

## A Trio of Claim Construction Cases

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This year we are covering three claim construction cases from the Federal Circuit—one coming from the Board and the two from district court. Taken together, the cases are a good reminder of the high burden that a party must surmount to contravene long-established, fundamental canons of claim construction.

### ***ABS Global, Inc. v. Cytonome/ST, LLC*, 84 F.4th 1034 (Fed. Cir. 2023) (Reyna, Taranto, Stark)**

Patent challenger ABS appealed a final written decision in an IPR that ABS had initiated on Cytonome/ST's patent. The patent describes a microfluidic device for use in processing particles of interest contained in a sample fluid. The processing involves "hydrodynamic focusing" where a microfluidic assembly uses a sheath fluid to focus a stream of sample fluid.

The Board found that the claims were not unpatentable as anticipated or obvious. The dispositive issue centered on the construction of the term "*a sample stream*" and "*a fluid focusing region configured to focus the sample stream.*" The Board construed "*a sample stream*" to require that there be only a single sample stream from entry of the sample through inspection. The Board found that the primary reference Simonnet did not disclose such a single stream because the relevant figures in Simonnet, which are micrographs of cross-sections of a sample fluid from two experiments, both show a split sample stream with a gap in the middle. Since ABS relied only on Simonnet to show the sample stream, the Board held that Simonnet neither anticipated nor rendered obvious the challenged claims.

ABS argued on appeal that the Board erred in limiting claim 1's "*a sample stream*" to a flow channel's focusing region configured for only a single sample stream. The Federal Circuit agreed. In rejecting the Board's construction, the court focused on two black-letter canons of claim construction.

The court invoked the well-known claim construction canon that, where a patentee acts as its own lexicographer, that definition will usually govern.

First, the court explained that, in open-ended "comprising" claims, like the claim at issue here, "use of 'a' or 'an' before a noun naming an object" requires that the phrase be construed to mean "'one or more' unless the context sufficiently indicates otherwise." The court explained that this is the "general rule," and that an exception "only arises where the language of the claims themselves, the specification, or the prosecution history necessitate a departure from the rule."

Second, the court invoked the well-known claim construction canon that, where a patentee acts as its own lexicographer, that definition will usually govern. Here, the specification unambiguously stated: "[F]or the purposes of the present disclosure, the term 'a' or 'an' entity refers to one or more of that entity. As such, the terms 'a' or 'an', 'one or more' and 'at least one' can be used interchangeably herein." According to the court, that definition reinforced the applicability of the general rule concerning "a" or "an" as referring to "one or more" and compelled the conclusion that "*a sample stream*" means "one or more sample streams."

The court was unpersuaded by the Board's rationale that a plural-allowing scope of "*a sample stream*" would be inconsistent with claim 2's requirement that the focusing fluid be "introduced into the flow channel symmetrically with respect to a centerline of the sample stream." Claim 2's language did not support rejection of the doubly-presumed plural-allowing meaning of "*a sample stream*," the court explained, because claim 2 referred to "*a centerline*," language that was "itself presumptively plural-allowing." The prosecution history also did not support such narrow-

ing. And, finally, there was no showing of “operational impossibility or something comparable that requires rejecting the plural-allowing meaning”—indeed, Simonnet disclosed a split sample stream.

***SSI Techs., LLC v. Dongguan Zhengyang Elect. Mech. LTD*, 59 F.4th 1328 (Fed. Cir. 2023) (Reyna, Bryson, and Cunningham)**

Patent owner SSI sued DZEM on two patents directed to sensors for determining the quality and volume of fluid in a container, such as a fuel tank. The '153 patent describes and claims a system that uses a transducer to generate and detect a soundwave for determining the quality of fluid in a tank. It detects whether a fluid has been diluted “while the measured volume of the fluid decreases.” The '038 patent also relies on a soundwave transducer, but it measures the volume of fluid in a tank. Important here, it claims a “filter” to substantially prohibit bubbles from impacting the measurements. The district court granted DZEM’s motion for summary judgment of non-infringement of both of SSI’s patents while dismissing DZEM’s counterclaims of invalidity. SSI appealed the non-infringement ruling, arguing that the district court erred in construing the “measured volume” term in the '153 patent and the “filter” term in the '038 patent.

The district court construed the “measured volume” term in the '153 patent to require that the dilution determination “actually consider the measured volume of the fluid.” SSI challenged that construction, arguing that the dilution limitation is satisfied so long as the volume of the liquid in the tank is decreasing, irrespective of whether the volume is *actually measured*. Under SSI’s broader construction, the “the measured volume of the fluid” would decrease anytime the vehicle’s engine is actually running.

The Federal Circuit rejected SSI’s broad construction and affirmed the district court’s grant of summary judgment. The court relied on the fundamental canon of claim construction that “[a] claim construction that

gives meaning to all the terms of the claim is preferred over one that does not do so.” Or, put differently, words in a claim should not be rendered superfluous. SSI’s broad construction would have rendered superfluous the term “measured.” Giving effect to the “measured” term was also consistent with the embodiment described in the specification.

The district court construed “filter” in the '038 patent to mean “a porous structure defining openings[] and configured to remove impurities larger than said openings from a liquid or gas passing through the structure.” In effect, the district court, at DZEM’s urging, imposed a size limit on the filter openings such that they be smaller than the impurities sought to be removed. It did so primarily based on an exemplary embodiment from the specification describing a filter where the effective filter size was on the order of 100 microns, which it described as “tiny.” DZEM’s filter, on the other hand, had only four openings that the district court described as “relatively large” and thus did not exclude bubbles “by straining fluid through a porous surface.”

The Federal Circuit held that the district court’s construction was too narrow. The claim recited a “filter” without imposing any restrictions on size or operation. The '038 patent specification likewise contained general and broad references to a “filter” that, in the Federal Circuit’s view, “do not reflect an intent to limit the term ‘filter’ to the disclosed embodiments.” Instead, the “filter need only perform the function” of “substantially prohibit[ing] one or more gas bubbles of the fluid from entering the sensing area.”

The court acknowledged that each described embodiment contained a mesh filter “which has very small openings.” But the court concluded that this was not a valid basis for the district court’s interpretation, citing the axiomatic claim construction canon that “the scope of a claim is not ordinarily limited to preferred embodiments or specific examples in the specification.”

## A Trio of Claim Construction Cases Continued

In light of its reversal on claim construction, the Federal Circuit vacated the district court's grant of summary judgment with respect to the '038 patent and remanded for further proceedings.

### ***AlterWAN, Inc. v. Amazon.com, Inc.*, 63 F.4th 18 (Fed. Cir. 2023) (Lourie, Dyk, Stoll)**

Patent owner AlterWAN sued Amazon on two patents for implementing wide-area networks (WANs) over the internet. The patents deal with two issues—latency due to uncontrolled “hops” between internet nodes during packet transmission and the lack of security for data transmitted over the internet. The patents purport to solve those problems by providing a “private tunnel” transmission path between pairs of customer sites that has low hop-count and a pre-planned high bandwidth.

Relevant here, the parties disputed the construction of the phrase describing the transmission path as being “associated with a reserved, *non-blocking bandwidth*.” The shared patent specification explains that “the quality of service problem that has plagued prior attempts is solved by providing non-blocking bandwidth (bandwidth that will always be available and will always be sufficient).” The accused infringer Amazon's proposed construction of “non-blocking bandwidth” as “bandwidth that will always be available and always be sufficient” mirrored the parenthetical from the specification. AlterWAN's proposed construction added the clause “while the network is operational” to Amazon's construction, arguing that it was necessary because “[t]here is no such thing as a network that can never fail.” The district court adopted Amazon's broader construction, reasoning that patentee AlterWAN had acted as its own lexicographer and that the claim therefore required the non-blocking bandwidth to be available even if the Internet was down. The parties then stipulated to judgment of non-infringement based on that construction and another construction issued by the district court (for


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the term “cooperating service provider”).

The Federal Circuit vacated the stipulated judgment of non-infringement because it did not “provide sufficient detail to allow us to resolve the claim construction issues presented on appeal.” The court further concluded that the district court's construction of “non-blocking bandwidth” was erroneous. That construction, the court explained, “effectively requires a system to provide bandwidth even when the Internet is inoperable,” which “is not a reasonable construction in light of the specification since it requires the impossible.”

Amazon had cited the Federal Circuit's *Chef America* case, which stands for the proposition that courts should not “redraft claims, whether to make them operable or to sustain their validity.” But the court distinguished *Chef America*, explaining that the claim language at issue here “does not unambiguously require bandwidth to be available even when the Internet is inoperable.” Further, the court explained, the statement in the specification upon which the district court's construction was based “must be read in context.” When so read, according to the Federal Circuit, “[t]he specification does not remotely suggest operability when the Internet is unavailable.” On the contrary, “[c]laims that are directed to transmission over the Internet cannot require such transmission when the Internet is not working.” In the end, the Federal Circuit concluded, the guidance in *Chef America* against redrafting claims “does not require us to depart from common sense in claim construction.”

Taken together, *ABS Global*, *SSI Technologies*, and *AlterWAN* serve to remind patent practitioners that they would do well to adhere to well-known, foundational canons of claim construction like respecting a patentee's lexicography, avoiding "impossible" constructions, not reading specification embodiments into claims, and respecting convention in interpreting common words like "a" and "an" when they appear in a claim. There is a high burden in going against such rules and conventions—flout them at your own risk.



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