

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

ION GEOPHYSICAL CORPORATION

Plaintiff,

v.

SERCEL, INC.

Defendant.

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Case No. 5:06-CV-236-DF/CMC

PLAINTIFF'S CONDITIONAL NOTICE OF APPEAL

On October 15, 2010, Defendant Sercel, Inc. ("Sercel") filed a "Notice of Appeal" in this case. (Docket No. 528) In that notice, Sercel contended that the United States Court of Appeals for the Federal Circuit had jurisdiction to hear an appeal under 28 U.S.C. § 1292(c)(2), which grants the Federal Circuit exclusive appellate jurisdiction over:

an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

Id. Sercel contended that the orders on the parties' post-trial motions (docket numbers 507 to 516) were "final except for an accounting" under Section 1292(c)(2). *Id.*

This is false. The Federal Circuit does not have jurisdiction under Section 1292(c)(2) because, *inter alia*, (1) there has been no "judgment" entered in the case, and (2) there are unresolved issues that prevent the case from being "final except for an accounting." Accordingly, Plaintiff ION Geophysical Corporation ("ION") will move to dismiss the appeal for lack of jurisdiction, and will work toward the resolution of this case in the district court.

However, in the unlikely event that the Federal Circuit ultimately assumes jurisdiction over this interlocutory appeal, ION desires to have its own Notice of Appeal accompany

Sercel's. Therefore, subject to the above explanation of the defect in Sercel's theory of appellate jurisdiction, and out of an abundance of caution, ION gives notice that it appeals to the United States Court of Appeals for the Federal Circuit from the various post-trial rulings in this action if indeed they constitute a "judgment" that is "final except for an accounting" for purposes of 28 U.S.C. § 1292(c)(2). This Notice of Appeal is filed within fourteen days of the date of Sercel's Notice of Appeal. FED. R. APP. P. 4(a)(3).

ION intends to appeal from the post-trial orders that allegedly satisfy the requirements of Section 1292(c)(2), along with all of the prior orders of the court that logically or necessarily preceded those orders, or that are merged into those orders. By way of example only, and not as a limitation of the broad rule of inclusion normally employed under FED. R. APP. P. 3, ION intends to appeal the following orders:

<u>Docket No.</u>	<u>Date</u>	<u>Description</u>
68	12/19/07	Claim Construction Report and Recommendation
111	4/28/08	Order on Claim Construction
---	1/16/09	Report and Recommendation on Sercel's Motion for Summary Judgment of Invalidity Pursuant to 35 U.S.C. § 112, ¶ 2
206	3/17/09	Memorandum Order on Sercel's Motion for Summary Judgment of Invalidity Pursuant to 35 U.S.C. § 112, ¶ 2
323	12/11/09	Order on Sercel's Motion to Present the Lubratt Thesis at Trial
513	9/16/10	Order on Sercel's Motion for Judgment as a Matter of Law that Sercel Does Not Infringe Claims 4, 6, and 7 of the '242 Patent Under 35 U.S.C. § 271(a)
514	9/16/10	Order on Sercel's Motion for Judgment as a Matter of Law on Damages Based on Foreign Sales and Foreign Offers for Sale
516	9/16/10	Order on Sercel's Motion for Judgment as a Matter of Law on Damages

Respectfully submitted,

Date: October 29, 2010

By: /s/ Michael O. Sutton

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this notice was served on all counsel who have consented to electronic service. Local Rule CV-5(a)(3)(A). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by certified mail, return receipt requested, on this the 29th day of October, 2010.

/s/ Tanya L. Chaney