout the specification, including the summary of the invention section, as the whole invention. The Court construed these limitations to require that the claimed data packets traveled directly from a local site to a remote site (and vice versa) over a telephone line and not a packet-switched network, concluding that it could not construe the claims to cover subject matter broader than that which the patentee itself regarded as comprising its inventions and represented to the PTO.

The Federal Circuit also found support for its ruling in the prosecution history, pointing to statements in a summary of the invention in the prosecution history that again specified the use of a telephone line. The Court applied its construction to the patent corresponding to the prosecution history containing these remarks, two subsequent but related patents, and even a prior issued but related patent. The Court noted that it must take the patentee at its word and will not construe the scope of the patent claims more broadly than the patentee itself clearly envisioned.

The Federal Circuit also construed several other claim limitations and confirmed the final judgments of noninfringement.

Judge Rader dissented, concluding that the majority was improperly limiting the claims when no clear disavowal of subject matter existed in the specification or prosecution history.

Conflicting Record on DOE Waiver Triggers Reconsideration and Remand

Eyal H. Barash

[Judges: Linn (author), Lourie, and Gajarsa]

In *Sulzer Textile A.G. v. Picanol N.V.*, No. 02-1410 (Fed. Cir. Feb. 17, 2004), the Federal Circuit granted a petition for panel rehearing and modified an earlier opinion ("*Sulzer I*") by vacating and remanding the district court's

motion in limine (“MIL”) in view of *Festo* for a determination of whether Sulzer Textile A.G. (“Sulzer”) waived the DOE defense, and, if not, whether Sulzer is estopped from arguing the DOE.

The Federal Circuit’s *Sulzer I* opinion and the facts of the case were reported in the January 2004 issue of *Last Month at the Federal Circuit*. After the *Sulzer I* decision, Picanol N.V. (“Picanol”) filed a petition for panel rehearing, arguing that the Federal Circuit’s determination that Sulzer had not waived recourse to the DOE was incorrect based on the record before the district court. Upon reviewing the papers filed by both Sulzer and Picanol, the Federal Circuit discovered that the parties had failed to disclose certain facts, including material differences between the district court’s nonfinal pretrial order and the final one. As a result, the Federal Circuit granted Picanol’s petition and agreed to reexamine whether Sulzer’s failure to argue infringement under the DOE was a waiver. Thus, in the instant opinion, the Federal Circuit modified *Sulzer I* solely with respect to the district court’s decision on the MIL preventing Sulzer from arguing infringement under the DOE.

Picanol argued that Sulzer failed to raise equivalents during its case-in-chief based on trial strategy rather than the district court’s evidentiary order, and, therefore, waived its right to appeal under the DOE. As evidence, Picanol pointed out that the district court’s MIL order did not issue until one day before the close of evidence. By comparison, Sulzer argued that it did not present evidence of infringement under the DOE because, prior to trial, the district court, in an off-the-record communication, informed Sulzer that it would be precluded from presenting evidence under the DOE.

The Federal Circuit examined the docket sheet from the trial and discovered that the pretrial conference did not mention a ruling on Picanol’s MIL. Further, in the Joint Final Pretrial Order, which was entered about a week before the close of evidence at trial, the MIL was listed as still pending, suggesting that the motion had not been decided prior to Sulzer’s case-in-chief. However, the Joint Final Pretrial Order showed that, unlike the draft Pretrial Order, the DOE

was not listed as contested, suggesting that the MIL had been decided, thereby barring Sulzer from presenting evidence. Faced with these conflicting facts, the Federal Circuit determined that only the district court had sufficient facts to determine whether a waiver had occurred and ordered the issue remanded. The Federal Circuit further instructed the district court to determine, in view of *Festo*, whether Sulzer could overcome the presumption of prosecution history estoppel.

Unambiguous Claims Do Not Cover Only Disclosed Embodiments Without a Clear and Unmistakable Disclaimer

Christopher W. Day

[Judges: Bryson (author), Lourie, and Dyk]

In *Liebel-Flarsheim Co. v. Medrad, Inc.*, No. 03-1082 (Fed. Cir. Feb. 11, 2004), the Federal Circuit reversed the district court’s claim construction of four patents assigned to the Liebel-Flarsheim Company (“Liebel”), vacated a SJ that Medrad, Inc. (“Medrad”) did not infringe any of the asserted four patents, and remanded the case back to the district court for further proceedings.

The four patents at issue are directed to the use of powered fluid injectors, such as syringes, for injecting fluid into patients during medical procedures. Two of the patents, U.S. Patent Nos. 5,456,669 (“the ‘669 patent”) and 6,658,261 (“the ‘261 patent”), claim several methods and devices relating to front-loadable injectors. The specifications of the ‘669 and ‘261 patents are essentially identical, each describing a pressure jacket surrounding the syringe to prevent it from breaking under the internal pressure generated when fluid is injected into the patient. Despite that none of the asserted claims expressly refers to a pressure jacket, the district court construed the claims to require the use of a pressure jacket around the syringe. That construction was based primarily on the fact that the ‘669 and ‘261 patents do not contain any description of an injector that

lacks a pressure jacket. After finding that the claim limitation “syringe receiving opening” was ambiguous as to the location of the opening, the court looked to the specification and concluded that, since each of the disclosed embodiments included an opening at the front end of a pressure jacket, the “opening” had to be located at the front end of a pressure jacket. Because Medrad’s accused devices did not use pressure jackets, the court granted SJ of noninfringement.

The other two patents, U.S. Patent Nos. 5,662,612 (“the ‘612 patent”) and 5,928,197 (“the ‘197 patent”) are drawn to methods and devices for controlling the plunger drives in such powered injectors. The specifications of the ‘612 and ‘197 patents also have a common specification, which addresses the problem of calibrating the amount of fluid to be injected into a patient based on the critical features of the particular syringe that is being used. The ‘612 and ‘197 patents solve this problem by using a detector to generate electrical signals based on “physical indicia” on the syringe and a control circuit for computing various syringe properties. The district court construed the claim language “physical indicia related to the amount of fluid in the syringe” and “control circuit” for computing “the amount of fluid in said syringe using said electrical signal” as requiring a direct relationship between the syringe properties in question and the “physical indicia” of the syringe. Since Medrad’s accused devices use a look-up table to identify syringe properties based on the type of electrical signals received from a detector, the district court granted SJ of noninfringement.

With respect to the ‘669 and ‘261 patents, Liebel appealed the district court’s claim construction, arguing that the intrinsic record did not limit the scope of the asserted claims to cover only injectors that include pressure jackets. Medrad argued that the ‘669 and ‘261 patents must be construed as limited to devices that have pressure jackets because, when the subject matter claimed in a patent is the only subject matter disclosed, that subject matter is the invention and not simply a preferred embodiment of a broader invention. Medrad also argued that if the asserted claims are not so construed, the validity of the ‘669 and ‘261 patents would be called into question.

The Federal Circuit rejected the district court’s claim construction. With respect to the term “opening,” the Court held that there was no reason to believe that this term was ambiguous. Since, in common usage, an opening is simply an aperture, the Court found no basis to read this term restrictively. The Court also recognized that none of the asserted claims actually state, explicitly or by necessary implication, that the opening must be formed in conjunction with a pressure jacket. And the Court emphasized that neither the specification nor the prosecution history demonstrate a clear and unmistakable intention to limit claim scope to an opening that is located at the front end of a pressure jacket. To the contrary, the Court noted that, by intentionally removing the pressure jacket claim limitation during prosecution and stating that there is not “necessarily a pressure jacket” in the claimed devices, Liebel evidenced a clear intention to claim methods and devices in which pressure jackets were not required. In addition, since the ‘669 and ‘261 patents both contain claims that explicitly recite the requirement of a pressure jacket, but are dependent upon asserted independent claims that do not contain such a requirement, the Court held that the doctrine of claim differentiation created a strong and un rebutted presumption that the independent claims are not so limited. Finally, the Court held that it was improper for the district court to limit the asserted claims simply because they might be vulnerable to separate validity challenges.

With regard to the ‘612 and ‘197 patents, Liebel and Medrad both appealed the district court’s claim construction. Liebel argued that the phrase “physical indicia related to the amount of fluid in the syringe” does not require a direct relationship. Medrad also appealed that claim construction, asserting that the district court adopted an improperly narrow claim construction because the ‘612 and ‘197 patents only describe the “physical indicia” as providing information as to the length of the extender.

The Federal Circuit held that the claim language did not support the district court’s claim construction. The Court found that the term “related to” by itself does not limit the relationship between “physical indicia” and the properties in question to a direct relationship. Similarly, the claim language “control circuit”

for computing “the amount of fluid in said syringe using said electrical signal” does not suggest that the control circuit must use the electrical signal in any particular way. The Court also held that the prosecution history did not evidence a clear disavowal of claim scope since the applicants distinguished the prior art by arguing that it did not disclose any “physical indicia” at all.

Finally, the Federal Circuit rejected Medrad’s argument. The Court found that the claim language did not limit the “physical indicia” to indicia that must be related to the length of the extender. Instead, the dependent claims of the ‘612 and ‘197 patent called for physical indicia that are related to various properties, including the amount of fluid in the syringe, the distance of the plunger from the ends of the syringe, the distance to the end of the plunger’s travel position, and the range of travel of the ram, which drives the plunger within the syringe. According to the Court, the doctrine of claim differentiation suggests that Liebel demonstrated a clear intent to cover a syringe having virtually any kind of “physical indicia.” The Court also found that the prosecution history made it clear that Liebel intended that asserted claims cover syringes having “physical indicia” other than the length of the extender.

Means-Plus-Function Limitation for Ultrasound Device Includes Table-Mount Structure from Specification

Roger P. Bonenfant

[Judges: Mayer (author), Gajarsa, and Dyk]

In *Nomos Corp. v. Brainlab USA, Inc.*, No. 03-1364 (Fed. Cir. Feb. 4, 2004), the Federal Circuit affirmed the district court’s grant of SJ of noninfringement.

Nomos Corporation (“Nomos”) owns U.S. Patent No. 5,411,026 (“the ‘026 patent”), which relates to a table-mounted ultrasound device that helps to locate cancerous lesions. Brainlab USA, Inc. (“Brainlab”) also manufac-

tures an ultrasound device that helps locate cancerous lesions, yet Brainlab’s device is a hand-held device while the Nomos device is mounted to a treatment table. Nomos, however, sued Brainlab for infringement.

In the district court, Brainlab moved for SJ by asserting that their device did not meet the limitation “a means for generating at least one ultrasound image of the lesion in the patient’s body,” because the ‘026 patent required mounting the ultrasound device to a table. The district court agreed and found substantial differences.

At the Federal Circuit, Nomos argued that the corresponding structure of the limitation was simply “an ultrasound probe and nothing more.” Nomos also argued that the principle of claim differentiation precluded fixation devices as corresponding structure, because dependent claim 3 recited that feature.

The Federal Circuit found several portions of the specification that referenced the ultrasound probe in relation to a fixation device. For instance, the specification’s only embodiment consistently referred to the ultrasound device in relation to a fixation device by using language such as “disposed on,” “secured to,” and “is mounted” when referring to the probe. As a result, the Federal Circuit found that the corresponding structure of limitation (a) of claim 1 included a mounting device.

The Court rejected Nomos’s claim-differentiation argument, because claim 1 is a means-plus-function claim and must be construed based on the corresponding structure from the specification.

Next, the Federal Circuit looked to determine whether Brainlab’s device literally infringed the ‘026 patent, taking into consideration that the corresponding structure of limitation (a) of claim 1 included a mounting device. While the Court did find that Brainlab’s device performed the same function as the Nomos device, it ultimately agreed that the Brainlab device functioned in a different manner.

Finally, the Federal Circuit determined that there was no equivalence because technology of Brainlab’s device predated that of the ‘026 patent and was not after-developed technology.

“Regularly Received Television Signal” Includes Both Older Analog and Newer Digital Signals

Adam Avrunin

[Judges: Prost (author), Mayer, and Michel (concurring in the result)]

In *SuperGuide Corp. v. DirecTV Enterprises, Inc.*, No. 02-1561 (Fed. Cir. Feb. 12, 2004), the Federal Circuit vacated a grant of SJ of no infringement because it reversed-in-part the claim construction on which that SJ was based.

SuperGuide Corporation (“SuperGuide”), owner of U.S. Patent Nos. 4,751,578 (“the ‘578 patent”); 5,038,211; and 5,293,357, sued a number of defendants for infringement of these patents. The patents relate generally to devices that receive program guides sent by television broadcasters, enable a television viewer to search the program guides, and display the results to the viewer. The infringement issues turned on the construction of various claim recitations.

One of the claim-construction issues involved whether three limitations (the “limitations-at-issue”) in claim 1 of the ‘578 patent, including the term “regularly received television signal,” covered digital signals or were limited to analog signals. Observing that the only type of television signals that were broadcast in 1985, the year in which the ‘578 patent was filed, were analog signals, the district court had held that the limitations-at-issue must be limited to analog television signals, not the digital television signals that later came into use. SuperGuide and Gemstar Development Corporation, a third-party defendant and exclusive licensee of the patents-in-suit in certain fields of use, challenged the district court’s claim construction.

In concluding that the limitations-at-issue encompass digital signals, the Federal Circuit found a number of factors persuasive. First, the claim language itself does not limit the disputed phrases to a particular signal format (analog or digital). Furthermore, the claim language does not explicitly limit the disputed terms to technologies that were conventional at the time of the invention. The Court also relied on evidence indicating that those skilled in the art knew that video data could be communicated in either analog or digital format and had

developed certain digital video standards by the time the ‘578 patent was filed. Finally, the Court examined the prosecution history and held that none of the arguments the patentee made in distinguishing various references required an exclusion of digital signals from the literal scope of the limitations-at-issue.

Judge Michel disagreed with the majority’s claim construction for the limitations-at-issue. In his view, the majority’s construction improperly expands the scope of the ‘578 patent beyond what the inventors described and enabled. Moreover, he felt that the evidence that digital signals were known at the time the ‘578 patent was filed did not support the broad interpretation that the majority gave to the limitations-at-issue because such evidence did not sufficiently establish how one of ordinary skill in the television art would have viewed those terms at the time. He also criticized the majority for ignoring various declarations in evidence indicating that one skilled in the art would have understood the limitations-at-issue to encompass only analog television signals. Finally, Judge Michel raised his concern that the Court’s increasing reliance on “ordinary meaning” has obscured the correct claim-construction analysis. In his opinion, the inventors had not invented a system that receives digital signals, so their patent cannot cover such systems. Though he disagreed with the majority’s interpretation of the limitations-at-issue, he concurred in the result for these limitations because he thought there are at least triable issues under the DOE.

A Nonsensical Result of Claim Construction Does Not Require Court to Redraft Claims

Vince Kovalick

[Judges: Friedman (author), Rader, and Schall]

In *Chef America, Inc. v. Lamb-Westin, Inc.*, No. 03-1279 (Fed. Cir. Feb. 20, 2004), the Federal Circuit affirmed a ruling of noninfringement for a patent covering a process for producing a dough product.

The only issue on appeal was the meaning of the claim language “heating the resulting batter-coated dough to a temperature in the

range of about 400°F to 850°F.” The district court ruled that this limitation required the dough itself to be heated to that temperature, while the patentee argued that this limitation concerns only the temperature of an oven in which the dough is to be heated.

According to the Federal Circuit, the claim language is clear that the dough is to be heated to the specified temperature. The Court rejected the patentee’s reasoning that such a construction makes little sense because the dough would be burned to a crisp at that temperature range, ruling that even a nonsensical result does not require it to redraft the claims. As written, the Court concluded, the claim unambiguously requires that the dough itself be heated to a temperature range of 400°F to 850°F.

According to the Federal Circuit, the prosecution history suggests that the patentee inten-

tionally used the word “to” rather than “at” in drafting the temperature requirements of the claim. The specification also gave an example of heating the dough “at” a certain temperature, but, in drafting the claims, the applicant chose to use the word “to.” The Federal Circuit construed this as a conscious selection to use the word “to” rather than “at.”

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In Last month at The Federal Circuit, certain terms, titles, and names of federal agencies that are frequently referred to in text, appear in abbreviated forms or as acronyms. These abbreviated forms and acronyms are listed below.

ALJ	Administrative Law Judge
ANDA	Abbreviated New Drug Application
APA	Administrative Procedures Act
APJ	Administrative Patent Judge
Board	Board of Patent Appeals and Interferences
Commissioner	Commissioner of Patents and Trademarks
CIP	Continuation-in-Part
DJ	Declaratory Judgment
DOE	Doctrine of Equivalents
FDA	Food & Drug Administration
IDS	Information Disclosure Statement
IP	Intellectual Property
ITC	International Trade Commission
JMOL	Judgment as a Matter of Law
MPEP	Manual of Patent Examining Procedure
PCT	Patent Cooperation Treaty
PTO	United States Patent and Trademark Office
SEC	Securities and Exchange Commission
SJ	Summary Judgment
SM	Special Master