

# **APPELLEE'S BRIEF**

BRIEF OF APPELLEES  
WESTVIEW INSTRUMENTS, INC. and ALTHON ENTERPRISES, INC.

UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

FILED  
U.S. COURT OF APPEALS FOR  
THE FEDERAL CIRCUIT

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No. 92-1042

HERBERT MARKMAN and  
POSITEK, INC.,

Plaintiffs-Appellants,

v.

WESTVIEW INSTRUMENTS, INC. and  
ALTHON ENTERPRISES, INC.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE HONORABLE MARVIN KATZ

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United States Court of Appeals  
For The Federal Circuit

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### CERTIFICATE OF INTEREST

Pursuant to Rule 47.4 of the Rules of Practice before the United States Court of Appeals for the Federal Circuit, counsel for Appellees, Westview Instruments, Inc. and Althon Enterprises, Inc. certify the following:

1. The full name of every party represented by the below-identified counsel is:

Westview Instruments, Inc., and  
Althon Enterprises, Inc.

2. Neither Westview Instruments, Inc. nor Althon Enterprises, Inc. has a parent company, subsidiary or affiliate that has issued shares to the public.

3. The names of all law firms and the partners and associates that appeared for Westview Instruments, Inc. and Althon Enterprises, Inc. in the trial court are:

#### Westview Instruments, Inc.

Frank H. Griffin, III	John C. Dorfman	Jack C. Goldstein
Peter A. Vogt	Patrick J. Hagan	Terry D. Morgan
Gollatz, Griffin, Ewing	Dann, Dorfman,	Arnold, White
& McCarthy	Herrell & Skillman	& Durkee

#### Althon Enterprises

Frank H. Griffin, III	Peter A. Dunn
Peter A. Vogt	Victoria F. Blum
Gollatz, Griffin, Ewing	Dunn, Haase, Sullivan, Mallon,
& McCarthy	Cherner & Broadt

4. The names of all law firms and the partners and associates that are expected to appear in this Court on behalf of Westview Instruments, Inc. and Althon Enterprises, Inc. are:

Westview Instruments, Inc.

Frank H. Griffin, III  
Peter A. Vogt  
Gollatz, Griffin, Ewing & McCarthy

Althon Enterprises

Frank H. Griffin, III  
Peter A. Vogt  
Gollatz, Griffin, Ewing & McCarthy



### STATEMENT OF RELATED CASES

1. No other appeal in or from the same civil action or proceeding in the lower courts or body was previously before this or any other appellate court under the same or similar title.

2. The following cases pending before courts other than this Court may be affected by this Court's decision:

a. Herbert Markman and Positek, Inc. v. Core Image Systems, Inc., and D & J Cleaners, Inc., in the United States District Court for the District of New Jersey, C.A. No. 91-1545 (AET); and

b. Herbert Markman and Dry Cleaning Computer Systems, Inc. v. J & H Systems, Inc. and Imperial Drycleaners, Inc., in the United States District Court for the Western District of Pennsylvania, C.A. No. 91-0169.

STATEMENT OF JURISDICTION

1. The statutory basis for jurisdiction of the trial court is 28 U.S.C. § 1338(a).

2. The statutory basis for jurisdiction of this court is 28 U.S.C. § 1295(a)(1).

STATEMENT CONCERNING ATTORNEYS' FEES

There is no claim for attorneys' fees being made in  
this brief.

### COUNTER-STATEMENT OF THE ISSUE

1. Was not the district court correct in granting Westview's motion under Rule 50 of the Federal Rules of Civil Procedure to direct a verdict in its favor where there was no dispute about any material fact and Westview was entitled to judgment as a matter of law?

### COUNTER-STATEMENT OF THE CASE

#### A. Nature of the Case and Procedural History

This is an appeal from an order of the United States District Court for the Eastern District of Pennsylvania entering judgment in favor of defendants-appellees, Westview Instruments, Inc. ("Westview") and Althon Enterprises, Inc. ("Althon") and against plaintiffs-appellants Herbert Markman ("Markman") and Positek, Inc. ("Positek"). The judgment was entered by the Honorable Marvin J. Katz after he granted Westview's motion for a directed verdict. The trial court granted the motion for directed verdict because it found that, as a matter of law, the proper construction of the plaintiffs' patent claims required numerous elements and functions that the accused system undisputedly did not possess.

Markman is the inventor and owner of a patent for an inventory control and reporting system. (A 1014) Markman's original patent, United States Patent No. 4,550,246 was issued on October 29, 1985. (A 1571) On September 12, 1989, Markman was issued United States Reissue Patent No. 33,054 ("the '054 patent" or "the patent-in-suit"). (A 1014) The patent-in-suit is

discussed in more detail below. Positek, Inc. is the licensee of the '054 patent in the drycleaning industry. (A 873-74)

Westview is a small manufacturer of specialty electronic devices, such as the accused system -- a control and reporting system that it manufactures and sells under the tradenames DATAMARK and DATASCAN for use in the drycleaning business. (A 54) Althon owns and operates two laundromat/drycleaning sites in Delaware County, Pennsylvania. In or about January, 1989, Althon acquired a DATAMARK device, manufactured and sold by Westview, for use in one of its drycleaning shops.

Plaintiffs instituted the present suit on February 12, 1991 against Westview and Althon. Their Complaint claimed that Westview has manufactured and sold, and Althon has used, control and reporting systems that infringe claims 1, 10 and 14 of the '054 patent. Westview filed an Answer and Counterclaim, in which it denied that it had ever infringed Markman's patent, asserted that the patent was invalid and sought a declaratory judgment in its favor on these two issues. (A 54-60)

Before trial, Westview moved for summary judgment on the grounds that its control and reporting system was fundamentally different from the patent-in-suit and, consequently, did not infringe the '054 patent. Specifically, Westview argued that its system did not store information about individual articles of clothing in system memory and did not tag or track individual articles through the drycleaning process. By

Order dated September 18, 1991, the Court denied Westview's Motion for Summary Judgment. Westview moved for Reconsideration of its Motion. By Order dated September 20, 1991, the Court denied Westview's Motion for Reconsideration, stating "There is a genuine issue of material fact as to whether defendant's product stores in memory individual articles." (A 613)

Westview also moved for a separate trial on the infringement issue because a verdict for Westview on its non-infringement defense would obviate the need to decide the issue of the patent's validity. The Court initially denied Westview's motion for a separate trial on the infringement issue, but reconsidered and granted the motion on September 27, 1991. (A 858-63)

At trial, plaintiff presented the testimony of four witnesses. John Mikula, an expert on bar code technology, testified about the operation of Westview's system. (A 703-41) Donald Pfingsler, an accountant, testified briefly about his qualifications as an expert. (A 864-70) Plaintiff Markman testified about the patent. (A 870-910) The fourth witness, Eugene Chovanes, a patent lawyer, testified about the meaning of the claim language. (A 741-852) The court allowed Mr. Chovanes to testify despite Westview's objection that claim interpretation was a matter of law about which no expert testimony was needed. (A 763)

At the close of the plaintiffs' case on the infringement issue, Westview moved for a directed verdict. (A

910) The district court deferred ruling on the motion. (A 910) Westview then presented the testimony of James Jenkins, the president of Westview, who testified about the capabilities and operation of the accused system. (A 911-35) After Mr. Jenkins testified, Westview rested on the infringement issue.

Subsequently, the jury returned inconsistent answers to general interrogatories. The jury's answers to interrogatories indicated that defendants had infringed independent claim 1 and dependent claim 10 of the patent but had not infringed independent claim 14. (A 650) It is undisputed that claim 14 is broader than claim 1. (Plaintiffs' Brief at 18, n.9)

After the jury returned its inconsistent findings, the Court heard argument on Westview's motion for a directed verdict. On September 30, 1991, the Court granted Westview's motion and issued a detailed opinion in which it explained why Westview was entitled to a directed verdict. (A 1-9) The opinion held that claim construction was a matter of law for the court and that plaintiffs' artificial interpretation of several key words did not create a material issue of fact. Since there was no factual dispute about the capabilities of the accused device, the infringement issue hinged solely on the construction of the claim. The district court correctly construed the language of claim 1 to require a system that: 1) can monitor and report upon the location of articles of clothing; 2) can generate at least one report that reconciles the invoice number against the descriptions of articles of clothing; and 3) has at least one

optical scanner connected to the data processor operable to detect bar codes on all articles of clothing that pass a predetermined, or fixed, station. (A 1-9) Since the accused system does not have any of these capabilities, the district court directed a verdict in favor of Westview and Althon. (A 1-9)

On October 1, 1991, the district court entered judgment in favor of defendants Westview and Althon and against plaintiffs Markman and Positek. This appeal followed.

B. Counter-Statement of Facts

1. Westview's DATAMARK/DATASCAN System

As demonstrated at trial and described by the court in its opinion, Westview's system is nothing more than "a rudimentary invoice printer, like a cash register." (Opinion at 7; A 9)

The accused system consists of two devices -- the DATAMARK and the DATASCAN. (A 1058-1094; A 1587-1602) The DATAMARK is a single unit, which contains a keyboard, electronic display, microprocessor and printer capable of printing a bar coded customer invoice. (A 1058-95; A 714-22) The DATASCAN is a portable unit consisting of a bar code reader and a microprocessor. (A 714-15; A 722-29)

The DATAMARK is used to print bar coded invoices that contain information about the customer, the clothes to be cleaned, and charges for the cleaning. (A 1587-1602) Although the DATAMARK stores some invoice information in microprocessor



memory, the stored information does not include article descriptions. (A 922)

The DATASCAN is used to read bar codes on all invoices at every location in the store. (A 918) First, the invoice list is transferred from the DATAMARK to the DATASCAN. (A 913) Second, the portable DATASCAN is carried throughout the store and used to read all invoices located anywhere in the store. (A 918) The DATASCAN will then report any difference between the invoice list it has received from the DATAMARK and the list of invoices that it has actually read, thereby identifying any extra or missing invoices. (A 913)

Although DATAMARK can detect extra or missing invoices, it cannot localize where those additions or deletions occurred, because DATASCAN is portable and does not operate at a fixed, predetermined station. (A 918) (Nor, logically, is there any need to localize extra or missing invoices.) Although the accused system can compute the inventory cash total, it has no ability to generate a report in which the article descriptions and the invoice numbers are reconcilable against one another. (A 912) In fact, the only document that the Westview system prints that contains article descriptions is the invoice itself. (A 920-921) The accused system does not retain in memory article descriptions so it cannot track the individual articles of clothing that constitute each invoice. To do so, the DATAMARK would also have to print individual bar coded tags for attachment to articles of clothing. It does not. (A 931) The DATAMARK

prints only bar coded invoices. Similarly, the DATAMARK stores the invoice numbers in memory but does not store descriptions of individual articles of clothing. (A 922) Since DATAMARK does not tag individual articles or store information about them, it can not detect deletions or additions to clothing inventory as the clothes pass through the drycleaning process. (A 918)

## 2. The Patent-in-Suit

The patent-in-suit discloses and claims an inventory control and reporting system, primarily for use in drycleaning stores. (A 1014-22) The system enables the drycleaner to identify, calculate and process costs of laundry articles to be cleaned, to print bar coded records and tags for attachment to the laundry articles, to scan bar coded tags on articles so as to monitor their location, and to generate reports based upon the information contained in the records and obtained by the scanner or scanners. (A 1014-22)

### a. Prosecution History

Markman's original application for his patent was filed on April 13, 1984 and rejected by the patent examiner, on August 9, 1984, for obviousness. (A 1571; 1655-56) The patent examiner concluded that "It would be obvious to employ these concepts with the prior art inventory systems." (A 1656) In support of the initial rejection, the patent examiner stated that Markman's patent was obvious in light of U.S. Patent 4,264,396-Stewart (which discussed a dot matrix printer for the bar code) and the patents mentioned in the specifications -- Patent

3,876,075-Wesner; 3,478,316-Block, et al.; and 4,340,810-Glass.  
(A 1656) As summarized by Markman's attorney, Stephen Gribok, in his remarks in support of the Amended Patent, "Wesner teaches a means of keeping a running inventory total, Block teaches use of scannable tags for laundry items and Glass teaches scannable tags for general warehouse use." (A 1665-1666)

In order to overcome the rejection and distinguish his claims over the prior art, Markman submitted amended claims, as well as remarks in support of those amended claims. The patent, as amended by Markman, was issued by the United States Patent Office on October 29, 1985. (A 1014-22) The amendments contained limiting language that clearly distinguishes the patent from Westview's system. As can be seen, the amendments and the remarks are illustrative of the meaning of certain terms that are "in dispute" in the current case. Amended claim 1, which was granted by the patent examiner, reads as follows. (Language deleted from the original claim 1 is in brackets and language added to the original claim 1 is underlined.)

1. An inventory control and reporting system, comprising:

a data input device for manual operation by an attendant, the input device having switch means operable to encode information relating to sequential transactions, each of the transactions having articles associated therewith, said information including transaction identity and descriptions of each of said [a plurality of] articles associated with the transactions [a transaction];

a data processor including memory operable to record said information and means to maintain an inventory total, said data

processor having means to associate sequential transactions with unique sequential indicia and to generate at least one report of said total and said transactions, the unique sequential indicia and the descriptions of articles in the sequential transactions being reconcilable against one another; [and,]

a dot matrix printer operable under control of the data processor to generate a written record of the indicia associated with sequential transactions, the written record including [comprising a plurality of] optically-detectable bar codes having a series of contrasting spaced bands, the bar codes being printed only in coincidence with each said transaction and at least part of the written record bearing a portion to be attached to [directly associated with] said articles; and,

at least one optical scanner connected to the data processor and operable to detect said bar codes on all articles passing a predetermined station,

whereby said system can detect and localize spurious additions to inventory as well as spurious deletions therefrom.

(A 1661-62)

Besides the previously cited claim 1, the patent as issued contained the following dependent claim 10:

The system of claim 1, wherein the input device is a keyboard having alpha-numeric keys, and also having keys specific to a plurality of common attributes of the articles and common optional attributes of the sequential transactions, said common attributes being recorded using single key strokes.

(A 1022)

On May 8, 1987, Max Business Systems, Inc. filed a Complaint seeking a declaratory judgment that Markman's patent

was invalid. (A 903; A 1763-69) On August 28, 1987, Markman applied for a reissue patent, seeking to add two new claims. (A 1700-1702) In his application for the reissue patent, Markman claimed that his original patent was invalid because he had claimed less than he had a right to claim. (A 1733-1734)

On March 18, 1988, the patent examiner rejected all of Markman's claims on the ground that his invention was known or used by others before Markman invented it. (A 2292-93) On September 12, 1989, upon reconsideration, the patent examiner issued the '054 patent, which retained all of the original claims and contained two additional claims, 14 and 15. (A 2329; A 1014-22; A 895-96) The two new claims were broader than the claims of the original patent.

Claim 14 of the '054 patent stated:

An inventory control and reporting system, comprising:

a data input device having switch means for encoding information related to sequential transactions, each of the transactions having articles associated therewith, said information including transaction identity data and data relating to the transactions;

a data processor including memory operable for recording said information, means for generating an inventory report and means for associating sequential transactions with unique indicia sequentially assigned to the transactions and for generating at least one report of said transactions, the unique indicia and the data relating to the transactions being reconcilable against one another;

a printer operable under control of the data processor to generate a written record for each of the sequential transactions, the

written record including optically-detectable bar codes printed only in substantial coincidence with each said transaction and at least part of the written record bearing a portion to be attached to said articles; and,

at least one optical scanner for data communication with the data processor and operable to detect said bar codes on all articles passing a predetermined station.

(A 1022)

At trial and now in this appeal, plaintiffs try to parse and distort the plain meaning of claim 1 of the patent so as to make it read on Westview's system. Plaintiffs also try to disguise the fact that the patent-in-suit describes a system that is fundamentally different from the accused system in both function and elements. An examination of the purpose of the invention defined by the patent-in-suit and the way in which it accomplishes that purpose demonstrates the fallaciousness of plaintiffs' current claim interpretation.

b. The Purpose of the Invention Defined by the Patent-in-Suit

The invention defined in the patent-in-suit was designed to solve a problem particularly prevalent in the drycleaning business. Markman's patent attorney described this problem in his remarks to the patent examiner, "As described in the specification, some basic difficulties with retail drycleaning establishments relate to the fact that attendants sometimes process undocumented articles through the system and pocket the proceeds. Another difficulty is that the loss, misplacement or separation in process of even a single article of



even relatively minor value will have a major impact on the customer's estimation of the quality of the establishment." (A 1666-67)

In order to prevent the attendant from "processing undocumented articles," and in order to identify and locate lost, misplaced or separated articles, Markman's system, as defined by the '054 patent, tracks articles of clothing through the drycleaning process. There is no dispute that this is a function that the accused device can not perform.

Thus, as described in the patent specifications, Markman's invention relates to "inventory control devices capable of monitoring and reporting upon the status, location and throughput of inventory in an establishment." (A 1017, col 1, ln 12-15) The last paragraph of claim 1 explains that "said system can detect and localize spurious additions to inventory as well as spurious deletions therefrom." (A 1022, col 11, ln 9-11) Finally, the specifications summarize the function of the invention, stating that "the progress of articles through the laundry and drycleaning system can be completely monitored." (A 1017, col 2, ln 55-56)

Hence, it is clear from the specifications and the claim language that the system described by claim 1 must have the ability to track individual articles of clothing through the drycleaning process, to detect and localize missing and additional articles of clothing in the drycleaning process and to

generate reports about the status and location of the individual articles of clothing.

Now that it fits their purpose to try to expand the meaning of the patent-in-suit, the plaintiffs deny that its purpose is to track articles of clothing. Their brief states "the court incorrectly interpreted the patent-in-suit as requiring the system to 'track' articles of clothing, which are individually assigned bar codes, through the drycleaning process ... 'tracking' is not required." (Plaintiffs' Brief at 23) This assertion is flatly contradicted by Markman's application for the '054 patent where he made the following comments about his claims:

"The limitations which render the claims unnecessarily narrow over all known prior art, are:

1. Tracking of individual articles.

It may be argued that the claims are limited to a system that tracks individual articles such as individual pieces of clothing brought by a single consumer to a drycleaning establishment or the like . . . The claim language recites entry of "descriptions of each of said articles associated with the transactions." This passage is more limited than I had a right to claim because, although individual articles, e.g. a pair of pants, could be accounted for by individual marking, scanning and reconciliation in reports, the grouping of such articles into sets for tracking is reasonably disclosed as forming part of the invention and is allowable over the prior art." (A 1734-35)

Although Markman may argue about whether the patent-in-suit defines a system that tracks individual articles or sets of



articles, there is no doubt that the patent-in-suit defines a system that tracks articles, either individually or collectively.

c. Plaintiffs' Distortion of the Claim Language

As discussed previously, Westview's system does not identify missing or extra articles, does not track articles through the drycleaning process, and does not generate reports about articles. Therefore, plaintiffs have tried to distort the meaning of the claim language to encompass a system, such as Westview's, that prints invoices and identifies missing and extra invoices. To accomplish this legerdemain, plaintiffs strain and twist the definitions of several different key words in the claim language so that all of them mean "invoices." Plaintiffs now contend that the "tag" attached to the articles is an invoice. (A 771 and Plaintiffs' Brief at 45) They redefine the "report" that reconciles article descriptions against invoice numbers so that it too is an invoice. (A 768-69) Finally, they argue that spurious additions and deletions to "inventory" are spurious deletions and additions to invoices. (A 772 and Plaintiffs' Brief at 15)

The contention that the detection of spurious additions and deletions to inventory means the detection of extra and missing invoices is particularly absurd when viewed in light of the explanation of Markman's invention contained in the remarks submitted by Markman's patent attorney in support of the amended patent:

"Unlike the usual system in which apparatus generates non-unique indicia (e.g., Stewart's

price indicia) and/or indicia that is not produced concurrently with the commencement of a transaction (e.g., pre-printed tags), applicant's system is operable to keep a running reconcilable inventory total by adding input articles and subtracting output articles, and also protects against the possibility of undocumented or spuriously-documented articles entering the system." (emphasis in the original) (A 1666)

The remarks also explain that in claim 1:

"Means are also provided for reconciling the very same unique and concurrently-generated indicia at later points during processing whereby the entry or exit of inventory articles in irregular ways can be localized." (A 1666)

These remarks show clearly and unambiguously that "inventory" means articles of clothing and not invoices. Moreover, the following phrases, all of which appear in the patent specifications, further demonstrate that the word "inventory," as used in the claim language, encompasses articles of clothing:

"[a] basic function of inventory control is the counting of incoming and outgoing materials" (A 1017, col 1, ln 19-20)

"the identity of specific articles must be monitored, making inventory control somewhat more complicated" (A 1017, col 1, ln 21-23)

"inventory control in connection with a laundry or retail establishment is assisted by use of automatically-scannable tags attached to articles of clothing." (A 1017, col 1, ln 66-68)

"Every transaction is recorded, including identification of the articles placed in inventory." (A 1019, col 5, ln 8-10)

"The best inventory control and management information reporting system has the ability to determine and

report the current location of any given article in inventory." (A 1019, col 5, ln 14-17)

"logging of inventory articles" (A 1019, col 5, ln 22)

"providing a mark for attachment to individual articles in inventory". (A 1019, col 6, ln 53-59)

"a problem which appears to occur randomly in the inventory (e.g., damage to garments)" (A 1019, col 5, ln 59)

"incoming articles to be placed in inventory are accumulated over a counter" (A 1019, col 6, ln 8)

"[i]ndividual article tags may be attached to items in inventory" (A 1020, col 8, ln 9-10)

Common sense also tells us that the meaning of "inventory" in the phrase "detect and localize spurious additions to inventory as well as spurious deletions therefrom," must be "clothing" and not "dollars" or "invoices." First, it makes no sense to "localize" dollars or invoices since dollars do not travel through the plant and the location of invoices is irrelevant. Location is only relevant to clothes, since they travel through different parts of the plant where they can be lost, stolen or damaged. Second, "spurious additions" and "spurious deletions" must also relate to articles of clothing because it defies logic to expect that dollars would be spuriously added to drycleaners' inventory.

Since Westview's system is not intended to track articles of clothing through the drycleaning process or localize and detect additions and deletions to the article inventory, it is not surprising that it does not include some of the key elements of the patent-in-suit as defined by certain key phrases

in claim 1. Plaintiffs' litigation-driven strategy is to redefine the meaning of those key phrases so that they read on Westview's invoice control and reporting system.

For the Court's convenience, defendants have prepared the ensuing chart, which sets forth key portions of the claim language and compares the comments contained in the specifications and file wrapper that explain this claim language with the interpretation of this language that the plaintiffs are currently suggesting:

Relevant Portions  
of the Claim  
Language

"A data processor including memory operable to record said information and means to maintain an inventory total, said data processor having means to associate sequential transactions with unique sequential indicia and to generate at least one report of said total and said transactions, the unique sequential indicia and the descriptions of articles in the sequential transactions being reconcilable against one another;"  
(A 1021, col 10, ln 56-64)

Comments in  
Specifications or  
File Wrapper  
Relating to Claim  
Language

"Article identification, customer identification and descriptions needed for generation of cost and pricing reports are entered and the articles to be cleaned are associated with a unique bar code indicia for later automatic or semiautomatic optical scanning and data input, whereby the progress of articles through the laundry and drycleaning system can be completely monitored." (A 1017, col 2, ln 50-57)

"Applicant's system is operable to keep a running reconcilable inventory total by adding input articles and subtracting output articles." (A 1666)

Plaintiffs'  
Current  
Interpretation of  
Claim Language

A system that prints an invoice with article descriptions where the article descriptions are stored in memory only until the invoice is totalled and printed.  
(Plaintiffs' Brief at 28-31) An inventory total is a total of dollar inventory even though no total of article inventory is maintained.  
(Plaintiffs' Brief at 22 and 37) An invoice is a report that reconciles the unique sequential indicia and the article descriptions.  
(Plaintiffs' Brief at 30)

Relevant Portions  
of the Claim  
Language

Comments in  
Specifications or  
File Wrapper  
Relating to Claim  
Language

Plaintiffs'  
Current  
Interpretation of  
Claim Language

"A dot matrix printer operable under control of the data processor to generate a written record of the indicia associated with sequential transactions, the written record including optically-detectable bar codes having a series of contrasting spaced bands, . . . at least part of the written record bearing a portion to be attached to said articles;"  
(A 1021-22)

"the processor and printer producing sequential multiple part bar code records and tags for attachment to the laundry articles."  
(A 1014)

A bar coded invoice that is attached to a plastic bag covering a group of clothes after they have been cleaned is the portion of the written record attached to the articles. (A771 and Plaintiffs' Brief at 45)

Relevant Portions  
of the Claim  
Language

Comments in  
Specifications or  
File Wrapper  
Relating to Claim  
Language

Plaintiffs'  
Current  
Interpretation of  
Claim Language

"At least one optical scanner connected to the data processor and operable to detect said bar codes on all articles passing a predetermined station,"  
(A 1022)

"The bar code tags are attached to articles of clothing and are used with scanning apparatus to facilitate generation of reports according to various management needs."  
(A 1014)

"The attendant cannot add or subtract any article from inventory without that article being reconcilable at at least one optical scanning station."  
(A 1668)

A portable bar code reader that reads bar coded invoices (whether or not they are associated with the clothes) anywhere in a drycleaning establishment is an optical scanner connected to a data processor and operable to detect said bar codes on all articles passing a predetermined station. (A771-72 and Plaintiffs' Brief at 38-39)

Relevant Portions  
of the Claim  
Language

"Whereby said system can detect and localize spurious additions to inventory as well as spurious deletions therefrom."  
(A 1022)

Comments in  
Specifications or  
File Wrapper  
Relating to Claim  
Language

"an optical scanning apparatus inputs data to reconcile the inventory with the expected inventory. Any loss of articles or errors in entering data can be immediately reported, before the physical association of articles from a given customer is lost." (A 1021, col 9, ln 57-61)

"Applicant's system ... protects against the possibility of undocumented or spuriously-documented articles entering the system." (A 1666)

"Means are also provided for reconciling the very same unique and concurrently generated indicia at later points during processing whereby the entry or exit of inventory articles in irregular ways can be localized."  
(A 1666)

Plaintiffs'  
Current  
Interpretation of  
Claim Language

A system that does not localize anything and cannot detect deletions or additions of articles of clothing is a system that can detect and localize spurious additions and deletions to inventory because it can detect missing and extra invoices. (A 772 and Plaintiffs' Brief at 15)



Plaintiffs' current interpretation of the patent-in-suit is directly at odds with any reasonable interpretation of claim 1 that can be gleaned from the specifications, prosecution history and patent itself. Besides the fundamental difference discussed earlier between tracking clothing and detecting missing and extra invoices, there are other major flaws in plaintiffs' current claim interpretation.

Plaintiffs claim that the invoice is not only the bar coded tag attached to articles but also the report that reconciles the article descriptions with the invoice number. Yet, the specifications make clear that the invoice, tags and the report are each separate documents. The specifications distinguish between tags and reports, stating: "the bar code tags are attached to articles of clothing and are used with the scanning apparatus to facilitate generation of reports according to various management needs." (A 1014)

The patent-in-suit also refers to "bar code records and tags" (A 1014) thereby clearly distinguishing between tags and invoices. Common sense dictates that an invoice may be part of a record but is not a tag or a report. Additionally, Figure 2 of the specifications (A 1015) clearly shows a multiple part record that includes an invoice (numbered 46 and referred to in the specifications as "an establishment ticket copy" at A 1020, col 7, ln 44-45) and detachable tags (numbered 48 and referred to in the specifications as "article tags" at A 1020, col 7, ln 46). Moreover, Markman admitted at trial that his system distinguished

between tickets, reports and tags. (A 889) Finally, the specifications state that the optical scanning station is used to reconcile inventory articles. (A 1021, col 9, ln 57-59) If the only reconciliation of articles involved checking them against the list on the invoice, the optical scanners would have no place in the reconciliation process.

Plaintiffs contend that the DATASCAN, Westview's portable bar code reader, operates at a predetermined station. Of course, operating a portable device at a predetermined station defeats the entire purpose of the device. Plaintiffs' brief tries to maneuver around this obvious difficulty by engaging in the following doubletalk: "The unchallenged testimony presented at trial was that the 'predetermined station' is any point along the drycleaning cycle as selected by the user of the infringing system to define the borderline at which inventory is to be checked." (Plaintiffs' Brief at 38-39) In fact, the testimony was that the user of DATASCAN carried it to the different invoices and read them where they were found. (A 918) Furthermore, the DATASCAN is not connected to the DATAMARK when it is used to scan bar codes; yet, claim 1 requires that the scanner be connected to the data processor.

Plaintiffs claim that Westview's system has memory operable to record article descriptions and means to maintain an inventory total. In support of their argument, they rely on Westview's promotional literature, which states that before the ticket is printed, certain data (garment, color, fabric, and

price) is "saved in DATAMARK memory and printed on the laundry/drycleaning ticket." (A 1067; Plaintiffs' Brief at 31)

But, plaintiffs fail to mention that article-specific information is kept in DATAMARK memory only until the ticket is totalled and printed. Once the ticket is finished printing, the DATAMARK has no memory of individual article descriptions. (A 921-22) The DATAMARK memory is not sufficient to generate any reports including article descriptions, because that information is not retained in memory for any period of time (beyond being kept temporarily so a ticket can be printed).

#### ARGUMENT

##### SUMMARY OF ARGUMENT

This patent infringement case is simple and straightforward. The district court correctly found as a matter of law that the accused system and the system defined by the patent-in-suit were as different as night and day. The district court properly granted Westview's motion for a directed verdict because no reasonable jury could find that defendants infringed claims 1 and 10. The jury's total confusion about this case is evidenced by its inconsistent findings - the jury found that defendants infringed claims 1 and 10 of the patent but did not infringe claim 14. As plaintiffs concede, however, claim 14 is broader than claim 1. The finding makes no sense. Indeed, the finding is akin to a finding that a person has been to Philadelphia but did not set foot in Pennsylvania.

Plaintiffs' attempts to distort Markman's patent to read on the accused system is worthy of a contortionist but fails as a matter of law. Westview's system is a control and reporting system for invoices only. The patent-in-suit defines a system that controls and reports on articles of clothing. This case turns on that distinction, as well as the fact that invoices are not articles of clothing, nor are they tags, nor are they reports. No expert testimony is needed to distinguish between invoices and articles of clothing, tags and reports. The specifications, claim language and prosecution history all conclusively demonstrate that the patent-in-suit defines a system that prints bar code tags for attachment to articles of clothing; tracks articles of clothing; stores information about clothing articles in memory so that it can generate reports that reconcile invoice numbers against article descriptions; and detects and localizes spurious additions and deletions to the articles of clothing. Westview's system does not have the ability to do any of these functions. The plaintiffs' attempted perversion of the patent-in-suit was properly rejected by the court below.

I. THE DISTRICT COURT CORRECTLY HELD THAT DEFENDANTS WERE ENTITLED TO A DIRECTED VERDICT.

The district court correctly applied and performed the two-step analysis used to determine patent infringement claims. In doing so, the trial court came to the only possible correct conclusion -- Westview's system does not infringe the patent-in-suit. Although the district court allowed the jury to make a finding on the legal question of the construction of the claim

language, the court properly rejected the jury's finding of infringement on claims 1 and 10 as unsustainable as a matter of law.

- A. The District Court Correctly Rejected the Testimony of Plaintiffs' Expert Concerning Claim Interpretation Because Claim Construction Is an Issue of Law That Does Not Require Expert Testimony to Resolve.
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The first step in resolving a patent infringement dispute is to interpret or construe the asserted patent claims. The interpretation or construction of claims is an issue of law. Intellicall, Inc. v. Phonometrics, Inc., 21 USPQ2d 1383, 1386 (Fed. Cir. 1992); Mannesmann Demag Corp. v. Engineered Metal Prods. Co., 793 F.2d 1279, 1282, 230 USPQ 45, 46 (Fed. Cir. 1986). In construing patent claims, the terms of a claim are generally given their ordinary and accustomed meaning. Envirotech Corp. v. Al George, Inc., 730 F.2d 753, 754, 221 USPQ 473, 477 (Fed. Cir. 1984). A patent claim is construed with reference to the specifications and drawings that make up the patent, the prosecution history or file wrapper of the patent and the other patent claims. Lemelson v. United States, 752 F.2d 1538, 1549, 224 USPQ 526, 532 (Fed. Cir. 1985). Disagreement over the meaning of a term within a claim does not necessarily create a genuine issue of material fact. Becton Dickinson & Co. v. C.R. Bard, Inc., 922 F.2d 792, 797, 17 USPQ2d 1097, 1100 (Fed. Cir. 1990).

As the court said in Intellicall, "where a disputed term would be understood to have its ordinary meaning by one of

skill in the art from the patent and its history, extrinsic evidence that the inventor may have subjectively intended a different meaning does not preclude summary judgment. In such instances, there is no genuine dispute respecting a material fact." Intellicall, 21 USPQ at 1386.

Where the inventor or his attorney testify at trial that terms in a patent have a different meaning than their ordinary one, courts have scrutinized this testimony carefully and often rejected it totally. See Intellicall, 21 USPQ2d at 1386-87 ("The litigation-induced pronouncements of [the inventor] coming nearly at the end of the term of his patent, have no effect on what the words of that document in fact do convey and have conveyed during its terms to the public"); Senmed, Inc. v. Richard-Allan Medical Indus., 888 F.2d 815, 819, n.8, 12 USPQ2d 1508, 1512, n.8 (Fed. Cir. 1989), reh'g denied, 1989 U.S. App. LEXIS 17023 (Fed. Cir. 1989), reh'g denied en banc, 1990 U.S. App. LEXIS 107 (Fed. Cir. 1990) ("self-serving, post hoc opinion testimony on the legal question of whether [claim language] should have a different meaning was of little if any significance . . . . Lastly, an inventor may not be heard to proffer an interpretation that would alter the undisputed record (claim, specification, prosecution history) and treat the claim as a 'nose of wax'").

Not only did the court have the power to disregard the artificial interpretations of the patent language proffered by the plaintiffs, and apparently accepted by the jury, it had the

duty to insure that the patent claims were correctly interpreted. The Senmed opinion puts it best: "That a jury has answered a legal question may not in itself require reversal. Of a certainty, however, that circumstance cannot serve to relieve that trial judge or this court of the judicial duty to insure that the law is correctly applied." 888 F.2d at 818, 12 USPQ2d at 1511.

Plaintiffs tried using expert testimony to create a dispute about the claim language. This testimony apparently was successful in flummoxing the jury, probably because Westview did not offer any expert testimony to counter it.<sup>1</sup> Eugene Chovanes, the plaintiffs' "patent expert" testified, over Westview's objection, about the meaning of certain words and phrases contained in the patent claims. The district court correctly rejected Mr. Chovanes' testimony because he defined terms in a way that was contrary to their ordinary and customary meaning. Specifically, Mr. Chovanes testified that "report" means "invoice;" "attached to said articles" means "attached to a plastic bag that covers a batch of the articles;" and "inventory" means "cash" or "invoices" but not "articles of clothing." Patent law is clear that "self-serving, post hoc opinion testimony" about claim interpretations has little, if any,

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<sup>1</sup> One reason that Westview did not offer expert testimony on this issue was its belief that the claim language was unambiguous and that its construction was a matter of law for the court to decide. Another reason was the desire not to spend money needlessly.



significance. Senmed, 888 F.2d at 819, n.8, 12 USPQ2d at 1512, n.8.

Furthermore, the key terms that Mr. Chovanes attempted to interpret, such as "inventory," "report," and "attached to" are common, ordinary words. There was no evidence presented at trial that these terms had a special meaning to those skilled in the art. Nor did the disputed claims involve complex scientific principles so that expert testimony was required.

Although, as the court stated in Senmed, "lawyers may create a 'dispute' about any word," 888 F.2d at 818, 12 USPQ2d at 1511, there was no real dispute here about the meaning of the claim, particularly when viewed in light of the drawings, specifications and prosecution history. The decision whether to allow, and to credit, expert testimony on the issue of claim language is a matter of law within the court's discretion. Seattle Box Co. v. Industrial Crating & Packaging, Inc., 731 F.2d 818, 826, 221 USPQ 568, 573 (Fed. Cir. 1984), appeal after remand, 756 F.2d 1571, 225 USPQ 357 (Fed. Cir. 1985). Moreover, there is no requirement that a party proffer expert testimony on claim language or on application of claim language to accused devices. Moleculon Research Corp. v. CBS Inc., 793 F.2d 1261, 1270, 229 USPQ 805, 822 (Fed. Cir. 1985), cert. denied, 479 U.S. 1030 (1987).

Consequently, the district court did not err when it decided that plaintiffs' expert offered definitions that were "contrary to the ordinary and customary meaning of these terms,



as well as the obvious meaning intended by the patentee, determined from the specifications, the drawings and the file histories of the original patent and the patent-in-suit."

(Opinion at 3; A 5) Nor was the trial court mistaken when it ruled that "[p]laintiffs' technical expert's testimony is based on an artificial interpretation of key words and phrases that runs counter to their ordinary meaning. The patent expert's testimony about the interpretation of the claim is not helpful because that is a legal issue for the court." (Opinion at 4; A 6)

The district court did not shirk its duty to interpret the patent claims. To the contrary, it issued a detailed opinion explaining the correct legal interpretation of independent claim 1 of the patent-in-suit. The district court's opinion held that:

1. Claim 1 related to "inventory control devices capable of monitoring and reporting upon the location of inventory in a dry cleaning and laundry establishment;" (Opinion at 4-5; A 6-7)

2. The invention described by claim 1 could track articles of clothing by using computer memory; (Opinion at 5; A 7)

3. The invention described by claim 1 included a computer with sufficient memory to record information about sequential transactions, including the identity and descriptions of the articles of clothing involved, and which could also generate at least one report of inventory total and transaction

totals in which the invoice number and the descriptions of the articles in the transaction can be reconciled against one another; (Opinion at 5; A 7)

4. Claim 1 defines a system in which the data processor has both the memory and means to maintain an inventory total, where "inventory" means articles of clothes and not just dollars; (Opinion at 5; A 7)

5. The system defined in claim 1 has the ability to detect and localize spurious additions to inventory as well as spurious deletions therefrom, where "inventory" means articles of clothing; (Opinion at 6; A 8)

6. The system defined in claim 1 has at least one optical scanner connected to the data processor operable to detect bar codes on all articles of clothing that pass a predetermined, or fixed station. (Opinion at 6; A 8)

Central to the plaintiffs' argument for reversal of the trial court's judgment is the argument that the word "inventory," as used in the claim, was not properly construed. Although plaintiffs contend that the meaning of "inventory" in the claim language is "invoices" and not "articles of clothing", they do not cite any part of the specifications or file wrapper to support their position. Their failure to do so is not surprising because the specifications and file wrapper clearly refute the plaintiffs' current interpretation of "inventory." See examples cited at pp. 15-16.

The only support that the plaintiffs can muster for their definition of "inventory" as "invoices" is taken from Westview's promotional literature for the accused system and the testimony of Westview's president, James Jenkins, about his invention. In relying on this evidence, plaintiffs miss the point. It is undisputed that, when Westview referred to its inventory control system, it was describing a system that controlled invoices rather than articles of clothing. In fact, this is one of the major distinctions between the patent-in-suit and the accused system. As explained by Mr. Jenkins at trial, drycleaners must keep track of their invoices, their customers' clothing, and the dollars that they receive for processing the clothing. (A 924-25) Any or all of these items can be referred to as inventory. But, it does not matter what is meant by the term "inventory" when it is used by Westview to describe Westview's system. The relevant inquiry is what Markman meant when he used "inventory" in connection with the definition of his invention. The claim language, specifications and prosecution history leave no doubt that he intended it to refer to articles of clothing.

In light of all of the evidence, the court's interpretation of the claim language was not only correct, but the only interpretation that a reasonable person could make.

B. There Is No Factual Dispute About the Capabilities of the Accused System.

The second step in deciding a patent infringement claim is to determine whether the properly interpreted claims encompass the accused device. The issue of whether the properly interpreted claims read on the accused device is a question of fact. Vieau v. Japax, 823 F.2d 1510, 1515, 3 USPQ2d 1094, 1098 (Fed. Cir. 1987). However, where there is no genuine dispute about the capabilities of the accused device then there is no fact issue for the fact-finder to decide. Intellicall, Inc. v. Phonometrics, Inc., 21 USPQ2d 1383, 1386 (Fed. Cir. 1992); Kraus v. Bell Atlantic Corp., 716 F. Supp. 182, 183 (E.D. Pa. 1989). Such was the situation presented by this case.

There was no real dispute among the parties concerning the function of the accused system. Westview's DATAMARK/DATASCAN system was introduced into evidence at trial and its operation was twice demonstrated for the judge and jury. Although before trial, the district court identified the issue of whether the DATAMARK stored article descriptions in memory as a disputed issue of fact, it became apparent at trial that there was no dispute about what information the DATAMARK stored and how long that information was retained. The only dispute between the parties was whether "memory operable to record said information" could be tortured and limited to mean the keeping of article descriptions in a "buffer" only until the invoice was totalled and printed. The trial court correctly concluded that it could not.

Plaintiffs either conceded or never disputed the following facts about the DATAMARK/DATASCAN system:

1. It does not track articles of clothing;
2. It does not generate any report in which the invoice number and the article descriptions are reconcilable against one another, unless the invoice itself is considered a report; (Plaintiffs' Brief at 30)
3. It does not have the memory or means to maintain an inventory total, where "inventory" means "articles of clothing;" (Plaintiffs' brief at 22)
4. It does not have the ability to localize spurious additions or deletions from inventory, regardless of whether "inventory" means "cash," "invoices," or "articles of clothing;" and
5. It does not have the ability to detect spurious additions or deletions from inventory, where "inventory" means "articles of clothing."

It is axiomatic that infringement requires that every limitation of a claim be met either literally or by a substantial equivalent. See e.g., Key Mfg. Group, Inc. v. Microdot, Inc., 925 F.2d 1444, 1449, 17 USPQ2d 1808, 1810 (Fed. Cir. 1991), reh'g denied, 1991 U.S. App. LEXIS 4500 (Fed. Cir. 1991). The burden of proof is on plaintiffs to prove infringement of every element of the claim as properly interpreted. Texas Instruments, Inc. v. International Trade Comm'n, 805 F.2d 1558, 1562, 231 USPQ 833, 834 (Fed. Cir. 1986), reh'g denied en banc, 7 USPQ2d 1414 (Fed.

Cir. 1988). Here, there was no evidence offered by plaintiffs, nor could there have been, that the accused system performed any of the functions described above. Accordingly, the district court reached the only reasonable result -- that Westview's system, as a matter of law, does not infringe the patent-in-suit.

C. Plaintiffs Are Not Entitled to Reversal of the District Court's Judgment Because They Have Not Shown that the Jury's Legal Conclusions Were Supported by the Facts.

In this appeal, plaintiffs-appellants must prove two elements in order to show that they are entitled to reversal of the district court's judgment. First, they must prove that the jury's fact findings were supported by substantial evidence. Second, they must demonstrate that the jury's legal conclusions were supported by those facts. Railroad Dynamics, Inc. v. Stucki Co., 727 F.2d 1506, 1513, 220 USPQ 929, 936 (Fed. Cir. 1984), cert. denied, 469 U.S. 871 (1984). Plaintiffs' brief discusses the first requirement at great length but gives very short shrift to the second requirement.

In this case, there were no disputed facts for the jury to decide. There was no dispute about the claim language, specifications, or prosecution history. There were no technical terms nor words of art having special meaning to those skilled in the art so that expert testimony was necessary. Finally, there was no dispute about the structure and operation of the accused system. The entire controversy turned on the interpretation of the claim language.

Plaintiffs have attacked the district court's claim interpretation on two grounds. First, they argue that the lower court erred when it interpreted the claim to require a system that "stored in its memory for later use information about clothing articles." Second, they argue that the district court was mistaken when it construed the patent language to require a system that tracked individual articles of clothing. Defendants believe that the Court's interpretation of the patent language on these two points is not only correct but also the only reasonable construction supported by the evidence. However, even if the plaintiffs are right on these two points, they have not met their burden of showing infringement of each element of claim 1. Therefore, they still would not be entitled to a reversal of the lower court's judgment. In essence, plaintiffs are quibbling over select phrases in the patent in suit and ignoring the fundamental, obvious differences between the accused system and the invention described in the patent in suit. Upon examination, plaintiffs' arguments are mere pettifoggery.

1. The Patent Defines a System that Generates a Report that Reconciles Invoice Numbers Against Article Descriptions, Not Merely a System That Has Memory Operable to Record.

Plaintiffs contend that the Westview system has memory operable to record article descriptions and means to maintain an inventory total. Their reasoning is that the DATAMARK prints (and therefore records) a ticket that contains article descriptions and also maintains a total of the drycleaner's dollar and invoice inventory. We will not repeat here all of the



references contained in the specifications and file wrapper that conclusively demonstrate that the patent-in-suit meant "inventory" to refer to articles of clothing. However, assuming for the sake of argument only that plaintiffs are right about the meaning of inventory, the plausibility of plaintiffs' argument still relies on the removal of the phrase "memory operable to record said information and means to maintain an inventory total" from its context. The remainder of the paragraph requires the data processor to generate "at least one report of said total and said transactions, the unique sequential indicia and the descriptions of articles in the sequential transactions being reconcilable against one another."

The trial court logically connected the two requirements contained in this paragraph so that the reason that the system had memory operable to record information and means to maintain an inventory total was to enable it to generate a report that included the total and the transactions and which reconciled article descriptions against invoice numbers. To generate the report, the system must maintain the article descriptions in memory. Even if the two requirements can somehow be separated, the fact remains that the Westview system does not generate the type of report required by the patent. Consequently, even if plaintiffs' argument is accepted, they have still failed to make this paragraph of claim 1 read on the accused system.



2. The Accused System Does Not Track Articles of Clothing, Individually or Collectively.

The second trifling argument that plaintiffs advance concerns the tracking of articles of clothing. Plaintiffs complain that the district court construed claim 1 too narrowly by interpreting it to require that bar code tags be attached to each individual article. Markman and Positek now contend that claim 1 allows individual articles or batches of clothes to be encoded.<sup>2</sup> This current argument is inconsistent with the patent language, which specifically requires "part of the written record bearing a portion to be attached to said articles" and "bar codes on all articles passing a predetermined station." Regardless, it does not matter whether the patent requires attachment of tags to individual articles or attachment of tags to batches because the accused system does not print tags and, consequently, does not attach tags to articles of clothing, either individually or collectively.

Moreover, plaintiffs are missing the forest for the trees. The purpose of the article tags is to allow for the tracking of articles through the drycleaning process. The Westview system tracks neither individual articles nor batches of articles through the drycleaning process.

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<sup>2</sup> This position contradicts Markman's deposition testimony where he said that the difference between one of his earlier inventions and the invention defined by the patent-in-suit was that in the earlier invention specific articles were not tracked into the inventory control system as they were in the invention defined by the '054 patent. (A 828)

In order to circumvent the fact that Westview's system does not print article tags, plaintiffs contend that the invoice is the tag attached to the articles. Of course, as discussed earlier, to equate the invoice with the tag is pure nonsense. The distinction between the invoice and the tag is underscored by the fact that the invoice is not attached to the clothes. At most, it is only attached to the plastic bag covering the cleaned clothes. It does not take an expert or expert testimony to understand that an invoice attached to the plastic bag is neither a tag nor is it attached to clothing. More to the point, because the accused system does not print bar coded tags for attachment to clothing, it does not permit the user to detect said bar codes on all articles passing a predetermined station as required by claim 1.

3. Article Tagging and Tracking Is Required by Claim 1, As Well As Claims 5 and 6.

Another red herring advanced by plaintiffs is the argument that the district court improperly interpreted claim 1 to include the elements of claims 5 and 6.

Dependent claims 5 and 6 read as follows:

5. The system of claim 1, wherein the written record has multiple separable parts printed concurrently, including a customer ticket, an establishment ticket and a plurality of article tags [sic tags], at least one of the tickets and tags having a bar code printed thereon, and each tag being detachable from the written record for direct association with at least one of the customer articles.  
(A 1022)
6. The system of claim 1, wherein the data input device is a keyboard and the printer is

operable to generate tags for direct attachment to articles comprising textile material, the articles being pieces of drycleaning. (A 1022)

Plaintiffs argue that claim 1 does not require tags to be attached to clothing but that this requirement is only necessitated by dependent claims 5 and 6, which are alternative embodiments of claim 1. Again, this argument ignores the language of claim 1, which requires "part of the written record bearing a portion to be attached to said articles." (A 1022) Thus, the "direct association" language of claim 5 is actually weaker than the "attached" language of claim 1. Defendants submit that there is no meaningful distinction between "attached" and "direct attachment," the phrases used in claims 1 and 6, respectively. This is not to say that claims 5 and 6 are superfluous. Rather, they define certain elements of claim 1 as specifically applicable to the drycleaning business. After all, the plaintiffs have consistently contended that claim 1 of the patent-in-suit is not limited to an inventory control and reporting system for the drycleaning business. See e.g., Plaintiffs' Brief at 33, n.13.

Thus, claim 5 specifically defines the written record as including "a customer ticket, an establishment ticket and a plurality of article taps [sic tags]" and claim 6 specifically discusses "articles comprising textile material, the articles being pieces of drycleaning."

This explanation is also consistent with the remarks in support of the amended patent submitted by Markman's attorney in which he states:

Further refinements of the invention which are recited in the claims and are likewise missing in the references relate to the mixture of optically-scannable and alpha-numeric indicia, generated at different print speeds, the multi-part nature of the printed media, the reconcilable nature of the system at any of various stations besides the initial receipt or ultimate delivery, and a unique keyboard data entry device that ties the package together. The subject matter in these claims as well as in independent claim 1 relate not only to general purpose inventory control or general purpose totalizing, but also to the specific usefulness of concurrently-generated unique bar code indicia in a laundry and drycleaning establishment, together with the integration of such a system into the pricing, marking and actual article [sic article], processing to improve the entire operation. (A 1670)

This statement shows that claim 1, not just claims 5 and 6, relate to article marking and processing despite what the plaintiffs are now contending. Article marking and article processing necessarily require the printing and attachment of article tags and the tracking of articles through the system. Dependent claims 5 and 6 were merely intended to limit claim 1, which defines a "general purpose inventory control" system, to an inventory control system for use in a drycleaning establishment.

D. The Trial Court Properly Rejected the Jury's Unsustainable Claim Construction.

The plaintiffs argue that the district court improperly rejected the jury's findings in their favor. However, the law is clear that the general deference accorded a jury's factual findings and application of the law to those facts does not preclude the trial court from entering judgment where the

findings are not supported by substantial evidence. As the trial court said in Connell v. Sears, Roebuck & Co., 722 F.2d 1542, 220 USPQ 193 (Fed. Cir. 1983):

Deference due a jury's fact findings in a civil case is not so great, however, as to require acceptance of findings where, as here, those findings are clearly and unquestionably not supported by substantial evidence. To so hold would be to render a trial and the submission of evidence a farce. . . . In sum, the right to trial by jury in a civil case carries with it a number of procedural safeguards insuring the parties and the system against an improper outcome that might result from a posited unruly or 'rogue elephant' jury.

Connell, 722 F.2d at 1546, 220 USPQ at 196-197.

Here, either the jury completely misunderstood the capabilities of the accused system or, as is more likely, applied an incorrect construction of the claim language in determining infringement. Under these circumstances, the district court had the power and the duty to reject the jury's incorrect construction and enter judgment in favor of defendants. In words that could have been written with this case in mind, this Court has said:

We are, of course, fully aware of the principles . . . calling for deference to jury findings supported by substantial evidence and the acceptance of a jury's application of the law when such application is sustainable. As explained, . . . acceptance of the jury's and the district court's application of the law of claim interpretation in this case would result in a patentee's recapturing what was forfeited in obtaining the patent, a result contrary to a fundamental underpinning of patent law. Such acceptance would not be mere "deference"; it

would be blind abdication of our appellate duty to uphold the law.

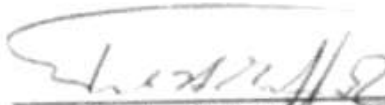
Senmed, 888 F.2d at 818, n.8, 12 USPQ2d at 1511, n.6.

Therefore, the district court was correctly following its duty to uphold the law when it granted Westview's motion for directed verdict.

CONCLUSION

For the foregoing reasons, Appellees Westview Instruments, Inc. and Althon Enterprises, Inc. respectfully request that this Court affirm the order of the court below entering judgment for Westview and Althon.

Respectfully submitted,



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Enterprises, Inc., Appellees

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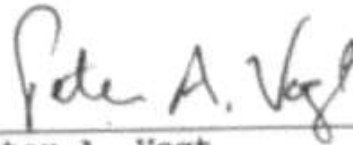
Of Counsel.

Dated: February 18, 1992

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Brief of Appellees, Westview Instruments, Inc. and Althon Enterprises, Inc., were served today upon the attorneys for appellants by first class mail addressed as follows:

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