EXHIBIT 2

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HOSPIRA, INC., et al. Plaintiffs, v. SANDOZ, INC., et al. Defendants.	:	CIVIL ACTION NO. 09-4591 (MLC) **DRAFT MARKMAN OPINION**

COOPER, District Judge

The Court's Draft Construction of the Term "Intensive Care"

Although the parties used the term "intensive care" in two definitions under United States Patent No. 6,716,867 ("the '867 Patent"), they did not define it. (See id. at 4 ("The parties do not dispute the construction of any terms of the Patents-In-Suit.").) Because the Court has determined that it must define this term before resolving the Motions, it will now construe it.

The Court begins by noting the "'heavy presumption' "that a claim term carries its ordinary and customary meaning." CCS Fitness Inc. v. Brunswick Corp., 288 F.3d 1359, 1366 (Fed. Cir. 2002). The ordinary and customary meaning of a claim term is the meaning a "person of ordinary skill in the art in question" (a "POSITA") would assign such term on the patent's priority date. Phillips v. AWH Corp., 415 F.3d 1303, 1313 (Fed. Cir. 2005). A POSITA is deemed to interpret the claim term in the context of

the entire patent, including the specification. Id. Claims terms carry their ordinary and customary meanings unless otherwise indicated in the patent specification or file history. Wolverine Worldwide, Inc. v. Nike, Inc., 38 F.3d 1192, 1196 (Fed. Cir. 1994).

"To ascertain the scope and meaning of the asserted claims, we look to the words of the claims themselves, the specification, the prosecution history, and any relevant extrinsic evidence." Retractable Techs., Inc. v. Becton, Dicksinon & Co., 653 F.3d 1296, 1303 (Fed. Cir. 2011), rehearing and rehearing en banc denied, 659 F.3d 1369. The Court first looks to the intrinsic evidence of record, which includes the patent's claims, specification, and complete prosecution history. Markman, 52 F.3d at 979. Such intrinsic evidence is the most significant source of the legally operative meaning of disputed claim language. Vitronic Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1583 (Fed. Cir. 1996). The specification is "always highly relevant to the claim construction analysis" and is "the single best guide to the meaning of a disputed term." Honeywell Int'l, Inc. v. ITT Indus., Inc., 452 F.3d 1312, 1318 (Fed. Cir. 2006) (internal quotation marks omitted). The specification may contain an intentional disclaimer or a disavowal of claim scope by the inventor, whereby the inventor's intention, expressed in the specification, is dispositive. Phillips, 415 F.3d at 1316.

It is, however, improper to read a limitation from the specification into the claims. Teleflex, Inc. v. Ficosa N. Am. Corp., 299 F.3d 1313, 1326 (Fed. Cir. 2002).

In some instances, the ordinary meaning of claim language, as understood by a POSITA, will be readily apparent to the Court after reviewing the intrinsic evidence. In such instances, claim construction will involve simply applying the widely accepted meanings of commonly understood words. Phillips, 415 F.3d at 1314. In other circumstances, however, the Court may consider extrinsic evidence, such as "expert and inventor testimony, dictionaries, and learned treatises." Id. In general, such evidence is less reliable than its intrinsic counterparts. Id. at 1318. Notably, "heavy reliance on the dictionary divorced from the intrinsic evidence risks transforming the meaning of the claim term to the artisan into the meaning of the term in the abstract, out of its particular context, which is the specification." Id. at 1321. Further, unsupported assertions by experts as to the definition of a claim term are not useful, and the after-the-fact testimony of the inventor is accorded little if any weight in the claim construction inquiry. Id. at 1318.

The term that actually appears in the '867 Patent claims is "intensive care unit." The parties have stipulated that an "intensive care unit" is "any setting that provides intensive care", but failed to define "intensive care".

The Court begins its claim construction inquiry by examining the intrinsic evidence of record. While the '867 Patent claims and related prosecution history do not help to define "intensive care", the'867 Patent specification provides some guidance. In the specification, Plaintiffs repeatedly refer to sedating patients that suffer from "critical illness" and sedating "critically ill patients". (See, e.g., '867 Patent at col. 1 at 32, 43.) In Example 3, the specification details sixteen cases of sedation of "critically ill patients", describing Phase III trials of dexmedetomidine and "the benefits of dexmedetomidine sedation in critically ill patients." (Id. at col. 8 at line 47 - col. 13 at line 54.) The specification provides that each of the sixteen "critically ill" patients was admitted to an "ICU", i.e., an intensive care unit, either preoperatively or postoperatively, and underwent some form of surgery. (Id.) The specification does not, however, disclose whether these patients underwent surgery because they were "critically ill" or whether they were considered"critically ill" because they underwent surgery. It also fails to disclose the type of nursing care provided to these patients or, more generally, the quality of perioperative care provided, except inasmuch as it discloses the administration of dexmedetomidine, analgesics, and other sedatives. (Id.)

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