

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

PARKERVISION, INC.,

Plaintiff,

v.

APPLE INC. AND QUALCOMM INCORPORATED,

Defendants.

Case No. 3:15-cv-1477

**DEFENDANT QUALCOMM INCORPORATED'S MOTION FOR PLAINTIFF
PARKERVISION, INC. TO COMPLY WITH THE COURT'S ORDERS**

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MOTION FOR PARKERVISION TO COMPLY WITH THE COURT'S ORDERS

Qualcomm moves the Court to (1) require ParkerVision to comply with the Court's Orders; (2) strike the improper portions of ParkerVision's final infringement contentions; and (3) require ParkerVision to reimburse Qualcomm for its fees and expenses related to this motion.

MEMORANDUM OF LAW IN SUPPORT OF MOTION

Unsatisfied with the Court's Orders, ParkerVision has taken to ignoring them. (Dkts. 141, 143, 151.) Even though the District Court and the Magistrate Judge both rejected ParkerVision's belated attempt to add indirect infringement claims to the case, ParkerVision's recent final infringement contentions assert indirect infringement. (Dkts.141, 143.) ParkerVision refuses to voluntarily withdraw those improper assertions, unless Qualcomm files a motion and obtains a ruling from the Court. Additionally, even though the Court issued a detailed 29-page Claim Construction Order addressing the parties' arguments and evidence, ParkerVision pretends that none of its proposed constructions and arguments were analyzed and rejected. (Dkt. 151.) ParkerVision hopes with additional time, everyone will forget why the Court ruled the way it did. It is wrong.

Despite multiple meet-and-confers, ParkerVision has caused Qualcomm to have no choice but to file this motion requesting that the Court order ParkerVision to comply with the Court's Orders. For clarity of the record as the parties approach expert discovery deadlines (Dkt. 171), the Court should either strike the improper portions of ParkerVision's final infringement contentions, or order ParkerVision to promptly serve final amended infringement contentions that remove the non-compliant portions.

I. PROCEDURAL HISTORY

A. Order No. 1: Order Denying ParkerVision’s Motion for Leave to File Third Amended Complaint to Add Indirect Infringement Claims to the Case.

ParkerVision commenced this patent case against Qualcomm in December 2015. The Court’s Scheduling Order required any motion to amend pleadings be filed by October 2017. (Dkt. 55 at 1.) **One year later**, in November 2018, ParkerVision filed a motion for leave to file a third amended complaint. (Dkt. 131, Brigham Ex. 4.) The stated purpose was to “eliminate” disagreement over “whether ParkerVision’s case includes claims that Qualcomm has *indirectly* infringed the ‘528 Patent,” since ParkerVision’s operative pleading failed to allege indirect infringement (*i.e.*, induced infringement or contributory infringement) of the ‘528 patent. (See Dkt. 131 at 1 (emphasis in original); Dkt. 133-1 at ¶¶ 17, 20-29, Brigham Ex. 5 (redline of proposed third amended complaint); *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1337-47 (Fed. Cir. 2012) (pleading indirect infringement requires, among other things, knowledge and intent); *Brandywine Commc’ns Techs. v. T-Mobile USA*, 904 F. Supp. 2d 1260, 1265 (M.D. Fla. 2012).) ParkerVision’s proposed third amended complaint sought to add eleven new paragraphs aimed at indirect infringement, with new section headings directed to “Indirectly Infringes,” “Induces Infringement,” and “Contributorily Infringes” allegations. (Brigham Ex. 5, Dkt. 133-1, pp. 7, 8, 10.)

The dispute about indirect infringement arose because ParkerVision had improperly tried to inject indirect infringement claims into its November 2018 infringement contentions, and Qualcomm objected. Of importance for purposes of this

motion to enforce, the parties agreed that the dispute about indirect infringement “would be best raised with a motion for leave to further amend the complaint.” (Dkt. 131 at 10.)

Following full briefing (including a reply and sur-reply), the Magistrate Judge issued an order denying ParkerVision’s motion. (Dkt. 141 (Klindt, M.J.); Brigham Ex. 1.) The June 2019 Order accurately characterized ParkerVision’s position: “according to ParkerVision,” the motion for leave is to “eliminate a new disagreement between the parties as to **whether ParkerVision’s case includes** claims that Qualcomm has **indirectly** infringed the ‘528 Patent”. (Dkt. 141 at 1 (quoting Dkt. 131 at 1; bold emphasis added).) The Magistrate Judge concluded that Defendants “have been proceeding on a theory of direct infringement of the patent at issue for almost the entire (if not the entire) course of this litigation,” so the late proposed amendment would “prejudice Defendants.” (Dkt. 141 at 4.) ParkerVision had “unduly delayed in seeking amendment” “almost thirteen months after” the Court’s Scheduling Order deadline (October 2017). (Dkt. 141 at 4.) In fact, the “weight of the evidence,” the Order stated, showed: “**ParkerVision did not intend to allege indirect infringement** with respect to the ‘528 Patent,” until a few months before ParkerVision filed its motion in November 2018. (Dkt. 141 at 3-4 (emphasis added).) The Magistrate Judge denied ParkerVision’s motion for leave to file a third amended complaint to add indirect infringement claims to the case.

ParkerVision objected to the Magistrate Judge’s Order. (Dkt. 142; Brigham Ex. 6.) ParkerVision reiterated again, the purposes of its motion for leave to file a third amended complaint was “to remove any doubt” that indirect infringement (*i.e.*, induced infringement and contributory infringement) is “part of this case,” and

“to remove the need for motion practice concerning Qualcomm’s objections to ParkerVision’s infringement contentions.”¹ (Dkt. 142 at 1 (emphasis added); Dkt. 142 at 4 (arguing it was filing its motion to “remove any doubt concerning the sufficiency of ParkerVision’s pleadings and avoid unnecessary motion practice concerning Qualcomm’s objections”); Brigham Ex. 6.)

“After an independent review of the record, the Order, [and] the Objections,” the District Court Judge overruled ParkerVision’s objections and affirmed the Magistrate Judge’s Order. (Dkt. 143 at 4 (Davis, J.); Brigham Ex. 2.) The July 21, 2019 Order stated: “the Magistrate Judge properly denied the Motion to Amend finding that a third amendment at this stage of the litigation would prejudice Defendants, who have been proceeding on a theory of direct infringement of the patent at issue for almost the entire (if not the entire) course of this litigation.” (Dkt. 143 at 4 (internal quotation marks omitted; emphasis added).) ParkerVision was not permitted to add indirect infringement claims to the case.

B. Order No. 2: Claim Construction Order

In July 2019, the Court ruled on claim construction. (Dkt. 151, Brigham Ex. 3.)²

1. Invalidated Claims

Following briefing, a technology tutorial, and the *Markman* hearing, the Court

¹ As the Court may recall, Qualcomm objected to ParkerVision’s second amended infringement contentions, and the Magistrate Judge noted that those objections and motion to strike may be a “moot point,” given the ruling denying ParkerVision’s motion for leave to file a third amended complaint. (Dkt. 141 at 4, n.4.)

² The Court noted in footnote 1 that it had “affirmed Judge Klindt’s Order” denying ParkerVision’s motion for leave to file a third amended complaint. (Dkt. 151 at 2, n.1.)

found that the ‘528 patent used the term “differential” in “inconsistent and nonsensical ways.” Claims 10 and 19 (and thus their dependent claims) were found “invalid for indefiniteness.” (Dkt. 151 at 28; Brigham Ex. 3.)

2. Court’s Claim Construction Analysis

For four disputed claim terms: “portion of energy that is distinguishable from noise,” “baseband signal portion,” “outputs,” and “derived,” the Court rejected ParkerVision’s proposed claim construction, and relied on Defendants’ arguments and evidence. (Dkt. 151 at 9-13; 15-17; 17-20; 22-24; Brigham Ex. 3.) For example, for the term “baseband signal portion,” in rejecting ParkerVision’s arguments, the Court held that it would “not ignore the language following ‘portion’ and [would] not rewrite the claim terms.” (Dkt. 151 at 16.) The Court stated: “[t]he claim language makes clear that ‘portion of’ refers to the language following ‘portion of.’” (Dkt. 151 at 17.)

Following the Claim Construction Order, the parties conferred on a case schedule whereby they could exchange final infringement and invalidity contentions. (*See* Dkt. 152, Dkt. 156.) The resulting schedule gave ParkerVision four months to revise its infringement contentions to account for the Claim Construction Order and discovery. Per the Court’s Order, ParkerVision’s final infringement contentions were due by November 20, 2019. (Dkt. 156.)

C. ParkerVision’s Final Infringement Contentions Ignored the Court’s Orders

When ParkerVision served its final infringement contentions,³ it did not account for the Court’s Orders. To the contrary, it ignored the Court’s Orders:

Problem	Court Orders
<ul style="list-style-type: none"> Alleged indirect infringement 	Dkt. 143 at 4; Dkt. 141 at 3-5
<ul style="list-style-type: none"> Asserted invalidated claims 	Dkt. 151 at 28
<ul style="list-style-type: none"> Made arguments rejected by the Court during claim construction 	Dkt. 151 at 9-24

ParkerVision continued to litigate the case as if the Court’s Orders did not exist.

D. ParkerVision Refused to Comply with the Court’s Orders

Qualcomm repeatedly urged ParkerVision to fix its infringement contentions to comply with the Court’s Orders, but ParkerVision refused.

On December 6, 2019, Qualcomm sent ParkerVision’s counsel a letter, asking ParkerVision to (1) “withdraw all indirect infringement allegations in ParkerVision’s infringement contentions” based on the Court’s Orders denying ParkerVision’s motion for leave to file a third amended complaint (Dkt. 141, 143), and (2) withdraw asserting invalid claims based on the Claim Construction Order. (Brigham Ex. 8 at 1-2.)⁴

³ On November 22, ParkerVision served a corrected Exhibit A, because the version it served on November 20 had more than half of the pages cut-off.

⁴ Given that the parties had already litigated ParkerVision’s motion for leave to file a third complaint, which was intended to “eliminate” the disagreement over whether indirect infringement was in the case, Qualcomm reserved the right to seek “fees and expenses,” if motion practice was required. (Brigham Ex. 8 at 2.)

ParkerVision responded on December 10, taking the position that “ParkerVision’s motion for leave to file a third amended complaint did not seek to add claims of indirect infringement to the case.” (Brigham Ex. 9 at 1.)

On December 11, 2019, Qualcomm urged ParkerVision again to comply with the Court’s Orders. (Brigham Ex. 10 at 1.) Qualcomm’s letter stated:

Despite telling the Court that ParkerVision’s motion was filed “to remove the need for motion practice concerning Qualcomm’s objections to ParkerVision’s infringement contentions” (Dkt. 142 at 1), it appears that ParkerVision still wants to burden the Court with additional motions.

(*Id.* at 2.) Qualcomm gave ParkerVision another opportunity to “withdraw all indirect infringement allegations in ParkerVision’s infringement contentions,” and to remove the invalidated claims. (*Id.* at 2.) Qualcomm again warned ParkerVision, “[w]e reserve all rights to seek relief from the Court, including fees and expenses, relating to the improper assertion of indirect infringement and the invalid claims.” (*Id.* at 2.)

On December 30, 2019, Qualcomm again reiterated its request for ParkerVision to voluntarily remove the improper indirect infringement allegations from its infringement contentions. (Brigham Ex. 11 at 6.) Per ParkerVision’s request, Qualcomm also identified some additional areas where ParkerVision’s infringement contentions were defective. (*Id.* at 5-6.) For example,

ParkerVision’s infringement contentions fail to address the Court’s claim construction ruling. In numerous instances, ParkerVision purports to address claim constructions that are not at issue in this litigation (*e.g.*, ParkerVision Infringement Contentions, Ex. A. at 22-23, 260, etc.). And in other instances, ParkerVision continues to advance infringement theories based on a **claim construction that was expressly rejected**

by the Court (*see, e.g.*, “down-converted in-phase baseband signal portion” and “downconverted inverted in-phase baseband signal portion”). This is wholly improper.

(*Id.* at 5 (emphasis added).)

The parties met-and-conferred telephonically in December 2019, and again on January 3, 2020, but ParkerVision refused to fix its infringement contentions to comply with the Court’s Orders.

II. ARGUMENT

“Orders are not suggestions or recommendations, they are directives with which compliance is mandatory.” *Gfeller v. Doyne Med. Clinic*, No. 14-CV-1940, 2015 WL 5210392, at *8 (D. Nev. Sept. 3, 2015); *Fees v. Zarco*, No. 17-CV-20564, 2017 WL 8784447, at *1, n.1, n.2 (S.D. Fla. Dec. 19, 2017) (sanctions for disobedience); *Vaughn v. GEMCO2*, No. 17-CV-1713, 2018 WL 6620600, at *3 (M.D. Fla. Oct. 31, 2018), *report and recommendation adopted*, 2019 WL 1765051 (M.D. Fla. Apr. 22, 2019) (inherent authority to impose sanctions) (citations omitted). The Federal Rules, including Rules 16(f) and 37, are “remedial”. *K.D. v. United Airlines*, No. 17-CV-2825, 2019 WL 6887221, at *3 (D. Nev. Nov. 4, 2019), *report and recommendation adopted*, 2019 WL 6878853 (D. Nev. Dec. 16, 2019); *Taser Int’l v. Phazzer Elecs.*, 754 F. App’x 955, 959–60 (Fed. Cir. 2018). Indeed, it is “firmly established” that “[t]he power to punish for contempts is inherent in all courts.” *Chambers v. NASCO*, 501 U.S. 32, 44 (1991).

A. The Court’s Orders Were in Effect and Binding.

There can be no dispute that the Court’s Orders were in effect and binding.

No Indirect Infringement Claims Allowed To Be Pled: The June 2019 Orders **denied** ParkerVision’s motion for leave to file a third amended complaint to add indirect infringement claims to the case. (Dkt. 143 at 4; Dkt. 141 at 5; Brigham Exs. 1, 2.) ParkerVision’s motion was designed to “eliminate” all disagreement about whether ParkerVision’s case “includes claims that Qualcomm has indirectly infringed the ‘528 Patent”. (Dkt. 141 at 1; Dkt. 131 at 1.) ParkerVision itself stated that “to remove any doubt” about whether indirect infringement was “part of this case,” and “to **remove the need for motion practice** concerning Qualcomm’s objections to ParkerVision’s infringement contentions,” ParkerVision filed the “motion for leave to file a Third Amended Complaint.” (Dkt. 142 at 1.) Because the Court denied ParkerVision’s motion, indirect infringement claims have been excluded from the case.

Claim Construction Order: The July 2019 Claim Construction Order invalidated certain claims as indefinite. (Dkt. 151 at 28; Brigham Ex. 3.) The Order also correctly rejected ParkerVision’s claim construction arguments. (Dkt. 151 at 9-13; 15-17; 17-20; 22-24.) Once a district court has construed the relevant claim terms, that legal determination governs. *Exergen v. Wal-Mart Stores*, 575 F.3d 1312, 1321 (Fed. Cir. 2009).

B. ParkerVision Refused to Comply with the Court’s Orders.

ParkerVision’s final infringement contentions, served months after the Court’s Orders were entered, asserted indirect infringement, invalidated claims, and arguments rejected during claim construction. For example, for the term “baseband signal portion,” ParkerVision continues to improperly argue that “a down-converted in-phase **baseband signal portion** of said modulated carrier signal” is satisfied by a signal that is

only a part of the “down-converted [inverted] in-phase baseband signal.” (Brigham Ex. 12 at 1.) The Court’s Claim Construction Order expressly rejected this interpretation:

The claim language makes clear that “portion of” refers to the language following “portion of.” Ending the claim with “baseband signal” does not conclude what is being claimed but instead omits “of said modulated carrier signal.” Moreover, the specifications support that “portion” refers to one of the “modulated carrier signal.” [] The Court declines Plaintiff’s invitation to rewrite the claim terms to ignore the surrounding claim language.

(Dkt. 151 at 17 (internal citations omitted); Brigham Ex. 3.) Despite having its claim construction position rejected, ParkerVision refuses to comply with the Court’s Claim Construction Order, let alone put Defendants on notice of any infringement theory that is consistent with the Court’s analysis.

C. The Court Should Enforce Its Orders, and Strike the Improper Portions of ParkerVision’s Infringement Contentions, or Order ParkerVision to Serve Final Amended Contentions that Remove the Non-Compliant Portions.

The Court should not allow ParkerVision to ignore the Court’s Orders as if they were never entered. The Court should order ParkerVision to comply with the Court’s Orders, and strike the improper portions of ParkerVision’s final infringement contentions:

- Strike portions asserting indirect infringement
- Strike portions asserting invalidated claims
- Strike portions deviating from the Court’s Claim Construction Order.

Specifically, the following improper portions should be stricken: Final Infringement Contentions, Cover Pleading, pages 1 and 5 (asserting invalid claims and

indirect infringement), pages 8-11 (indirect infringement) (Brigham Ex. 14); Corrected Exhibit A, pages 55-139, 174-261; Exhibit B, pages 28-101, 112-189; and Exhibit C, pages 29-107, 119-200 (non-compliant with claim construction order).⁵ *E.g.*, *Sloan Valve Co. v. Zurn Indus.*, No. 10-CV-204, 2012 WL 6214608, at *2 (N.D. Ill. Dec. 13, 2012) (striking portions of infringement contentions which went beyond the Court’s order); *Uni-Splendor v. Remington Designs*, No. 16-9316, 2017 WL 4786085, at *4 (C.D. Cal. Aug. 10, 2017) (granting motion to strike infringement contentions which failed to comply with the Court’s order); *Xiaohua Huang v. Nephos*, No. 18-6654, 2019 WL 5892988, at *1 (N.D. Cal. Nov. 12, 2019) (granting motion to strike non-compliant infringement contentions). Alternatively, the Court may order ParkerVision to serve final infringement contentions that remove the non-compliant portions.

D. The Court Should Order Reimbursement of Qualcomm’s Fees and Costs Due to ParkerVision’s Improper Litigation Tactics.

ParkerVision is a serial litigant, with a long history of using litigation in the courts to raise money. ParkerVision began suing Qualcomm more than eight years ago. *ParkerVision v. Qualcomm*, No. 11-719 (M.D. Fla. July 20, 2011) (Dalton, J.) (“*ParkerVision I*”). ParkerVision sued Qualcomm again the day after Judge Dalton held the hearing on Qualcomm’s motion for judgment as a matter of law of non-infringement (which he ultimately granted). *ParkerVision v. Qualcomm, et al.*, No. 14-687 (M.D. Fla. May 2, 2014) (Byron, J.) (“*ParkerVision II*”). Then, after the Federal Circuit affirmed

⁵ ParkerVision copied and pasted materials repeatedly in the exhibits to its final infringement contentions, rendering them voluminous. If helpful to the Court, Qualcomm can file under seal (and/or lodge) paper copies of ParkerVision’s final contentions.

Judge Dalton’s judgment of noninfringement in Qualcomm’s favor on all claims, ParkerVision sued Qualcomm again, filing two more lawsuits. *ParkerVision v. Qualcomm*, 621 F. App’x 1009, 1014 (Fed. Cir. July 31, 2015); *In re the Matter RF Capable Integrated Circuits and Prods. Containing the Same*, No. 337-TA-982 (ITC) (“ITC Action”); *ParkerVision v. Apple, et al.*, No. 15-1477 (M.D. Fla. Dec. 14, 2015).

Then, on the eve of trial in the ITC, after forcing Qualcomm to expend millions of dollars litigating ParkerVision’s patents, including the ‘528 patent, through complete fact and expert discovery, and facing imminent defeat once the ITC Investigative Staff sided with Qualcomm on non-infringement and invalidity, ParkerVision withdrew its ITC complaint, telling the presiding Judge that “an administrative hearing [*i.e.*, trial on the ‘528 patent] would not be a justifiable or effective use of anyone’s resources.” (Brigham Ex. 13 at 2.)

ParkerVision instead turned to this Court, asserting the same ‘528 patent as asserted in the ITC Action, promising this Court that it would “take advantage of the extensive discovery, briefing, and other work that the parties *have already completed*” in the ITC, which “involved the same parties, the same patents, and the same accused products”. (Dkt. 54 at 3-4 (emphasis in original, footnote omitted).) ParkerVision stated the parties had “litigated almost every possible stage,” including “infringement contentions,”⁶ “invalidity contentions,” “completing all fact discovery,” and “completing all expert discovery” in the ITC. (Dkt. 54 at 4.)

⁶ ParkerVision alleged only direct, never indirect, infringement of the ‘528 patent in the ITC, and the ITC Staff concluded ParkerVision had waived its rights to assert indirect infringement. (Dkt. 133 at 3-5; Brigham Ex. 7.)

Nevertheless, ParkerVision has been on a relentless campaign to further drive up Qualcomm's cost of defense and disrupt Qualcomm's business, including by demanding the depositions of individuals already deposed, noticing the depositions of more than ten individuals despite the Federal Rule limits, serving a facially overbroad Rule 30(b)(6) notice with over 180 topics and sub-topics, serving subpoenas on former high-ranking Qualcomm executives during the Christmas holidays, and now requiring Qualcomm to incur the expense of bringing the instant motion. ParkerVision has refused to comply with the Court's Orders unless Qualcomm brings a motion and obtains another ruling from the Court. Due to ParkerVision's bad faith litigation tactics, Qualcomm respectfully requests that the Court order ParkerVision to reimburse Qualcomm for its attorneys' fees and expenses related to this motion. Fed. R. Civ. P. 16(f) ("must order" payment of reasonable fees and expenses due to non-compliance with the rules, including failing to "obey" a "pretrial order"); Fed. R. Civ. P. 37 (sanctions for failure to comply with court orders); 28 U.S.C. § 1927 (sanctions for those who "so multiplies the proceedings in any case unreasonably and vexatiously"); *Chambers*, 501 U.S. at 44 (inherent powers).

III. CONCLUSION

For the reasons stated herein, Qualcomm requests that the Court enter an Order: (1) requiring ParkerVision to comply with the Court's Orders; (2) striking the improper portions of ParkerVision's final infringement contentions (*e.g.*, Cover Pleading, pages 1, 5, 8-11; Corrected Exhibit A, pages 55-139, 174-261; Exhibit B, pages 28-101, 112-189; and Exhibit C, pages 29-107, 119-200); and (3) requiring ParkerVision to reimburse Qualcomm for its fees and expenses related to this motion.

LOCAL RULE 3.01(G) CERTIFICATION

Pursuant to Local Rule 3.01(g), Qualcomm's attorneys conferred in good faith with ParkerVision's attorneys, who object to the relief sought in this motion.

Dated: January 13, 2020

COOLEY LLP

By: /s/ Matthew J. Brigham

Stephen C. Neal

(admitted *pro hac vice*; Trial Counsel)

nealsc@cooley.com

Matthew J. Brigham (admitted *pro hac vice*)

mbrigham@cooley.com

Jeffrey Karr (admitted *pro hac vice*)

jkarr@cooley.com

Dena Chen (admitted *pro hac vice*)

dchen@cooley.com

3175 Hanover Street

Palo Alto, CA 94306-2155

Phone: (650) 843-5000

Fax: (650) 849-7400

Stephen Smith (admitted *pro hac vice*)

ssmith@cooley.com

1299 Pennsylvania Avenue, NW, Suite 700

Washington, DC 20004

Phone: (202) 842-7800

Fax: (202) 842-7899

Eamonn Gardner (admitted *pro hac vice*)

egardner@cooley.com

380 Interlocken Crescent, Suite 900

Broomfield, CO 80021-8023

Telephone: (720) 566-4000

Facsimile: (720) 720-566-4099

BEDELL, DITTMAR, DEVAULT, PILLANS
& COXE, P.A.

John A. DeVault, III
Florida Bar No. 103979
jad@bedellfirm.com
Michael E. Lockamy
Florida Bar No. 069626
mel@bedellfirm.com
The Bedell Building
101 East Adams Street
Jacksonville, Florida 32202
Telephone: (904) 353-0211
Facsimile: (904) 353-9307

*Attorneys for Defendant
Qualcomm Incorporated*

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ Matthew J. Brigham
Matthew J. Brigham (admitted *pro hac vice*)
mbrigham@cooley.com
Cooley LLP
3175 Hanover Street
Palo Alto, CA 94304
Phone: (650) 843-5000
Fax: (650) 849-7400

*Attorney for Defendant
Qualcomm Incorporated*