UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

_____,

Plaintiff,

Case. Number __-____
Honorable David M. Lawson

v.

_____,

Defendant.

_____/

PATENT CASE MANAGEMENT AND SCHEDULING ORDER

I. Computation of time under this order and under any notice of any scheduling order or notice in this cause shall be in conformity and accordance with Fed. R. Civ. P. 6(a).

II. DISCOVERY.

A. The Court enforces Rule 26 discovery plans agreeable to all parties. Disclosure required by Fed. R. Civ. P. 26(a)(1) and (a)(2)(A) (including, in this case, the defendant's sales figures) shall be served on opposing counsel, *but not filed with the Clerk of the Court*, on or before _____.

B. Disclosure of information regarding expert witnesses required by Fed. R. Civ. P. 26(a)(2) shall be made as follows: if not already disclosed under Paragraph II(A) above, disclosure of an expert witness's identity under Rule 26(a)(2)(A) shall be made within three (3) business days of the expert's retention; other disclosure under Rule 26(a)(2)(B) and (C) shall be served on opposing counsel, *but not filed with the Clerk of the Court*, by plaintiff on or before _____ and by defendant on or before _____.

C. **The Court reminds the parties that Fed. R. Civ. P. 5(d) and E.D. Mich. LR 26.2 prohibit filing with the Clerk depositions, interrogatories, requests for the production of documents, requests for admission, responses to such discovery material, *and certificates of service* except as provided for in Local Rule 26.2. Additionally, disclosures under Rule 26(a)(1) and (2), the corresponding discovery requests and responses must not be filed with the Clerk until they are used in the proceedings or the Court orders them to be filed pursuant to Local Rule 26.2. *See* Fed. R. Civ. P. 5(d). *Parties and counsel who submit filings in violation of these provisions may be assessed costs by the Court.***

D. The patentee must serve his disclosure of the following information on or before _____:

1. Each patent claim that is allegedly infringed by each opposing party;
2. For each asserted claim, the accused product of each opposing part of which the patentee is aware. This identification shall be as specific as possible. Plaintiff shall identify each accused product by name or model number, if known.
3. A chart identifying specifically where each limitation of each asserted patent claim is found within each accused product, including for each limitation that such party contends is governed by 35 U.S.C. § 112 ¶ 6, the identity of the structure(s), act(s), or material(s) in the accused product that performs the claimed function.
4. Whether each claim limitation of each asserted claim is claimed to be literally present or present under the doctrine of equivalents in the accused product.

E. Any party asserting invalidity or unenforceability claims or defenses must serve disclosures containing the following on or before _____:

1. Each item of prior art that allegedly anticipates each asserted claim or renders it obvious. For prior art that is a document, a copy of the document should be provided to the patentee's counsel or be identified by Bates Number if it was previously produced. As to prior art that is not documentary in nature, such prior art shall be identified with particularity (by "who, what, when, and where" etc.) as to publication date, sale date, use date, source, ownership, inventorship, conception and any other pertinent information.
2. Whether each item of prior art anticipates each asserted claim or renders it obvious. If a combination of items or prior art makes a claim obvious, each such combination, and the reason why a person of ordinary skill in the art would combine such items must be identified.
3. A chart identifying where specifically in each alleged item of prior art each limitation of each asserted claim is found, including for each claim limitation that such party is governed by 35 U.S.C. § 112 ¶ 6, the identity of the structure(s), act(s), or material(s) in each item of prior art that performs the claimed function; and
4. For any grounds of invalidity based on 35 U.S.C. § 112 or other defenses, the party asserting the claim or defense shall provide its reasons and evidence why the claims are invalid or the patent unenforceable. Such positions shall be made in good faith and not simply *pro forma* arguments.

F. On or before _____, Defendant shall serve non-infringement contentions, which shall explain the factual basis for its allegations that it does not infringe the patent-in-suit either literally or under the doctrine of equivalents, including identifying what claim limitations that it believes are not present in the accused products.

G. Fact discovery shall be completed on or before _____. The Court will not order discovery to take place subsequent to the discovery cutoff date. Discovery can be conducted both before and after the discovery cutoff date by stipulation only if the extension of time does not affect the motion cutoff, final pretrial conference, or trial dates. Extensions or adjournments of all other dates will only be considered upon the filing of a timely written motion for good cause shown.

H. The Court will enter a default protective order. Other proposed protective orders must comply with the guidelines contained on the Court's web page. *See* http://www.mied.uscourts.gov/Judges/guidelines/index.cfm?judgeID=20.

I. The defendant must make its election and shall notify the plaintiff of its intention to rely on an advice-of-counsel defense on or before _____. Failure to serve notice by that date shall constitute a waiver of that defense.

J. Expert discovery shall be completed on or before on or before _____.

K. A list in the form required by Fed. R. Civ. P. 26(a)(3) of the witnesses, both lay and expert, whom a party may call to testify, and exhibits shall be filed with the Clerk of the Court and served on opposing counsel on or before _____.

III. CLAIM CONSTRUCTION PROCEEDING

Pursuant to the decision of *Markman v Westview Instruments, Inc.,* 517 U.S. 370 (1996), the following procedures will be followed for resolution of claim construction issues in this case.

A. **INITIAL IDENTIFICATION OF DISPUTED CLAIM TERMS** – The parties will confer to determine what claim terms may need to be interpreted by the Court on or before _____**.**

B. **PROPOSED INTERPRETATIONS** – On or before _____, the parties shall exchange, but not file, a chart or table that lists for each disputed claim term the party's proposed interpretation of the disputed claim term along with citations to the intrinsic and extrinsic evidence (e.g., patent, prosecution history, dictionary definitions, etc.) that supports its interpretation, and a summary of any testimony that is expected to be offered to support that interpretation.

C. **FINAL IDENTIFICATION OF DISPUTED CLAIM TERMS – [One week after III(B)]**, the parties shall confer again about the claim terms in dispute. At this meeting, the parties shall attempt to narrow and finalize the claim terms that need to be interpreted by the Court. If at any time, the parties determine that a claim construction hearing is not necessary, they shall notify the Court promptly. The

parties shall set forth separately the construction of those claim terms on which the parties agree.

D. **TECHNOLOGY TUTORIAL** - Before any claim construction briefs are submitted, the Court typically schedules an information tutorial on the technology involved in the case. The purpose of the information tutorial is to give the Court an understanding and background of the technology. This tutorial is not on the record. The Court will hold an information conference with the attorneys on **_____, 20__ at _____.** At the conference the attorneys for each side will explain the technology at issue in the litigation. The conference will not be recorded.

E. Each party's opening claim construction brief shall not exceed 20 pages (i.e., plaintiff's opening claim construction brief and defendant's response brief). The plaintiff's reply brief shall not exceed five (5) pages. If the parties believe that they need a page extension, they may make such a request at the Court's informal technology tutorial or by filing a motion. The request shall set forth the reasons why a page extension is needed.

F. **PLAINTIFF'S OPENING CLAIM CONSTRUCTION BRIEF** – The plaintiff shall file its opening claim construction brief on or before _____.

G. **DEFENDANT'S RESPONSE BRIEF** – The defendant shall file any responsive claim construction brief on or before _____.

H. **DRAFTING OF PLAINTIFF'S REPLY BRIEF** – To the extent that the plaintiff intends to file a reply brief on claim construction issues, the plaintiff shall serve, but not file, a good-faith draft of its intended reply brief on opposing counsel on or before _____. The plaintiff shall prepare and serve within this time period a draft four-column claim interpretation schedule in the form of Exhibit A. Each side shall attach to the schedule a chart in the form prescribed in paragraph III(B) of this Order to support their respective proposed constructions.

I. **IN-PERSON MEETING AT THE COURTHOUSE** – Within two weeks after service of the DRAFT OF PLAINTIFF'S REPLY BRIEF, or the time that service would have been due if plaintiff does not file a reply brief, principal counsel for both parties shall have a face-to-face meeting at the courthouse to discuss the parties' legal theories and proposed claim interpretations in an effort to narrow the disputes and arguments that the Court must resolve. The courthouse has attorney conference rooms available for the meeting. Counsel should contact the Court's case manager to schedule a room.

J. **FILING OF FINAL VERSION OF REPLY BRIEF AND CLAIM CHART** – On or before _____, the plaintiff shall file with the Court and serve on opposing counsel the final versions of its reply brief and the claim chart in the

form of Exhibit A. The plaintiff shall set forth in its reply brief any previous claim interpretation disputes that the parties have resolved in the IN-PERSON MEETING AT THE COURTHOUSE. The plaintiff shall also submit a copy of the final version of the claim chart in the Court in WordPerfect format via CM/ECF utilities as a proposed order through the Court's electronic filing system.

K. **CLAIM CONSTRUCTION HEARING** – The Court will conduct a claim interpretation hearing on _____, 20__ **at** _____. The Court typically does not hear live testimony at the claim construction hearing. However, on a case-by-case basis, the Court may allow expert testimony from a person of ordinary skill in the art. If the Court allows expert testimony, each side is typically limited to one hour of live testimony. A request for live testimony must be made to the Court at the Court's informal technology tutorial or by motion filed by that date.

IV. Each party shall file and seasonably amend any infringement, invalidity, or non-infringement contention in accordance with Rule 26(e) of the Federal Rules of Civil Procedure upon learning that the contention is incomplete or incorrect. Any amendment to a party's infringement, invalidity, or non-infringement contents, or other pleading, that is necessary due to the Court's claim interpretation ruling, must be timely made but in no event later than one month after the Court's claim construction ruling.

V. MOTIONS CHALLENGING EXPERT WITNESSES. Motions challenging the admissibility of expert witness testimony pursuant to Fed. R. Evid. 702, 703 or 705 shall be filed on or before _____ . If such motion requires a testimonial hearing, it should be filed within sufficient time to permit scheduling a hearing so as not to interfere with the trial date. All such motions should include specific references to the witness's deposition and to all other record material needed to establish the foundation for the motion

VI. DISPOSITIVE MOTIONS. Dispositive motions shall be filed on or before **_____.**

No party may file more than one motion for summary judgment without obtaining leave of Court. Challenges to several counts of a complaint shall be brought in a single motion. When filing motions for summary judgment, parties must adhere to the following guidelines:

A. Before filing a motion for summary judgment or responding to such a motion, the parties are urged to familiarize themselves with *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). An excellent summary of these cases appears in *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989). *See also* Schwarzer, *Summary Judgment under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465 (1984). Counsel are discouraged from employing elaborate boilerplate recitations of the summary judgment standard or lengthy string citations in support of well-established legal principles.

B. Briefs in support of motions for summary judgment must contain a recitation of the undisputed facts with specific references to the record. If facts are disputed, the moving party must explain how the fact is not material to the dispute.

VII. GENERAL MOTION PRACTICE.

A. Discovery motions may be referred to the magistrate judge. Once a motion has been referred, all communication regarding that motion should be directed to the magistrate judge's chambers.

B. The Court strictly enforces the requirements of Eastern District of Michigan Local Rules 5.1 and 7.1 and the Electronic Filing Policies and Procedures for all motions. Failure to follow these rules likely will result in a denial of the motion and may lead to sanctions.

C. The Court requires strict compliance with LR 7.1(a), which requires moving parties to seek concurrence before filing a motion. The Court requires that a good-faith effort be made to obtain concurrence, which normally involves actual contact with opposing counsel. If no actual conversation occurs, the moving party must show that reasonable efforts were undertaken to conduct a conference. All of this must be documented specifically in the motion papers.

D. Motions must be clear and succinct without extensive factual development. All briefs must comply with Eastern District of Michigan Local Rules 5.1 and 7.1, must contain citation to appropriate authorities within the text of the brief (not in footnotes), and citations must conform to the latest edition of The Bluebook: A Uniform System of Citation published by the Harvard Law Review. In addition,

briefs must contain a concise statement of facts supported by references to the record. Footnotes are discouraged, but if they are utilized they must be printed in the same font size as the text, which may not be less than 12 points.

E. Answers to motions and supporting briefs must be filed according to the schedule set forth in LR 7.1(d). Note that Rule R5(e) of the Electronic Filing Policies and Procedures prohibits combining an answer to a motion with a counter-motion in the same filing. *The Court does not issue a briefing schedule. The Court enforces the response and reply due dates as set forth in LR 7.1(d) and Fed. R. Civ. P. 6, even when the motion hearing is set far in advance.* Attorneys who do not respond to motions in a timely fashion are not permitted to argue before the Court during oral argument, if oral argument is scheduled.

F. Counsel are discouraged from employing elaborate boilerplate recitations of the applicable motion standards and lengthy string citations in support of well-established legal principles. Instead, counsel should focus their analysis on a few well-chosen cases, preferably recent, published, and from controlling courts.

G. Facts stated in the statement of facts *must* be supported with citations to either the pleadings, interrogatories, admissions, depositions, affidavits, or documentary exhibits.

H. When referring to unpublished sources, the full text of any unpublished source cited should be filed with Court as an appendix. The appendix shall contain an index. As to cited deposition testimony, counsel are also encouraged to supply the Court with a transcript of cited page(s) together with sufficient accompanying pages to provide context. All citations must have page references. Other documents referred to in the briefs should be included in the appendix.

I. Courtesy copies of motions and briefs must be provided to chambers in accordance with Rule R5(b) of the Electronic Filing Policies and Procedures.

J. If a hearing is scheduled, the Court's case manager will send out a notice of the hearing date.

K. The Court endeavors to decide pending motions promptly, ordinarily within six weeks after a hearing, or within three weeks after the time for a response has passed without a response being filed. Complex motions or those raising novel issues may require additional time to conclude. If a motion has been pending in chambers without resolution for an apparently inordinate time, counsel are asked to notify the Court's case manager by telephone or in writing (jointly if possible) as to the status of the motion. Such notification is a service that is appreciated by the Court and is not viewed by the Court as inappropriate or impertinent.

VIII. E-FILING.

A. All attorneys must obtain a PACER account and become a registered user to allow participation in the Case Management/Electronic Case Filing (CM/ECF) system. *All* attorneys should become familiar with the CM/ECF Policies and Procedures, which can found as an Appendix to the Local Rules.

B. Registered users will be notified immediately by the CM/ECF system of the Court's filing of orders, opinions, and notices. Attorneys who are not registered users must retrieve paper copies of orders and opinions from the office of the Clerk of the Court, 231 West Lafayette Blvd., 5th Floor, Detroit, Michigan.

C. Courtesy copies submitted in accordance with Rule R5(b) of the Electronic Filing Policies and Procedures may be sent by ordinary mail posted within one (1) business day of the e-filing date. Paper copies should be directed to chambers and NOT files in the Clerk's office.

D. **WARNING!** UNDER THE E-GOVERNMENT ACT OF 2002, CERTAIN INFORMATION MUST NOT BE INCLUDED IN COURT DOCUMENTS. BEFORE FILING ANY COURT DOCUMENTS, EITHER ELECTRONICALLY OR IN THE TRADITIONAL MANNER, CONSULT THE E-GOVERNMENT NOTICE THAT CAN BE FOUND AT http://www.mied.uscourts.gov/Rules/Plans/07-AO-030.pdf.

E. Proposed orders can stipulated orders should not be e-filed. Rather, they should be submitted to chambers through the document utilities feature of the CM/ECF. *See* Rule R11 of the Electronic Filing Policies Procedures. Submissions must be in current WordPerfect format. Electronic signatures must conform to Rule R9 of the Electronic Filing Policies and Procedures.

F. No documents may be filed or submitted under seal without prior approval of the Court, except as permitted by LR 5.3(a). Parties seeking to file sealed items must comply with LR 5.3(b)-(e).

IX. MOTIONS IN LIMINE must be filed by _____. It is the intention of the Court that all responses to motions *in limine* shall have been filed in advance of the final pretrial conference date; therefore counsel must strictly adhere to the deadlines set forth in LR 7.1(d)(2). Counsel should be prepared to address motions *in limine* at the final pretrial conference.

X. FINAL PRETRIAL CONFERENCE AND FINAL PRETRIAL ORDER. The final pretrial conference shall take place on _____, 20__ at ____. The Proposed Joint Final Pretrial Order must be submitted to chambers (and not e-filed) before the close of business on _____. Following is the procedure counsel are to use to prepare for the final pretrial conference and the Proposed Joint Final Pretrial Order:

A. Counsel for all parties are directed to confer *in person (face to face) at their earliest convenience* in order to (1) reach any possible stipulations narrowing the issues of law and fact, (2) deal with non-stipulated issues in the manner stated in this paragraph, and (3) exchange documents that will be offered in evidence at the trial. It shall be the duty of counsel for plaintiff to initiate that meeting and the duty of other counsel to respond to plaintiff's counsel and to offer their full cooperation and assistance. If, after reasonable effort, any party cannot obtain the cooperation of other counsel, it shall be his or her duty to communicate with the Court. Counsels' meeting shall be had sufficiently in advance of the date of the scheduled final pretrial conference with the Court so that counsel for each party can furnish all other counsel with a statement of the real issues the party will offer evidence to support, eliminating any issues that might appear in the pleadings about which there is no real controversy and including in such statement issues of law as well as ultimate issues of fact from the standpoint of each party. *Counsel for plaintiff then will prepare a draft joint final pretrial order and submit it to opposing counsel, after which all counsel will jointly submit*[1] *the original and one copy of the final draft of the proposed joint final pretrial order to the Judge's chambers (or in open court, if so directed) on the date fixed for submission.* All instructions contained within this order *must* be followed carefully; they will be binding on the parties at trial. If there are any pending motions requiring determination in advance of trial,[2] they should specifically be called to the Court's attention not later than the date of submission of the final pretrial order.

The proposed joint final pretrial order should provide for the signature of the Court, which, when signed, will become an Order of the Court. *AN ORIGINAL AND ONE COPY IS TO BE MAILED OR HAND-DELIVERED TO CHAMBERS, NOT THE CLERK'S OFFICE AND NOT E-FILED.*

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[1]Counsel for plaintiff has primary responsibility for preparation of the Proposed Final Pretrial Order and, in that respect, for its submission to opposing counsel in ample time for revision and timely filing. Nonetheless, full cooperation and assistance of all other counsel are required for proper preparation of the final pretrial order and must therefore be extended.

[2]This includes motions in limine, disputes over specific jury instructions or the admissibility of any evidence at trial upon which the parties desire to present authorities and argument to the Court.

THE PROPOSED JOINT FINAL PRETRIAL ORDER SHALL STRICTLY COMPLY WITH THE PROVISIONS AND REQUIREMENTS OF LR 16.2 INCLUDING SUBPARTS (d) AND (f), EXCEPT AS THIS COURT MAY OTHERWISE PROVIDE HEREIN.

B. The following person and entities shall *personally* attend the final pretrial conference:

1) **Trial counsel** for each party;
2) **All parties** who are natural persons;
3) **A representative** on behalf of any other party;
4) **A representative of any insurance carrier** that has undertaken the prosecution or defense of the case and has contractually reserved to itself the ability to settle the action.

Representatives must possess full authority to engage in settlement discussions and to agree upon a full and final settlement. "Full authority" is authority that exceeds the level of the last demand by the plaintiff.

"Personal attendance" by each party is not satisfied by (1) trial counsel professing to have full authority on behalf of the client or (2) a party being available by telephone.

Any party who disregards these requirements may be sanctioned pursuant to Fed. R. Civ. P. 16(f). Possible sanctions include fines, cost, fees, foreclosure of witnesses, or loss of claims or defenses.

Requests for adjournment of the final pretrial conference should be made in accordance with section XIV of this Order.

XI. Trial shall commence on _____**,** 20__ at 8:30 a.m.

XII. At least ***ONE WEEK*** prior to the trial date all counsel must meet, confer, and furnish to the Court the following in proper form:

A. In jury cases, any requests for *VOIR DIRE* and proposed *JOINT JURY INSTRUCTIONS*. In jury cases, the parties are hereby **ORDERED** to meet and confer prior to trial to discuss jury instructions. No later than one week prior to the first day of trial, the parties are to file with the Court a single set of proposed, stipulated jury instructions. The Court will provide proposed opening and closing instructions, and counsel are responsible for all instructions related to their specific claims or defenses. All such instructions are to be submitted in typewritten form (double spaced) and on computer disk compatible with WordPerfect version 12.0 or later; each instruction shall contain references to authority (e.g., "Devitt and Blackmar, Section 11.08"); and each instruction shall be contained on a separate

page. In addition, each party shall separately file any additional proposed instructions (in the same form) to which any other party objects. The parties must make a concerted, good faith effort to narrow the areas of dispute and to discuss each instruction with a view to reaching agreement as to an acceptable form.

B. A statement of claims or defenses, no longer than two pages, suitable to be read to the jury during opening instructions.

C. In jury cases, trial briefs are optional, but if furnished they must be submitted at least one week before trial.

D. In non-jury cases, proposed finding of fact and conclusions of law and (mandatory) trial briefs.

E. In all cases, a list of witnesses to be called at trial and an exhibit list **using the attached exhibit form.**

Note: This order supersedes the deadlines set forth in LR 16.2.

XIII. Exhibits During Trial.

A. Counsel are required to mark all proposed exhibits in advance of trial; the preferred method is to use the traditional "Plaintiff's Exhibit __" (yellow) and "Defendant's Exhibit __" (blue) stickers, but any clearly marked method is acceptable. A consecutive numbering system should be used by each party. Numbers used by one party shall not be used by other parties.

B. **COUNSEL ARE REQUIRED TO KEEP TRACK AND MAINTAIN CUSTODY OF ALL ADMITTED EXHIBITS DURING TRIAL.**

C. Parties are encouraged to use electronic aids to display evidence at trial. However, a party intending to do so must disclose that intention to the Court and all other parties at or before the final pretrial conference. Parties are responsible for providing equipment for such purpose.

D. If a party does not intend to display evidence by electronic means, exhibits must be tabbed and put in binders. If the exhibits are voluminous, exhibits used for each witness should be bound separately. In either case, binders should be provided to the Court and each juror.

E. Counsel must confer and purge from one set of binders or files all exhibits not admitted during the course of trial. Admitted exhibits should be ready to be turned over to the jury foreperson prior to closing jury instructions so that jury deliberations are not delayed.

F. It is the responsibility of the parties to see that the record is complete; at the conclusion of trial, all trial exhibits, briefs, proposed jury instructions, etc. are to be filed in accordance with Rule R18 of the Electronic Filing Policies and Procedures.

G. The Court requires full disclosure to opposing counsel of computer generated visual or animated evidence and full disclosure of underlying data.

XIV. **Requests for an extension of a scheduling order date are not routinely granted**. All requests shall be made *in writing* to the Court setting forth good cause, *see* Fed. R. Civ. P. 16(b)(4), in a (1) stipulation by the parties with a proposed order or (2) motion to extend the date which states that concurrence was sought and refused. The Court will consider persuasiveness of the reasons for the extension and the overall reasonableness of the request, including its effect on the other dates in the scheduling order.

XV. ALTERNATIVE DISPUTE RESOLUTION: Lead counsel for the parties shall appear for a status conference on _____, 20__ at _____ to discuss Alternative Dispute Resolution.

XVI. The Court will not allow counsel not admitted in the Eastern District to practice upon a special motion. All inquiries regarding admission to the Eastern District must be directed to the Clerk's Office at (313) 234-5005.

XVII. Counsel may contact the Court's case manager with questions regarding the Court's practices, this order, or other matters of practice and procedure. However, **before calling chambers,** please consult the Court's web page at http://www.mied.uscourts.gov/Judges/guidelines/index.cfm?judgeID=20.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: _____, 20__

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on _____.

s/Shawntel Jackson
SHAWNTEL JACKSON

EXHIBIT A

CLAIM INTERPRETATION CHART

Disputed Claim Term	Plaintiff's Proposed Construction	Defendant's Proposed Construction	Court's Construction
1. "Term 1"			
2. "Term 2"			
3. "Term 3"			
4. "Term 4"			

PLAINTIFF'S EXHIBITS
DEFENDANT'S EXHIBITS

EXHIBIT NO.	DESCRIPTION	DATE OFFERED	OBJECTED TO	RECEIVED