

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SAP AMERICA, INC.
Petitioner,

v.

VERSATA DEVELOPMENT GROUP, INC.
Patent Owner.

Case CBM2012-00001 (MPT)
Patent 6,553,350

Before SALLY C. MEDLEY, MICHAEL P. TIERNEY, and RAMA G. ELLURU,
Administrative Patent Judges.

TIERNEY, *Administrative Patent Judge.*

DECISION
Institution of Covered Business Method Review
37 C.F.R. § 42.208

I. Introduction

SAP has filed a petition seeking covered business method review of Versata's 6,553,350 ('350) patent pursuant to Section 18 of the Leahy-Smith America Invents Act (AIA)¹. The patent owner, Versata, has filed a patent owner preliminary response (POPR) opposing the institution of the review. Paper No. 29. We have jurisdiction under 35 U.S.C. § 324.

The standard for instituting a covered business method review is set forth in 35 U.S.C. § 324(a), which provides as follows:

THRESHOLD --The Director may not authorize a post-grant review to be instituted unless the Director determines that the information presented in the petition filed under section 321, if such information is not rebutted, would demonstrate that it is more likely than not that at least 1 of the claims challenged in the petition is unpatentable.

SAP challenges claims 17 and 26-29 of the '350 patent as unpatentable for failure to comply with 35 U.S.C. §§ 101, 102, and 112, 1st and 2nd paragraphs.

We grant the petition as SAP has demonstrated that claims 17 and 26-29 are more likely than not unpatentable under 35 U.S.C. §§ 101 and 102. SAP however, has not demonstrated a likelihood that Versata's claims are unpatentable under 35 U.S.C. § 112, 1st and 2nd paragraphs therefor these grounds of unpatentability do not form a part of the review. 37 C.F.R. 42.408(a).

¹ Pub. L. No. 112-29, 125 Stat. 284 (2011).

II. Background

A. Versata's '350 Patent

Versata's '350 patent is directed to a method and apparatus for pricing products and services. SX 1001, '350 patent, 3:9-13.² The central concept of the '350 patent is hierarchies and the hierarchal arrangement of data. SX 1005, ¶ 20.³

The '350 patent states that its "invention operates under the paradigm of WHO (the purchasing organization) is buying WHAT (the product)." '350 patent, 3:24-25. An example of the WHO/WHAT paradigm is depicted in Figure 1 of the '350 patent below:

FIG. 1
PRIOR ART

| <i>WHAT</i> <i>WHO</i> | <i>486/33</i> <i>CPU</i> | <i>486/50</i> <i>CPU</i> | <i>486/66</i> <i>CPU</i> |
|---------------------------|-----------------------------|-----------------------------|-----------------------------|
| <i>ADAM</i> | <i>\$40</i> | <i>\$60</i> | <i>\$80</i> |
| <i>BOB</i> | <i>\$42</i> | <i>\$58</i> | <i>\$72</i> |
| <i>CHARLIE</i> | <i>\$44</i> | <i>\$68</i> | <i>\$92</i> |

² SAP's exhibits are referred to as SX and Versata's exhibits are referred to as VX.

³ Declaration of SAP expert, Michael Siegel, Ph.D.

According to the '350 patent, the WHO/WHAT paradigm was known in the art. *Id.*, Fig. 1, 4:16-18. The '350 patent however, states that prior art pricing tables for WHO/WHAT (customer/products) required large tables of data. *Id.*, 1:52-59.

The '350 patent invention is said to improve upon the prior art and reduce the need for large tables of data by arranging customers into a hierarchy of customer groups and products into a hierarchy of product groups. *Id.*, 3:24-27, 41-42. Specifically, in the '350 patent, WHO is said to be defined by creating an organizational hierarchy of organizational groups, where each group represents a characteristic of the organizational group. *Id.* An example of an arrangement of an organization customer group is depicted below in Fig. 4A of the '350 patent:

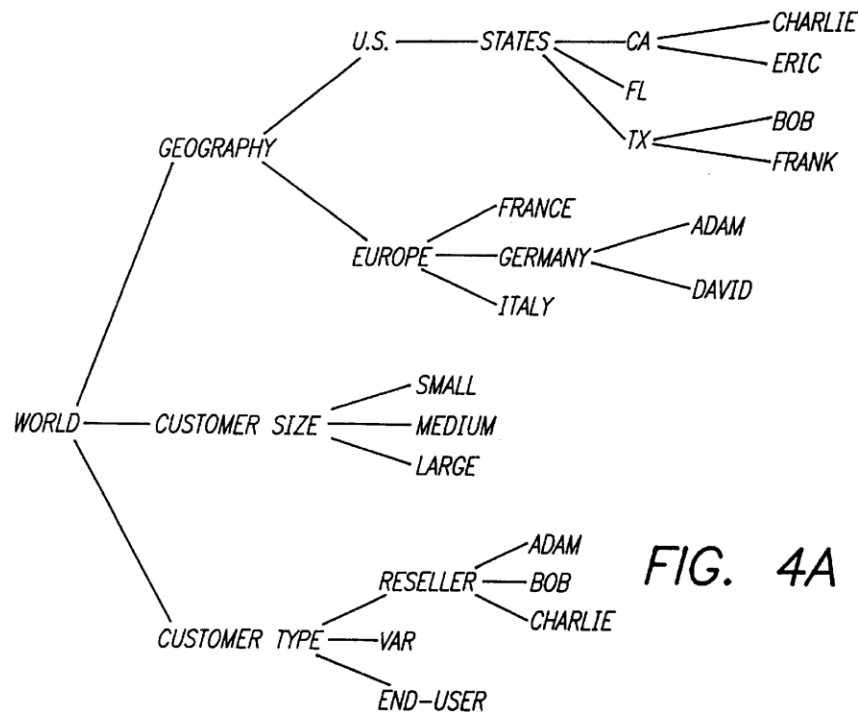


FIG. 4A

Similarly, a product group hierarchy for products (WHAT) is also defined. *Id.*, Fig. 4B, 4:26-28. Pricing information is then associated with the customer and product groups. *Id.*, 8:17-25. As such, special pricing adjustments may be defined as applying to all members of a specific customer group or a specific product group. *Id.*, 3:26-49.

B. Procedural History

In 2007, Versata sued SAP for infringement of, inter alia, the '350 patent. The case proceeded to trial and a jury found infringement and awarded damages. SX 2039, Jury Verdict (Aug. 26, 2009). The district court confirmed the infringement verdict for the '350 patent, but reversed other rulings unrelated to the '350 patent, resulting in a new trial on damages. POPR, 7. In the second trial, the jury found that an SAP post-patch software continued to infringe, and awarded lost-profits damages and reasonable royalty damages. The district court upheld those awards. *Id.*

SAP appealed the district court's Final Judgment to the U.S. Court of Appeals for the Federal Circuit on October 11, 2011. *Versata Software, Inc. v. SAP America, Inc.*, Nos. 2012-1029, -1049. The appeals have been fully briefed and are currently pending. Of note, SAP did not appeal the district court's claim

construction, and there are no issues on appeal relating to the validity of the '350 patent. POPR, 8.

III. Analysis

There are five claims challenged in this proceeding, claims 17 and 26-29. The claims are directed to methods and apparatuses for determining the price of a product offered to a purchasing organization. To better understand the challenges brought against these claims, we begin by first construing the claims.

A. Claim Construction

During a review before the Board, we provide claims with the broadest reasonable interpretation in light of the specification. 37 C.F.R. 42.300(b). *See*, 77 Fed. Reg. 157 (August 14, 2012) at 48697-48698. We begin our analysis with the plain language of the claims themselves but look to the specification for guidance as to how one skilled in the art would understand the ordinary meaning of the claims. In interpreting claims care must be exercised as there is a fine line between interpreting claims in light of the specification and reading limitations into the claims from the specification. *Comark Commc'ns, Inc. v. Harris Corp.*, 156 F.3d 1182, 1186 (Fed. Cir. 1998).

The parties have identified four claim terms for which claim construction is sought: “sorting the pricing information,” “the pricing information that is less restrictive,” “pricing type(s),” and “pricing information.” Claim 17 is illustrative of the claims for which review is sought and reads as follows:

17. A method for determining a price of a product offered to a purchasing organization comprising:
 - arranging a hierarchy of organizational groups comprising a plurality of branches such that an organizational group below a higher organizational group in each of the branches is a subset of the higher organizational group;
 - arranging a hierarchy of product groups comprising a plurality of branches such that a product group below a higher product group in each of the branches is a subset of the higher product group;
 - storing **pricing information** in a data source, wherein the **pricing information** is associated, with (i) a **pricing type**, (ii) the organizational groups, and (iii) the product groups;
 - retrieving applicable **pricing information** corresponding to the product, the purchasing organization, each product group above the product group in each branch of the hierarchy of product groups in which the product is a member, and each organizational group above the purchasing organization in each branch of the hierarchy of organizational groups in which the purchasing organization is a member;
 - sorting the pricing information** according to the **pricing types**, the product, the purchasing organization, the hierarchy of product groups, and the hierarchy of organizational groups;
 - eliminating any of the **pricing information that is less restrictive**; and
 - determining the product price using the sorted pricing information.

'650 Patent, SX 1001 (emphasis added). Claim 24, which was not challenged by SAP, and is not part of this proceeding, depends from claim 17 and limits claim 17 as follows:

24. The method of claim 17 wherein the **pricing information** comprises denormalized pricing adjustments.

Id. (emphasis added).

The four terms for which claim construction is sought are analyzed below.

1. Sorting the Pricing Information

SAP requests that the Board construe the term “sorting the pricing information” to mean that the pricing information is ordered. Pet., 11. Versata does not oppose this construction. POPR, 58-60.

SAP’s expert, Dr. Siegel,⁴ testifies that the plain meaning of “sorting the pricing information” is that the pricing information is ordered. SX 1005, ¶ 98. This construction is consistent with Versata’s proposed construction in the related district court proceeding, and this is the construction that was adopted by the

⁴ The field of the invention is computerized financial systems. SX 1005, ¶ 16. A person of ordinary skill in the art would have at least a bachelor’s degree in computer science and experience developing computerized financial systems. *Id.*, ¶ 18. Dr. Siegel has a Ph.D. in computer science and extensive experience in financial services software. *Id.*, ¶¶ 1-11. We conclude that Dr. Siegel is qualified to testify as to the understanding of one skill in the art.

district court. SX 1012,⁵ 16-17. We credit Dr. Siegel’s testimony and hold that sorting the pricing information means that the pricing information is ordered.

SAP and Versata disagree however, on when the pricing information is sorted. Specifically, Versata contends that the information must first be retrieved and then sorted, whereas SAP contends the language of claim 17 does not imply or require a temporal limitation forcing the sorting to occur after retrieving. Pet., 12-13 and POPR, 60.

The plain language of claim 17 does not require that the information be retrieved first and then sorted. This is in contrast to claim 1, which requires “sorting the *retrieved* information.” Dr. Siegel testifies that this is an important distinction and concludes that there is no basis in claim 17 for requiring retrieving to happen before sorting or vice versa. Dr. Siegel concludes that the term “sorting the pricing information” in the context of the ’350 patent simply means that pricing information is sorted either before or after the information is retrieved. SX 1005, ¶ 98.⁶ SAP also directs our attention to the trial testimony of a Versata expert, Dr.

⁵ Memorandum Opinion and Order Regarding Claim Construction, *Versata v. SAP* Litigation, 07-cv-00153.

⁶ The district court held that the retrieving step must be performed before the sorting step as claim 1 requires the “retrieved pricing information” be sorted. SX 1012, 15-16. As noted by Dr. Siegel, claim 17 does not require “retrieved” pricing information be sorted.

Nettles, who indicated that there was not always a need to change the retrieved data set to fall within the definition of “sort.” Pet., 13, SX 1018, 81-82.

We agree with SAP that the ordinary meaning of “sorting the pricing information” in claim 17 does not require that the information be retrieved and then sorted. There are circumstances however, where a claim term may be construed more narrowly than its ordinary meaning. Such circumstances include where a patentee sets out a definition and acts as its own lexicographer and where the patentee disavows the full scope of a claim term in the specification. *Thorner v. Sony Computer Entm’t. America L.L.C.*, 669 F.3d 1362, 1365 (Fed. Cir. 2012).

Versata fails to direct our attention to sufficient and credible evidence that the ’350 patent restricted the term “sorting the pricing information” to sorting retrieved information. While Versata directs the Board’s attention to four exhibits, VX 2061, VX 2063, VX 2064, and SX 1018, none of the exhibits demonstrates that the specification defined the term or sought to disavow sorting the information prior to retrieval. Specifically, the exhibits reflect trial testimony excerpts and a closing statement, none of which provide an underlying basis for their positions. *ActiveVideo Networks Inc. v. Verizon Commc’ns Inc.*, 694 F.3d 1312 (Fed. Cir. 2012) (district court did not err in granting JMOL where expert opinion was conclusory and lacked factual support).

We credit the testimony of SAP's expert, Dr. Siegel, and conclude that claim 17 does not require a temporal limitation forcing the sorting to occur after retrieving.

2. The Pricing Information That Is Less Restrictive

SAP contends that the term "the pricing information that is less restrictive" is insolubly ambiguous, but employs the district court construction for purposes of prior art analysis. Pet., 11-12. Versata disagrees that the term is insolubly ambiguous and directs our attention to the fact that SAP initially offered a claim construction in the related district court proceeding. POPR, 57-58, SX 1012, 17, fn. 3. Further, Versata requests that we adopt the district court construction and construe the term to mean "less specifically applicable to a product, a purchasing organization, an organizational group or a product group." *Id.* 17-18.

We agree with Versata and adopt the district court's construction of the term "pricing information that is less restrictive." Specifically, we construe the term as meaning "less specifically applicable to a product, a purchasing organization, an organizational group or a product group."

3. Pricing Types and Pricing Adjustments

SAP contends that the term “pricing types” means “a class or category of pricing adjustments.” Pet., 12. Versata did not oppose this construction.

SAP relies upon the testimony of Dr. Siegel, who testifies that the ‘350 patent leads to an understanding that the term “pricing type(s)” is “a class or category of pricing adjustments.” SAP notes that the parties agreed at the district court to this construction.

We credit Dr. Siegel’s testimony and hold that the term “pricing types” means a class or category of pricing adjustments.

SAP further defines the term “pricing types” by contending that pricing types means a class or category of pricing adjustments and that the term pricing adjustments means “a denormalized number that may affect the determined price.” Pet., 12 and 14. SAP then defines denormalized number as meaning nothing more than a user, at data entry time, associating units with a number and specifying how the number is to be applied, and then, at runtime, a system simply uses that information. *Id.*, 14-15. Versata agrees that the term “pricing adjustment” is limited to denormalized numbers and contends that all of the challenged claims require denormalized numbers. POPR, 26. We disagree that “pricing adjustment” is limited to denormalized numbers and do not adopt this construction.

The plain and ordinary meaning of the term “pricing adjustment” does not require the use of denormalized numbers nor do the ’350 claims and specification require such an interpretation. For example, ’350 claim 1 requires the use of pricing information. Dependent claim 6 depends from claim 1 and states that the pricing information comprises pricing adjustments. Dependent claim 7 depends from claim 6 and states that pricing adjustments comprise denormalized numbers. Similarly, claim 17 requires the use of pricing information and claim 24, which depends from claim 17, states that pricing information comprises *denormalized* pricing adjustments. To read pricing adjustments as restricted to denormalized pricing adjustments would render the term denormalized in claim 24 redundant and render claim 7 superfluous. Accordingly, the ’350 claims themselves create a rebuttable presumption that the term “pricing adjustments” is broader than the use of denormalized numbers.

SAP contends that Versata restricted the term “pricing adjustment” to denormalized numbers. Pet., 14 and 16. Versata agrees. POPR, 26 n. 3.

SAP identifies the following language from the ’350 patent as evidence of Versata’s alleged disclaimer for the term pricing adjustment:

The combination of organizational groups and product groups hierarchies and the denormalized pricing table relating a particular organization (or an entire organizational group) to a particular product (or an entire product group) result in some of the advantages of the present invention over the prior art pricing systems.

Pet., 14, SX 1001, 3:65-4:4. The quoted language however does not restrict pricing adjustments to denormalized numbers but instead is consistent with the proposition that denormalized numbers represent a preferred embodiment of Versata's invention. Other citations provided by SAP likewise do not evidence that Versata sought to be its own lexicographer or disclaim a broader definition for the term "pricing adjustment." Further evidence that Versata did not intentionally seek to disclaim the broader construction may be found in the district court proceeding where Versata argued that the claims are not so limited and that "denormalized" constitutes a preferred embodiment. SX 1012, 7-9.

We hold that the plain language of the claims creates a rebuttable presumption that the term "pricing adjustment" encompasses, but is not limited to, "denormalized pricing adjustments." Further, we hold that the parties have failed to rebut this presumption such as by providing evidence demonstrating that Versata acted as its own lexicographer or that Versata disavowed the broader construction. Accordingly, we hold that pricing adjustment means simply a price modification. *In re Bigio*, 381 F.3d 1320, 1325-26 (Fed. Cir. 2004) ("Absent claim language carrying a narrow meaning, the PTO should only limit the claim based on the specification or prosecution history when those sources expressly disclaim the broader definition.").

4. Pricing Information

SAP states that the broadest reasonable interpretation of the term “pricing information” should include denormalized numbers. Pet., 16. SAP further states that the term “pricing information” means “any information relating to price other than an adjustment to price that is not a denormalized number.” *Id.* Versata agrees and states that all the challenged claims require denormalized numbers and that denormalized numbers are determined at run time. POPR, 26-27, n. 3 and 4.

The plain and ordinary meaning of the term pricing information is not restricted to denormalized numbers. Further, the claims themselves do not place such a limitation on the term. As recognized by Versata in the related litigation, the term “pricing information” in dependent claims 6 and 24 encompasses both price adjustments and denormalized price adjustments. SX 1012, 10. To interpret the term “pricing information” as restricted to denormalized pricing adjustments would make the term denormalized superfluous in claims 6 and 24. We hold that there is a rebuttable presumption that the term pricing information is not restricted to the use of denormalized numbers.

SAP relies upon the testimony of Dr. Siegel to support its construction of the term pricing information. Pet., 15. Dr. Siegel agrees with the district court’s interpretation of the ‘350 patent that the patent owner limited its invention to

denormalized numbers. SX 1005, ¶ 103. Dr. Siegel directs the Board's attention to various passages in the '350 patent that allegedly limit the invention to denormalized numbers. *Id.*, ¶ 100. The cited passages however, contain statements such as "Fig. 5 is an example of the inventions denormalized table," "[o]ne aspect of the invention is now explained by referring to FIG 5 and comparing the invention with prior art systems for generation of pricing recommendations," "[s]till referring to FIG 5," "the prior art systems do not use denormalized price tables." Although the cited passages highlight the benefits of using denormalized numbers in combination with organizational and product groups hierarchies, they do not literally disavow the broader construction of the term pricing information or "repeatedly, consistently, and exclusively" seek to confine pricing information to denormalized numbers. *Cf., In re Abbott Diabetes*, Nos. 2011-1516, 1517, 2012 WL 4465236 (Fed. Cir. September 28, 2012) (plain language of claim and specification consistently demonstrated absence of external wires).

Although the doctrine of claim differentiation creates only a rebuttable presumption, SAP has failed to provide sufficient intrinsic evidence to overcome this presumption and justify its narrow construction. *Thorner v. Sony Computer Entm't America*, 669 F.3d at 1365 ("It is likewise not enough that the only embodiments, or all of the embodiments, contain a particular limitation. We do

not read limitations from the specification into claims; we do not redefine words. Only the patentee can do that.”). We agree with the position advanced by patent owner Versata in the district court litigation and hold that denormalized numbers represent a preferred embodiment of the invention. We further hold that the term pricing information means information related to pricing and comprises both price adjustments and denormalized price adjustments. SX 1012, 10.

Versata, to the extent it disagrees with the claim constructions provided, may seek to file a motion to amend during the review and propose substitute claims that state with precision the claim scope it so desires. 35 U.S.C. § 326(a)(9) and (d).

B. SAP Has Standing to File a Petition for a Covered Business Method Review of Versata’s ’350 Patent

The parties disagree as to whether SAP has standing to file a petition for a covered business method review of the ’350 patent. Pet., 3-10, and POPR, 10-45 and 61-68.

Section 18 of the AIA provides for the creation of a transitional program for covered business method reviews. Section 18 limits reviews to persons or their privies that have been sued or charged with infringement, of a covered business method patent where covered business method patents do not include patents for technological inventions. AIA, §§ 18(a)(1)(B) and 18(d)(1).

1. SAP Has Been Sued for Infringement of the '350 Patent

SAP represents that it has been sued for infringement of the '350 patent in *Versata Software Inc. v. SAP America Inc.*, No. 2:07-cv-153 (E.D. Tex). Pet. 9-10. Versata acknowledges that SAP was sued for infringement but contends that the related litigation has progressed beyond the point where the statute contemplated it would be employed. POPR, 62.

Versata represents that “sued for infringement” should be interpreted as requiring ongoing litigation and that while SAP was sued for infringement, there will be no further proceedings in the district court on the issue of validity. POPR, 62. Versata acknowledges, however, that it is unaware of any legislative history relating to this question. *Id.* We give § 18(a)(1)(B) its literal meaning and conclude that a party sued for infringement of a patent, and not otherwise estopped from challenging validity, may file a petition for a transitional proceeding with respect to a covered business method patent. 37 C.F.R. 42.302 (party that has been sued for infringement and not otherwise estopped may file a petition).

Versata contends that SAP should be precluded from pursuing its challenge under the principles of issue and claim preclusion. POPR, 63-68. We disagree.

37 C.F.R. 42.302 generally provides that a party may not file a petition for a covered business method review unless the party has been sued for infringement or

charged with infringement under that patent and that the petitioner must not otherwise be estopped from challenging the claims. As recognized by Versata, estoppel may arise from claim preclusion and issue preclusion. Claim preclusion requires a final judgment on the merits of the first suit. *Bowers Inv. Co. v. United States*, 695 F.3d 1380, 1384 (Fed. Cir. 2012) (citing *Ammex, Inc. v. United States*, 334 F.3d 1052, 1055 (Fed. Cir. 2003)). Similarly, issue preclusion requires that the party against whom preclusion will apply had a full and fair opportunity to litigate the issue in the first action. *In re Freeman*, 30 F.3d 1459, 1465 (Fed. Cir. 1994). For a judgment to be “final” for purposes of preclusion before the Board, the decision needs to be immune, as a practical matter, to reversal or amendment. *See, e.g., Vardon Golf Co., Inc. v. Karsten Mfg. Corp.*, 294 F.3d 1330, 1333 (Fed. Cir. 2002) (citing *Miller Brewing Co. v. Jos. Schlitz Brewing Co.*, 605 F.2d 990, 996 (7th Cir. 1979)). As the final judgment in the related *Versata v. SAP* litigation is currently on appeal to the Federal Circuit, we hold that the district court’s judgment is not sufficiently firm to be accorded conclusive effect for purposes of 37 C.F.R. 42.302 as it is still subject to reversal or amendment.

Versata states that the validity of the ’350 patent has been finally adjudicated and even if the ’350 patent were held unpatentable in this proceeding, that determination would have no effect on the judgment in the litigation and thus, “the lawsuit is over for purposes of 37 C.F.R. 42.302.” POPR, 62-63.

As stated above, we hold that the district court's judgment is not sufficiently firm to be accorded conclusive effect for purposes of estoppel under 37 C.F.R. 42.302. Additionally, Versata has failed to establish on this record that a determination of unpatentability would have no effect on the related litigation.⁷

We hold that SAP has been sued for infringement for purposes of AIA § 18(a)(1)(B) and 37 C.F.R. 42.302.

2. Versata Claims 17 and 26-29 are Directed to Financial Products or Services

SAP and Versata disagree as to whether the '350 patent is directed to a covered business method. Pet., 4-5 and POPR, 31-45. According to SAP, the '350 patent is a covered business method patent as it claims methods and corresponding apparatus for determining a price, and relates to management of pricing data and is

⁷ *In re Translogic Technology Inc.*, 504 F.3d 1249 (Fed. Cir. 2007) arose out of a reexamination proceeding whose patent was the subject of a related patent infringement litigation between *Translogic* and Hitachi. In *Translogic*, the Board upheld a rejection of the patent claims and an appeal was taken to the Federal Circuit. 504 F.3d at 1251. In the related district court litigation a jury found that Hitachi had induced infringement and held Hitachi liable for \$86.5 million in damages. *Id.* After post-trial briefing, the district court entered final judgment and Hitachi appealed to the Federal Circuit. *Id.* On appeal from the Board's unpatentability determination, the Federal Circuit upheld the decision of the Board and held *Translogic's* claims unpatentable. *Id.* 1262. That same day, the Federal Circuit vacated the district court's judgment and remanded the case to the district court for dismissal. *Translogic Tech., Inc. v. Hitachi, Ltd.*, 250 Fed. Appx. 988 (Fed. Cir. 2007).

classified in class 705. Pet. 5. Versata takes the position that the broadest reasonable definition of financial services or products would exclude its claimed invention. POPR, 32.

The AIA defines covered business method patents as:

(1) IN GENERAL.—For purposes of this section, the term “covered business method patent” means a patent that claims a method or corresponding apparatus for performing data processing or other operations used in the practice, administration, or management of a *financial product or service*, except that the term does not include patents for technological inventions.

AIA, § 18(d)(1).

The Office published notices of proposed and final rulemaking seeking to implement Section 18. The notice of proposed rulemaking solicited public comment, and fully considered and responded to comments received. 37 C.F.R. 42.301(a) was among the rules proposed and finalized by the notices. 37 C.F.R. 42.301(a) tracks the language of AIA § 18(d)(1) and was subject to comment and response as to its interpretation. In considering public comments, the Office stated that it would consider legislative intent and history behind the definition and the transitional program itself. 77 Fed. Reg. 157 (August 14, 2012) 48734, 48735. The Office stated that the legislative history explained that the definition of covered business method patents supported the notion that the definition be broadly interpreted and encompass patents claiming activities that are financial in

nature, incidental to a financial activity or complementary to a financial activity.

Id. The Office also stated that it did not adopt the suggestion that the term financial product or service be limited to the products or services of the financial services industry as it ran contrary to the intent behind § 18(d)(1). *Id.* at 48736.

Versata raises a number of issues as to why its method and apparatus for pricing would not be considered a financial product or service. We do not find them persuasive.

Versata cites definitions from a variety of sources including the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Bank Holding Company Act of 1956, as well as North American Industry Classification Codes. POPR, 32-37. Versata's proposed definitions are inconsistent with the legislative history of Section 18 and the final rules. For example, Versata relies upon an FTC definition of "financial product or service" as directed to products or services that a financial holding company could offer. The suggestion to adopt a definition limiting financial services or products to a particular industry, financial services industry, was considered but not adopted during rulemaking as such a narrow construction would be contrary to the legislative history of Section 18. 77 Fed. Reg. 157, 48736.

Versata contends that there is nothing in the claims indicating that they are related to a financial service or product. POPR, 37 – 42. Versata alleges that

financial products or services are not mentioned anywhere in the claims or specification, rather, the claims are directed to product/service pricing. We do not interpret the statute as requiring the literal recitation of the terms financial products or services. The term financial is an adjective that simply means relating to monetary matters. This definition is consistent with the legislative history for Section 18, which explains that the definition was intended to encompass patents claiming activities incidental and complementary to a financial activity.⁸ We hold that Versata's '350 patent claims methods and products for determining a price and that these claims, which are complementary to a financial activity and relate to monetary matters, are considered financial products and services under § 18(d)(1).

⁸ The legislative history also provides that:

The plain meaning of “financial product or service” demonstrates that section 18 is not limited to the financial services industry. At its most basic, a financial product is an agreement between two parties stipulating movements of money or other consideration now or in the future.

Rather, because the patents apply to administration of a business transactions, such as financial transactions, they are eligible for review under this section. To meet this requirement, the patent need not recite specific financial product[s] or service[s].

157 Cong. Rec. S5432 (daily ed. Sept. 8 2011)(statement of Sen. Schumer).

Versata further contends that Senator Schumer's comments appearing in the legislative history cannot change the express language of the statute. We agree. Legislative history cannot cloud statutory text that is clear. Yet, in the case before us, the plain language of § 18(d)(1) is consistent with the legislative history and Senator Schumer's commentary.⁹

3. Versata Claim 17 is Not Directed to a Technological Invention

A petitioner in a covered business method proceeding must demonstrate that the patent for which review is sought is a covered business method patent. 37 C.F.R. § 42.304(a). Covered business method patents by definition do not include patents for technological inventions. AIA § 18(d)(1) (excludes patents for technological inventions from the definition of covered business method patents).

The AIA required the Office to assist in the implementation of the covered business method review by promulgating "regulations for determining whether a patent is for a technological invention." AIA, § 18(d)(2). Consistent with the statute, the Office published a notice of proposed rulemaking and requested written comments on the Office's proposed technological invention regulation, 37 C.F.R. 42.301, and also published a practice guide advising the public on the Office's

⁹ This is not surprising as Senator Schumer was the principal author of Section 18 of the AIA, along with his colleague Senator Kyl.

proposed rules, including the proposed technological invention regulation. The Office received written comments, and after analyzing the comments thoroughly, the Office published a notice of final rules on the definition of covered business method patents and technological inventions. 77 Fed. Reg. 157 (August 14, 2012) 48734. The final rules provide the following definition of technological invention to assist in the determination of whether a patent is for a technological invention:

(b) Technological invention. In determining whether a patent is for a technological invention solely for purposes of the Transitional Program for Covered Business Methods (section 42.301(a)), the following will be considered on a case-by-case basis: ***whether the claimed subject matter as a whole recites a technological feature that is novel and unobvious over the prior art; and solves a technical problem using a technical solution.***

37 C.F.R. 42.301(b) (emphasis added). To help the public understand how the rule would be applied in practice, the Office provides the following guidance as to claim drafting techniques that would not typically render a patent a technological invention under 37 C.F.R. 42.301(b):

(a) Mere recitation of known technologies, such as computer hardware, communication or computer networks, software, memory, computer readable storage medium, scanners, display devices or databases, or specialized machines, such as an ATM or point of sale device.

(b) Reciting the use of known prior art technology to accomplish a process or method, even if that process or method is novel and non-obvious.

(c) Combining prior art structures to achieve the normal, expected, or predictable result of that combination.

77 Fed. Reg. 157 (August 14, 2012) at 48763-48764.

SAP contends that the '350 patent does not claim a technological feature that is novel and unobvious over the prior art. Versata disagrees stating that SAP has failed to address the subject matter of the challenged claims as a whole. POPR, 15.

We agree with Versata that we are to address the subject matter of the claims as a whole. As the presence of a single claim is sufficient to institute a covered business method review, we exercise our discretion and begin our analysis with Versata claim 17.

SAP states that claim 17 lacks a novel and unobvious technological feature as it is merely directed to a business process of determining product prices that lacks even minimal computer-related recitations. Pet., 9. Versata states that the novel and unobvious technological feature recited by each of its claims is its hierarchical data structure used in combination with a software-implemented pricing procedure. POPR, 16. As stated by Versata:

As shown by the express language of the challenged claims and the detailed discussion of the novel and unobvious features of the claimed invention, the '350 patent discloses and claims a *software invention*. The novel and unobvious features are all about creating a hierarchical data structure to enable a hierarchical arrangement of organizational groups and product groups stored in a data source and software implementing a pricing procedure that performs hierarchical accesses to the hierarchical arrangements of organizational and product data to retrieve pricing information adjusted using denormalized numbers to determine a product price.

POPR, 24-25, emphasis in original.

Claim 17 lacks a novel and unobvious technological feature. Claim 17 is directed to a method of determining a price. The claim arranges organizational and product groups using hierarchies (a classification system), hierarchies which were acknowledged to be “ubiquitous customer and product hierarchies” already used by companies to organize pricing information. SX 1011, p. 5. The pricing information is stored in a data source, which on its face encompasses a record keeping book. The information is retrieved and sorted according to the pricing types, product and purchasing organization. The less restrictive pricing information is eliminated, i.e., the least applicable pricing information is not used, and the price is determined. None of these claim limitations, taken alone or in combination, rises to the level of a technological feature as the claimed method steps could be performed by one of ordinary skill in the art with pencil and paper.

Versata states that each of its claims, including claim 17, requires the use of a computer, denormalized numbers and further that the denormalized numbers are to be determined at “run time.” POPR 24-26. Even assuming that each of these limitations was read into claim 17, they would still fail to demonstrate that claim 17 taken as a whole possessed a novel and unobvious technological feature. As to the required use of a computer and software, the ’350 patent states that its invention may be implemented in any type of computer system or programming or

processing environment. SX 1001, 5:55-58. Accordingly, no specific, unconventional software, computer equipment, tools or processing capabilities are required. *Dealertrack v. Huber*, 674 F.3d 1315, 1333 (Fed. Cir. 2012) (term “computer aided” did not impose meaningful limit on scope of the claims as “[t]he claims are silent as to how the computer aids the method, the extent to which a computer aids the method, or the significance of a computer to the performance of the method.”). We hold that Versata claim 17 lacks a novel and unobvious technological feature.

Additionally, claim 17 does not solve a technical problem using a technical solution. According to the ’350 patent, prior art pricing tables overcomes the prior art’s disadvantages in storing, maintaining and retrieving large amounts of data. SX 1001, 6:1-7. Claim 17 allegedly overcomes this problem by reorganizing the data into customer and product hierarchies. According to Versata, the inventor “leveraged the hierarchal data structures used by large companies to organize pricing information.” SX 1011, 5. Versata refers to the customer and product hierarchies as “ubiquitous.” *Id.* Organizing data into hierarchies however, is not a technical solution as this is akin to creating organizational management charts. SX 1005, ¶ 47.

We hold that Versata’s ’350 patent is a covered business method patent.

C. Versata Claims 17 and 26-29 are Unpatentable Under 35 U.S.C. § 101

SAP challenges claims 17 and 26-29 as unpatentable under 35 U.S.C. § 101 stating that the claims are directed to an unpatentable abstract idea. Pet., 16. Versata disagrees and maintains that its claims are directed to a technological invention. POPR, 80.

1. § 101 Subject Matter Eligibility

The Supreme Court has made it clear that the test for patent eligibility under § 101 is not amenable to bright-line categorical rules. *Bilski v. Kappos*, 130 S. Ct. 3218 (2010) and *Mayo Collaborative Servs. v. Prometheus Lab., Inc.* 132 S. Ct. 1289 (2012). For example, the fact that a claim recites a method that is implemented on a computer or is directed to a computer-readable medium that causes a computer to implement certain steps are not per-se indicators of patent eligibility. Rather, a challenged claim, properly construed, must incorporate enough meaningful limitations to ensure that it claims more than just an abstract idea and not just a mere “drafting effort designed to monopolize [an abstract idea] itself.” *Mayo*, 132 S. Ct. at 1297. To be meaningful, the claim must contain more than mere field-of-use limitations, tangential references to technology, insignificant pre- or post-solution activity, ancillary data-gathering steps, or the like. Thus, claims that recite a method of doing business on a computer and do no

more than merely recite the use of the computer for its ordinary function of performing repetitive calculations are not patent eligible. *Bancorp Servs., LLC v. Sun Life Assurance Co.*, 687 F.3d 1266, 1278-79 (Fed. Cir. 2012) (computer used only for its most basic function, the performance of repetitive calculations does not impose a meaningful claim limitation). Thus, we analyze a claim to determine whether the claim embodies a specific, practical application of an abstract idea, or merely nothing more than the abstract idea itself.

2. Versata's Challenged Claims 17 and 26-29 are Unpatentably Abstract

Versata's claims are directed to a method for determining a price, a computer readable storage media comprising instructions for a method of determining a price, as well as a computer implemented method for determining a price. The claims employ customer and product hierarchies to arrange data for retrieval and processing. As Versata has explained in its brief to the Federal Circuit, the use of hierarchal data structures to organize pricing information was already used by large companies and Versata's invention represented these "ubiquitous customer and product hierarchies within the pricing tables themselves." SX 1011, 5. The concept of arranging customer and product data into hierarchies is an unpatentable abstract idea, just like the basic hedging concept at issue in *Bilski*.

Versata contends that its claims are patent eligible for the same reasons its claims represent a technological invention and that the petition is incorrect in stating that Versata's claims fail the machine or transformation test. POPR, 80. We recognize that Versata's claims require the manipulation and reorganization of data on a computer, but the mere manipulation and reorganization of data does not satisfy the transformation prong of the machine or transformation test. Further, claims directed to software implementation of a mental process that could otherwise be performed without the use of a computer, such as a method for determining a price, does not satisfy the machine prong of the machine or transformation test. *CyberSource Corp. v. Retail Decisions, Inc.* 654 F.3d 1366, 1375 (Fed. Cir. 2011).

We recognize that the machine or transformation test is not the exclusive test to determine patent eligibility. We hold however that Versata's claims do not incorporate sufficient meaningful limitations to ensure that the claims are more than just an abstract idea. Although Versata's challenged claims recite such limitations such as computer readable media comprising instructions (claim 26), a processor (claim 29), memory coupled to the processor (claim 29), and computer program instructions (claim 29), such generic descriptions are not tied to a particular computer but rather merely require the use of a general purpose computer and programming and processing environment. Further, even if we were

to limit the claims to denormalized numbers calculated at runtime, such calculations may also be performed on the general purpose computer, or even by a person seeking to determine the price using the hierarchies recited in the claimed method. SX 1001, 5:55-58. We conclude that SAP has established that Versata's challenged claims are more likely than not unpatentable under 35 U.S.C. § 101.

3. 35 U.S.C. § 101 is a Permissible Grounds for Challenging Claims in a Covered Business Method Review

Versata contends that the USPTO may not consider patent subject matter eligibility challenges under § 101 as part of the covered business method review. POPR, 68. According to Versata, the grounds for challenging patents during the review do not encompass § 101. Specifically, Versata states that the statute and controlling precedent lead to the conclusion that the USPTO may not consider such challenges during a review. *Id.*, 68-80. We disagree.

Under the AIA, any ground that could be raised under 35 U.S.C. § 282(b)(2) or (3) can be raised in a post-grant review or (with exceptions not relevant here) in a covered business method review. The grounds under § 282(b)(2) and (3) are:

- (2) Invalidity of the patent or any claim in suit on any ground specified in part II as a condition for patentability.
- (3) Invalidity of the patent or any claim in suit for failure to comply with—(A) any requirement of section 112, except that the failure to disclose the best mode shall not be a basis on which any claim of a

patent may be canceled or held invalid or otherwise unenforceable; or
(B) any requirement of section 251.

As recognized by the Supreme Court, § 101 is a condition for patentability.

In *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 12 (1966), the Supreme Court stated that the 1952 Patent Act “sets out the conditions of patentability in three sections,” citing 35 U.S.C. §§ 101, 102, and 103. The Supreme Court has also addressed invalidity under § 101 when it was raised as a defense to an infringement claim under § 282. *See Mayo Collab. Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. at.

The Federal Circuit has also recognized that §101 is a condition for patentability that can be raised as an affirmative defense under 35 U.S.C. § 282(b)(2). For example, in *Dealertrack*, the majority rejected the dissent’s contention that §101 is not a “condition for patentability,” stating that “the ‘defenses provided in the statute’ § 282, include not only the conditions of patentability in §§ 102 and 103, but also those in § 101.” *Dealertrack*, 674 F.3d at 1330, n. 3 citing *Aristocrat Techs. Austl. PTY Ltd. v. Int’l Game Tech.*, 543 F.3d 657, 661 (Fed. Cir. 2008) (“It has long been understood that the Patent Act sets out the conditions for patentability in three sections: sections 101, 102, and 103.”).

The legislative history of the AIA also makes it clear that Congress intended the Office to consider challenges brought under § 101 for post-grant reviews. For example, with certain exceptions not relevant here, the covered business method

review program employs the same standards and procedures as the post grant review program. AIA, § 18(a)(1). The covered business method review program was added to the AIA via a manager's amendment in the Senate. 157 Cong. Rec. S1363 (daily ed. Mar. 8, 2011) (discussing the Schumer-Kyl program included in the manager's amendment adopted March 1). The specified purpose of the covered business method review program was to allow the Office to revisit business method patents post-*Bilski* and evaluate whether the patents were too abstract to be patentable under § 101. This was explained in the "Summary of the Manager's Amendment," which states:

The Schumer-Kyl business-methods proceeding, as modified to accommodate industry concerns and PTO needs. In its 1998 State Street decision, the Federal Circuit greatly broadened the patenting of business methods. Recent court decisions, culminating in last year's Supreme Court decision in *Bilski v. Kappos*, have sharply pulled back on the patenting of business methods, emphasizing that these "inventions" are too abstract to be patentable. In the intervening years, however, PTO was forced to issue a large number of business-method patents, many or possibly all of which are no longer valid. The Schumer proceeding offers a relatively cheap alternative to civil litigation for challenging these patents, and will reduce the burden on the courts of dealing with the backwash of invalid business-method patents.

157 Cong. Rec. S1367 (daily ed. Mar. 8, 2011). Senator Kyl, a primary author of the covered business method review program, confirmed this understanding stating that "section 101 invention issues" are among those that can be raised in post grant reviews. 157 Cong. Rec. S1375 (daily ed. Mar. 8, 2011).

Both houses of Congress and the executive branch of government all agree - § 101 can be raised in post grant reviews and by consequence, in covered business method reviews.¹⁰

We have reviewed Versata's contentions and citations to the contrary but do not find them persuasive. For example, Versata contends that "in *Diamond v. Diehr*, the Supreme Court concluded that subject matter eligibility under § 101 is not a condition for patentability" and provided the following quotation from the case:

Section 101, however, is a general statement of the type of subject matter that is eligible for patent protection "subject to the conditions and requirements of this title." Specific conditions for patentability follow and § 102 covers in detail the conditions relating to novelty. The question therefore of whether a particular invention is novel is "wholly apart from whether the invention falls into a category of statutory subject matter."

POPR, 70-71, *Diamond v. Diehr*, 450 U.S. 175, 189-190 (1981). The passage cited above is entirely consistent with the proposition that § 101 is a general condition for patent eligibility, i.e., a course threshold filter, whereas § 102 and §

¹⁰ See the Office's proposed and final rules implementing the AIA, e.g., 77 Fed. Reg. 48,680, 48,684 (Aug. 14, 2012) (The "grounds available for post-grant review include 35 U.S.C. 101 and 112, with the exception of compliance with the best mode requirement."); and, 77 Fed. Reg. 7080, 7088 (Feb. 10, 2012) ("Under the proposed rules, a covered business method patent review petition would be based upon most grounds identified in 35 U.S.C. 321(b), e.g., failure to comply with 35 U.S.C. 101, 102 (based on certain references), 103, and 112 (except best mode)").

103 represent more specific conditions for patentability. Additionally, Versata states that the Federal Circuit concluded in *MySpace, Inc. v. Graphon Corp.*¹¹ that § 101 is not specified as a condition for patentability. POPR, 71-72. Although *MySpace* does not specifically address the issue in question, it does state that § 101 is an invalidity defense, just as §§ 102, 103 and 112 also represent permissible invalidity defenses. *Id.* at 1261-62.

D. Versata Claims 17 and 26-29 are Unpatentable Under 35 U.S.C. §102

SAP sold an “R/3” business information system designed to manage and account for all of the resources, information and activities of a business.

According to SAP, Versata claims 17 and 26-29 are anticipated by SAP’s R/3 documentation, which accompanied its R/3 2.2C product, which shipped in January 1995. Pet., 31, SX 1009. Versata opposes. POPR, 50-56.

The R/3 documentation describes the R/3 system as an enterprise information system that is designed to manage an account for business activities and includes a number of modules covering business functions.¹² A Sales and

¹¹ 672 F.3d 1250 (Fed. Cir. 2012)

¹² The R/3 documentation spans over ten thousand pages. SX 1017. SAP’s expert, Dr. Siegel, has provided a declaration that shows where each element of Versata’s challenged claims may be found in the R/3 document and summarizes this information in an extensive claim chart at Appendix C of his declaration. SX

Distribution (“SD”) module includes tasks for determining the price at which a sales company will offer a product or service for sale to a customer. The price will depend upon a number of factors, including the relationship with the customer, the size of the order, special offers, packaging, freight, taxes, etc. The R/3 documentation refers to a “condition technique” that is described as a flexible process for accounting for varying factors and considerations in determining a price. The SD module organizes customer organizations and products into hierarchies. For example, customers can be organized by geographic regions (country-state-city) and products can be organized into material pricing groups, such as electrical appliances with subgroups for wet and dry appliances and further subgroups for specific types of wet and dry appliances.

The condition technique employs “condition records.” These records are associated with pricing types, organizational groups and product groups. Hence, the condition technique allows users to store pricing information associated with pricing types, organizational and product groups.

The pricing procedure described in the R/3 documentation involves the use of an “access sequence.” The access sequence specifies the order in which tables should be searched to find applicable condition records.

1005. In analyzing the R/3 documentation, we have relied heavily upon Dr. Siegel’s citations to the record.

The condition technique sorts pricing information according to pricing types, the purchasing organization, and the hierarchy of product and organizational groups. For example, all condition records are first sorted according to the condition type they belong and then the access sequence determines the order in which the condition records will be retrieved for each type. Once all the condition records are retrieved, the R/3 documentation specifies that all but the last condition record will be eliminated and only the most specific one will be used, i.e., the system will eliminate any of the pricing information that is less restrictive and will determine the product pricing using the sorted information.

Versata contends that the R/3 documentation lacks a material limitation that appears in each of the challenged claims. Specifically, Versata states that there is no dispute that the claim term “pricing information” means “any information relating to price other than an adjustment to price that is not a denormalized number.” POPR, 47. Versata states that all its challenged claims require denormalized numbers and that SAP has failed to establish that the R/3 system employs denormalized numbers.

Our claim construction discussed *supra* is consistent with the construction that Versata advanced at district court, that denormalized numbers represent a preferred embodiment and that the claims are not limited to the use of denormalized numbers. SX 1012, 8-9. Further, SAP’s petition explains that the

broadest reasonable interpretation of Versata's claims should *include* denormalized numbers. Pet., 16. As stated above, we agree with Versata's position before the district court and we agree with SAP's position before the Board; Versata's claims encompass ("include") denormalized numbers but are not restricted to the use of denormalized numbers.

We credit the testimony of Dr. Siegel and find that the R/3 documentation describes the claimed computer implemented methods for determining a price of a product offered to a purchasing organization. We find that SAP has established that Versata's claims are more likely than not anticipated by the R/3 documentation.

Additionally, although we have construed the claims as not requiring the use of denormalized numbers, we further find that SAP has established on the record filed to date that the R/3 documentation describes the use of denormalized numbers at runtime to arrive at a final price calculation. Specifically, even if the claims required the use of denormalized numbers, Dr. Siegel has provided credible testimony that the R/3 documentation describes a system that uses denormalized numbers at runtime to calculate a final price. SX 1005. In crediting Dr. Siegel's testimony, we agree with Versata that Dr. Boyd, SAP's expert in the related district court litigation, testified that SAP's R/3 2.2 system did not use denormalized numbers. VX 2047, 33:8-20. We also agree with Versata that Dr. Boyd's

testimony is, on its face, inconsistent with that of Dr. Siegel, SAP's expert for this proceeding. Versata however, does not provide a sufficient explanation as the basis for Dr. Boyd's conclusion that the R/3 prior art system does not employ denormalized numbers. For example, Versata directs our attention to Dr. Boyd's opening expert report as the basis for his opinion but, the opinion merely concludes without much explanation that the R/3 system does not employ denormalized numbers and goes on to state:

Once I learn what Versata's theory regarding denormalized numbers is, I expect I will be able to make more concrete arguments in response. I therefore reserve the right to supplement my report to rebut Versata's infringement theory and, if appropriate, show why its acceptance would have to lead to the "pricing adjustment" and "pricing information" claim limitations being met by prior art R/3.

Opening Expert Report of Dr. E Andrew Boyd, SX 2046, ¶ 246. Based upon the evidence presented, we credit the testimony of Dr. Siegel over that of Dr. Boyd and find that the R/3 system employs denormalized numbers at runtime to calculate a final price.

SAP contends that Versata's challenged claims are unpatentable as anticipated over admitted prior art, including the R/3 system. Pet., 61-62. This ground for challenging Versata's claims is unnecessary as cumulative in light of our decision finding that it is more likely than not that Versata's claims are

anticipated by the R/3 documentation. Accordingly, we deny this ground for challenging the claims in the trial and it is not authorized as part of the trial.

E. SAP has Failed to Demonstrate that Versata Claims 17 and 26-29 are Unpatentable under 35 U.S.C. § 112

1. § 112, Second Paragraph

SAP alleges that the claims 17 and 26-29 are indefinite because they fail to reasonably apprise those of skill in the art of their scope. Pet. 25. We agree with Versata that SAP has failed to demonstrate that the claims are more likely than not unpatentable under 35 U.S.C. § 112, second paragraph. POPR, 57. Specifically, we hold that the terms “less restrictive” and “pricing information” are definite, and that one skilled in the art could determine the statutory category of invention (article of manufacture) to which claims 26 and 28 belong.

2. § 112, Written Description

SAP contends that claims 17 and 26-29 lack sufficient written description. According to SAP, the '350 specification fails to explain how the claimed software operates and thus fails to adequately describe certain functions, for example, “computer instructions to implement the method of claim 17.” Pet., 22-23. SAP relies upon the testimony of Dr. Siegel to support its position. *Id.*, citing SX 1005, ¶¶ 62-64.

The test for written description is an objective inquiry into the four corners of the specification from the perspective of a person of ordinary skill in the art. Using this test, the invention must be described in a manner sufficient to demonstrate that the inventor actually invented the claimed invention. *Ariad Pharm. Inc. v. Eli Lilly & Co.*, 598 F.3d 1336 (Fed. Cir. 2010). Using this test, we find that Dr. Siegel’s testimony fails to demonstrate that the inventor failed to describe the invention. Specifically, the testimony merely demonstrates that the '350 specification lacks specificity as to the software aspects of the invention, a finding that is consistent with the notion that the claims are directed to an abstract idea as opposed to a software invention.

IV. Summary

Petitioner has demonstrated that Versata '350 claims 17 and 26-29 are more likely than not unpatentable. The petition is granted as to the following grounds:

- I. 35 U.S.C. § 101: Claims 17 and 26-29
- II. 35 U.S.C. § 102: Claims 17 and 26-29.

The petition is denied as to the grounds raised under 35 U.S.C. § 112.

V. Order

In consideration of the foregoing, it is hereby:

ORDERED that the Petition is granted as to claims 17 and 26-29 of the '350 patent.

FURTHER ORDERED that pursuant to 35 U.S.C. § 324(a), a covered business method review of the '350 patent is hereby instituted commencing on the entry date of this Order, and pursuant to 35 U.S.C. § 324(d) and 37 C.F.R. § 42.4, notice is hereby given of the institution of a trial.

FURTHER ORDERED that the trial is limited to the grounds identified in I-II above and no other grounds are authorized.

FURTHER ORDERED that an initial conference call with the Board is scheduled for 2 PM EST on February 5, 2013. The parties are directed to the Office Trial Practice Guide, 77 Fed. Reg. 48756, 48765-66 (Aug. 14, 2012) for

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guidance in preparing for the initial conference call, and should come prepared to discuss any proposed changes to the Scheduling Order entered herewith and any motions the parties anticipate filing during the trial.

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