

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 17-20243-CIV-ALTONAGA/Goodman**

**ATLAS IP, LLC,**

Plaintiff,

v.

**JEA,**

Defendant.

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**ORDER**

**THIS CAUSE** came before the Court on Defendant, JEA’s Motion to Dismiss for Failure to State a Claim [ECF No. 17] filed May 23, 2017. Plaintiff, Atlas IP, LLC, filed its Response [ECF No. 20] on June 6, 2017, to which Defendant filed a Reply [ECF No. 21] on June 13, 2017. The Court has carefully considered the parties’ written submissions, the record, and applicable law.

**I. BACKGROUND**

Plaintiff brings this suit against JEA, a municipal utility based in Jacksonville, Florida, alleging infringement of U.S. Patent No. 5,371,734. (*See generally* Complaint [ECF No. 1]).

**A. ‘734 Patent**

The ‘734 Patent, titled “Medium Access Control Protocol for Wireless Network,” was filed on January 29, 1993. (*See id.* ¶ 7; *see also* ‘734 Patent [ECF No. 1-2] 2).<sup>1</sup> The purpose of the invention is “to provide a reliable medium access control (MAC) protocol for wireless . . . network communications among a plurality of resources.” (‘734 Patent, col. 5, ll. 9–13 (alteration added)). The invention functions by having “a communicator station or

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<sup>1</sup> Citations refer to page numbers generated by the CM/ECF filing system, which appear in the header on all court filings.

communicator wirelessly transmit[ing] frames to and receiv[ing] frames from a[t] least one additional communicator in accordance with a predetermined MAC protocol.” (*Id.* at col. 5, ll. 34–38 (alterations added)). Each communicator contains a transmitter and a receiver, and communication takes place among a “Group” of communicators. (*See id.* at col. 5, ll. 38–40).

Each Group of communicators includes one designated “hub,” with all remaining communicators designated as “remotes.” (*See id.* at col. 5, ll. 42–44). “The hub establishes repeating communication cycles, each of which has intervals during which the hub and the remotes transmit and receive frames. The hub transmits control information to the remotes to establish the communication cycle and to establish a plurality of predeterminable intervals during each communication cycle.” (*Id.* at col. 5, ll. 44–50). “These intervals allow the hub to transmit frames to the remotes, . . . the remotes to transmit frames to the hub, and . . . each remote to anticipate receiving frames.” (*Id.* at col. 5, ll. 50–54 (alterations added)).

By virtue of these communication cycle intervals and the cycle-establishing information communicated by the hub, the remotes may power off their transmitters when they are not transmitting frames, or power off their receivers when they do not anticipate receiving frames, which “conserve[s] considerable power.” (*Id.* at col. 5, ll. 54–66 (alteration added)).

Plaintiff asserts Defendant has infringed claims 1, 2, 5, 12, 13, 15, 16, 17, 18, 22, 23, 24, 25, 26, 29, 31, 34, and 44 directly and under the doctrine of equivalents. (*See* Compl. ¶¶ 25, 26).

Representative Claim 1 reads:<sup>2</sup>

A communicator for wirelessly transmitting frames to and receiving frames from a[t] least one additional communicator in accordance with a predetermined medium access control protocol, the communicators which transmit and receive the frames

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<sup>2</sup> Plaintiff’s Claim Chart [ECF No. 1-3] and Complaint provide analysis of the Accused Products only as to Claim 1 (*see generally* Claim Chart; *see also* Compl. ¶ 9), and the parties’ written submissions address only those limitations as set forth in Claim 1.

constituting a Group, each communicator including a transmitter and a receiver for transmitting and receiving the frames respectively, the medium access control protocol controlling each communicator of the Group to effect predetermined functions comprising:

[a] designating one of the communicators of the Group as a hub and the remaining the [sic] communicators of the Group as remotes;

[b] the hub establishing repeating communication cycles, each communication cycle having intervals during which the hub and the remotes transmit and receive frames;

[c] the hub transmitting cycle establishing information to the remotes to establish the communication cycle and a plurality of predeterminable intervals during each communication cycle, the intervals being ones when the hub is allowed to transmit frames to the remotes, when the remotes are allowed to transmit frames to the hub, and when each remote is expected to receive a frame from the hub;

[d] the hub transmitting a frame containing the cycle establishing information which establishes both an outbound portion of the communication cycle when the hub transmits frames to the remotes and an inbound portion of the communication cycle when the remotes transmit frames to the hub, the frame containing the cycle establishing information also establishing the predetermined intervals during the outbound and inbound portions of the communication cycle when each remote is allowed to transmit and receive;

[e] the remotes powering off their transmitters during times other than those intervals when the remote is allowed to transmit frames to the hub, by using the cycle establishing information transmitted from the hub; and

[f] the remotes powering off their receivers during times other than those intervals when the remote is expected to receive a frame from the hub, by using the cycle establishing information transmitted from the hub.

(‘734 Patent col. 44, l. 63–col. 45, l. 40 (alterations added)). Clause (d) above is known as the “Frame Limitation,” and clauses (e) and (f) describe the “Powering-Off Limitation.”

### **B. Accused Products**

Plaintiff alleges Defendant’s Landis Gyr Focus AX with Landis Gyr Gridstream RF communication modules — also known as “smart meters” or “remotes” — and the base station, or hub, with which they communicate over a wide area network, “form a communication group” and infringe the ‘734 Patent. (Compl. ¶¶ 11–13). Each of the Accused Products contains “a transceiver consisting of a transmitter and receiver,” and “operate[s] to transmit and receive information about customer electricity usage.” (*Id.* ¶¶ 14–15 (alteration added)).

The Complaint alleges the base station transmits “at least one frame of data to a smart meter that initiates a communication session, and which allows the smart meter to calculate the duration of the communication session and its constituent intervals before the smart meter transmits to the base station.” (*Id.* ¶ 17). The communication sessions involve transmission and receipt of packets of data to transmit information regarding customer utility usage. (*See id.* ¶ 18).

In addition, “[e]ach smart meter determines whether to power off its receiver during times other than those when it is receiving data during a communication session,” and “whether to power off its transmitter,” when it is not transmitting information. (*Id.* ¶ 22 (alteration added)). According to the Complaint, “a smart meter can communicate with the [base] using half-duplex radio frequency communications.” (*Id.* (alteration added)). “In half-duplex communications, the smart meter powers down the receiver circuitry of the radio transceiver during the interval of the communication cycle in which it is transmitting the read and power status check request messages.” (*Id.*). Once the smart meter has completed transmission of its

data packets, “if its receiver has been powered down, it activates its receiver to await the reception of data from the base.” (*Id.*).

In the Motion, Defendant argues Plaintiff’s allegations fail to demonstrate how the Accused Products infringe the Frame Limitation or the Powering-Off Limitation. (*See generally* Mot.). Plaintiff insists the claim chart adequately demonstrates how the Accused Products practice the relevant Limitations.<sup>3</sup> (*See generally* Resp.).

## II. LEGAL STANDARDS

### A. Federal Pleading Standards and Claims of Patent Infringement

Rule 8(a) requires a pleading contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). Although this pleading standard “does not require ‘detailed factual allegations,’ . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (alteration added) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Pleadings must contain “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (citation omitted).

“To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (alteration added) (quoting *Twombly*, 550 U.S. at 570). Indeed, “only a complaint that states a plausible claim for relief survives a motion to dismiss.” *Id.* at 679 (citing *Twombly*, 550 U.S. at 556). To meet this plausibility standard, a plaintiff must “plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 678 (alteration added) (citing *Twombly*, 550 U.S. at 556).

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<sup>3</sup> In its Response, Plaintiff cites to, and bases its argument on, a claim chart filed in a different case; the Response is therefore of limited utility and only partially responds to Defendant’s assertions.

Apart from the factual allegations of the Complaint, which are construed in the light most favorable to the Plaintiff, the Court also properly considers the attachments to the Complaint. *See Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1205 (11th Cir. 2007) (“Exhibits [to the complaint] are part of the pleading ‘for all purposes’ . . . ‘including a Rule 12(b)(6) motion.’” (alterations added) (quoting FED. R. CIV. P. 10(c); then quoting *Solis-Ramirez v. U.S. Dep’t of Justice*, 758 F.2d 1426, 1430 (11th Cir. 1985))).

Following the amendments to the Federal Rules of Civil Procedure, which took effect December 1, 2015, and abrogated Rule 84 and Form 18,<sup>4</sup> claims for direct infringement are subject to the *Iqbal/Twombly* standard applied to most other civil pleadings. *See Thermolife, Int’l, LLC v. Vitamin Shoppe, Inc.*, No. 0:16-CV-60693-UU, 2016 WL 6678525, at \*2 (S.D. Fla. June 8, 2016) (collecting cases). Consequently, “there is a dearth of case[.]law” applying the *Iqbal/Twombly* pleading standard to claims of patent infringement. *Atlas IP LLC v. Pac. Gas & Elec. Co.*, Case No. 15-cv-05469-EDL, 2016 WL 1719545 (N.D. Cal. Mar. 9, 2016).

The Federal Circuit has held “[d]irect infringement under [section] 271(a) occurs where all steps of a claimed method are performed by or attributable to a single entity.” *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020, 1022 (Fed. Cir. 2015) (alterations added; citation omitted). “Similarly, the doctrine of equivalents will support an infringement claim only ‘if the accused device contains an equivalent for each limitation not literally satisfied.’” *Atlas IP, LLC v. Exelon Corp.*, 189 F. Supp. 3d 768, 774 (N.D. Ill. 2016) (quoting *Wi-Lan, Inc. v. Apple Inc.*, 811 F.3d 455, 463 (Fed. Cir. 2016)), *aff’d*, 2016-2203, 2017 WL 1906917 (Fed. Cir. May 9, 2017).

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<sup>4</sup> Prior to the abrogation of Rule 84 and Form 18, a complaint which made “*proper use* of [Form 18] . . . effectively immunize[d] a claimant from attack regarding the sufficiency of the pleading.” *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1288 (Fed. Cir. 2013) (emphasis and first alteration in original; citation omitted).

“[S]imply reciting some of the elements of a representative claim and then describing generally how an accused product operates, without specifically tying the operation to any asserted claim or addressing all of the claim requirements, is insufficient.” *Pac. Gas & Elec. Co.*, 2016 WL 1719545, at \*2 (alteration added). Accordingly, the Court must determine whether Plaintiff has alleged sufficient facts to demonstrate the Accused Products practice each limitation, or its equivalent, described in Claim 1. *See also Atlas IP, LLC v. City of Naperville*, Case No. 15 C 10744, 2016 WL 3907029, at \*3 (N.D. Ill. July 19, 2016) (“Applying the ordinary analysis of *Twombly/Iqbal* . . . Atlas must plead that every limitation, or equivalent thereof, in the representative claim can plausibly be found in an accused product.” (alteration added)).

### **B. Claim Construction**

“The construction of claim terms based on the claim language, the specification, and the prosecution history are legal determinations.” *Trs. of Colum. Univ. v. Symantec Corp.*, 811 F.3d 1359, 1362 (Fed. Cir. 2016) (citing *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 839 (2015)). Courts “begin a claim construction analysis by considering the language of the claims themselves.” *Id.* (citation omitted). In construing claims, “the words of a claim are generally given their ordinary and customary meaning.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (internal quotation marks and citation omitted). “[T]he ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention.” *Id.* (citation omitted; alteration added).

Claims must be read in the context of the whole specification, as “[t]he specification is the ‘single best guide to the meaning of a disputed term . . . and ‘is, thus, the primary basis for construing the claims.’” *Trs. of Colum. Univ.*, 811 F.3d at 1362 (alterations added) (quoting *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996); then quoting

*Phillips*, 415 F.3d at 1315). Indeed, “[b]ecause the meaning of a claim term as understood by persons of skill in the art is often not immediately apparent . . . the court looks to those sources available to the public that show what a person of skill in the art would have understood disputed claim language to mean.” *Phillips*, 415 F.3d at 1314 (internal quotation marks and citation omitted). “Those sources include the words of the claims themselves, the remainder of the specification, the prosecution history, and extrinsic evidence concerning relevant scientific principles, the meaning of technical terms, and the state of the art.” *Id.* (internal quotation marks and citation omitted).

### III. ANALYSIS

The parties dispute whether Plaintiff’s Complaint and attached Claim Chart allege sufficient facts to satisfy the *Iqbal/Twombly* pleading standard. Specifically, Defendant asserts the Complaint does not contain “plausible allegations that the accused product meets” the Frame Limitation or the Powering-Off Limitation. (Mot. 8).

#### A. Frame Limitation

In the Claim Chart, Plaintiff alleges the Accused Products practice the Frame Limitation in the following manner:

The read request and power status check request messages are “an ordered group of bits,” i.e., they are frames. As explained above, these . . . frames contain information establishing the communication cycle, including the interval in which a read request or power status check request message[] is sent from the . . . hub to the smart meter . . . (the outbound portion of the communication cycle), and the interval in which a read message or power status message is sent from the smart meter . . . to the hub (the inbound portion of the communication cycle).

(Claim Chart 4 (alterations added; emphasis and internal brackets omitted)). According to the Motion, the Frame Limitation “requires that the ‘cycle[-]establishing information’ must establish

two elements.” (Mot. 10 (alteration added; emphasis omitted)). Specifically, it must establish (1) both an outbound portion when the hub transmits frames to remotes and an inbound portion when the remotes transmit to the hub and (2) “the predetermined intervals during the outbound and inbound portions when each remote is allowed to transmit and receive.” (*Id.* (emphasis omitted)). Defendant argues the pleading is “silent concerning the requirement that the accused product have a frame that ‘also establish[es]’ when ‘each remote’ is allowed to transmit and receive.” (*Id.* at 11 (alteration in original) (citing ‘734 Patent, col. 45, ll. 27–30)).

Plaintiff alleges the read and power status messages sent in response to the hub’s requests are of “fixed length or duration” (Resp. 5; Claim Chart 3),<sup>5</sup> which is sufficient to demonstrate the hub has sent information establishing the duration of each interval. According to Plaintiff, “a fair reading of the claim chart clearly conveys the fact that the frame sends information from the base . . . that establishes (a) a starting time, (b) specific intervals, (c) the duration of each interval, and (d) the constituent intervals.” (Resp. 5). The Court disagrees.

Allegations nearly identical to those appearing in the Claim Chart reprinted above regarding the Frame Limitation appeared in Plaintiff’s claim chart filed in the *Exelon* case, which also involved the ‘734 Patent. (*See Reply 6–8*). In that case, the District Court for the Northern District of Illinois concluded the claim chart as written did not allege sufficient facts to satisfy the *Iqbal/Twombly* standard because “the bare fact that the [hub] queries a single Smart Meter would not convey any information at all about transmission opportunities allocated to the other Smart Meters.” *Exelon*, 189 F. Supp. 3d at 776 (alteration added).

According to the *Exelon* decision, the Frame Limitation “requires that the hub transmit cycle-establishing information with two components, without exception.” *Id.* at 777. Apart from

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<sup>5</sup> Although Plaintiff mistakenly quotes language not appearing in the Claim Chart filed in this case, identical language discussing the “fixed length or duration” of the read or power status requests and responses appears in the Claim Chart filed with the Complaint. (Claim Chart 3).

“allocat[ing] time between the hub and the remotes[,] . . . it must also identify for ‘each remote’ its allocation of the hub’s time when it is expected to receive a transmission and its allocation of the remotes’ time when it is permitted to send a transmission.” *Id.* (alterations added) (citing ‘734 Patent, col. 45, ll. 25–30). “Neither part of that cycle-establishing information can be dispensed with [as] [n]either part is stated conditionally.” *Id.* (alterations added) (citing ‘734 Patent, col. 45, ll. 20–30).

In *Exelon*, Plaintiff attempted to argue the accused product would practice the Frame Limitation of Claim 1 where there was only a single smart meter in the Group, *see Exelon*, 189 F. Supp. 3d at 776; Plaintiff makes no such argument here, but the *Exelon* court’s logic remains persuasive. Similar to Plaintiff’s one-smart-meter configuration problem in *Exelon*, in this case Plaintiff alleges only that the hub queries a remote, and requests one of two types of messages from that remote. This is insufficient. Absent any allegation the frame containing the cycle establishing information would also include information establishing the inbound portion’s constituent intervals for communication between the hub and a Group of remotes, Plaintiff cannot show Defendant has practiced the Frame Limitation. This reasoning is all the more persuasive considering the Federal Circuit’s affirmance of the *Exelon* decision, *see Atlas IP, LLC v. Commonwealth Edison Co.*, 2016-2203, 2017 WL 1906917 (Fed. Cir. May 9, 2017), as well as its decision in an earlier case related to the ‘734 Patent, *see Atlas IP, LLC v. Medtronic, Inc.*, 809 F.3d 599 (Fed. Cir. 2015).

In *Medtronic*, the court performed a claim construction analysis of Claim 21. The issue was the timing of the transmission of the cycle-establishing information (*see id.* at 603), but the Circuit court’s analysis is instructive here. Specifically, in construing the word “establish” with respect to the hub’s transmission of frames “establishing communication cycles,” the court

explained the context “makes clear that the *schedule* thus established must be transmitted in advance of the start of the intervals set up for remotes to transmit.” *Id.* at 605 (internal quotation marks omitted; emphasis added).

The court turned to the specification for guidance, determining “[i]f the hub does not define the intervals when the hub will transmit to the remotes and when each remote will transmit to the hub, multiple communicators . . . could transmit simultaneously.” *Id.* at 605–06 (alterations added) (citing ‘734 Patent col. 3, ll. 4–10). Furthermore, “[t]he specification confirms that the interval allotment must be defined (and communicated to the remotes) before the remote-transmission opportunities begin.” *Id.* at 606 (alteration added). “Thus, the hub-sent information must indicate both the start and end time of the intervals of each communication cycle.” *Id.* The court concluded, “[a]ll of this makes clear that the hub must set up a schedule of intervals and send that schedule to the remotes before the transmission-opportunity slots for the remotes arrive.” *Id.* (alteration added).

The Complaint and Claim Chart do not allege the power status check or read request messages convey any information beyond the message requests. Accordingly, even if these frames initiate a communication cycle and, by virtue of the type of request, inform the remote of the duration of its own inbound communication interval, this does not satisfy the elements of the Frame Limitation as outlined above. Because Plaintiff has not alleged the frame communicates the assignment and duration of all constituent intervals of the inbound portion of the communication cycle to all remotes, Plaintiff’s claim for direct infringement must fail.

### **B. Powering-Off Limitation**

Plaintiffs allege, with respect to the Powering-Off Limitation at clause (e):

The smart meter . . . communicates with the . . . hub using half-duplex radio frequency communications. In half-duplex

communications, a smart meter . . . powers down the transmitter circuitry of the radio transceiver during the interval of the communication cycle in which it is receiving the read request and power status check request messages.

(Claim Chart 4–5 (alterations added; emphasis and brackets omitted)). Regarding clause (f), the Claim Chart reads:

The smart meter . . . communicates with the . . . hub using half-duplex radio frequency communications. In half-duplex communications, a smart meter . . . powers down the receiver circuitry of the radio transceiver during the interval of the communication cycle in which it is transmitting the read and power status check request messages.

(*Id.* 5 (alterations added; emphasis and brackets omitted)).

According to Defendant, “Claim 1 . . . requires that: (1) the remotes power off their transmitters and receivers when they are not expected to transmit or receive a frame, and (2) such powering off is accomplished ‘by *using* the cycle[-]establishing information.’” (Mot. 12 (emphasis in original) (alterations added)). Defendant asserts Plaintiff’s allegations “[t]he smart meter determines whether to power off its receiver during times other than those when it is receiving data,” and “the smart meter determines whether to power off its transmitter during times other than those when it is transmitting,” are insufficient to show the Accused Products practice the Powering-Off Limitation. (*Id.* (alteration in original)). Defendant argues Plaintiff must provide some factual allegation “that the accused product powers off the smart meter *by using* the information transmitted from the alleged hub.” (*Id.* 12–13 (emphasis in original)). Plaintiff bases the section of its Response addressing the Powering-Off Limitation on a different product; thus, the arguments made there have no bearing on the Court’s analysis.

The Powering-Off Limitation requires the remotes to power off their receivers “during times other than those intervals when the remote is expected to receive a frame from the hub, by

using the cycle establishing information,” and the same is true for powering down the transmitters when they are not allowed to transmit. (‘734 Patent, col. 45, ll. 31–40). The specification indicates “[t]he hub transmits control information to the remotes to establish the communication cycle and to establish a plurality of predeterminable intervals during each communication cycle.” (‘734 Patent col. 5, ll. 47–50 (alteration added)). “That control information ‘define[s] the starting times and durations of the subsequent intervals of the present communication cycle.’” *Medtronic*, 809 F.3d at 606 (alteration in original) (quoting ‘734 Patent, col. 27, ll. 57–61).

Therefore, “[b]ecause the hub conveys those ‘defined intervals’ to the remotes, they are able to power off their transmitters when they are not scheduled to transmit and their receivers when they are not schedule to receive, and thereby achieve the significant battery saving power of the invention.” *Id.* (alteration added). The *Medtronic* court concluded, “[t]o fulfill the core claimed function of power saving, each remote must know when its receiver and transmitter can be off and must be on, which naturally, perhaps necessarily, calls for the scheduling information to arrive before any remote transmissions begin.” *Id.* (alteration added). Because, as discussed, Plaintiff has not even alleged the hub transmits the information remotes must “use” to power on and off, the Court concludes Plaintiff has not alleged the Accused Products practice the Powering-Off Limitation.

Apart from the fact the hub as described in the Claim Chart does not send all the information remotes must use to power off (*see supra* Section III.A.), the allegations of the Complaint also indicate the timing of the smart meters’ powering down is not occurring in accordance with the ‘734 Patent’s criteria.

The Complaint reads, “[o]nce the smart meter has transmitted data packets . . . if its receiver has been powered down, it activates its receiver to await the reception of data from the base or from remotes it controls.” (Compl. ¶ 22 (alterations added)). Similarly, Plaintiff alleges an Accused Product will power down its receiver “during the interval . . . in which it is transmitting.” (Claim Chart 5). Neither of these comport with the requirement smart meters power down the receiver circuitry “during times other than those intervals when the remote is expected to receive a frame from the hub by using the cycle establishing information.” (‘734 Patent, col. 45, ll. 36–40). Indeed, the allegation as written indicates the smart meters’ receivers are powered up any time they are not transmitting. This is contrary to the battery-saving aspect of the invention and indicates the Accused Products are not practicing the Powering-Off Limitation. Plaintiff’s failure to show the smart meters utilize the cycle establishing information to make determinations about when to power down circuitry is fatal to its claim.

### **C. Doctrine of Equivalents**

Under the doctrine of equivalents, “a product or process that does not literally infringe upon the express terms of a patent claim may nonetheless be found to infringe if there is ‘equivalence’ between the elements of the accused product or process and the claimed elements of the patented invention.” *Warner-Jenkinson Co., Inc. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 21 (1997) (citation omitted). A court will find infringement “if every limitation of the asserted claim, or its ‘equivalent’ is found in the accused [products], where an ‘equivalent’ differs from the claimed limitation *only insubstantially*.” *Ethicon Endo-Surgery, Inc. v. U.S. Surgical Corp.*, 149 F.3d 1309, 1315 (Fed. Cir. 1998) (alteration and emphasis added). But, if a “theory of equivalence would entirely vitiate a particular claim element,” there can be no equivalence as a matter of law. *Warner-Jenkinson Co., Inc.*, 520 U.S. at 39 n.8.

Plaintiff has not attempted to allege any “equivalence.” The Complaint contains one line stating “Defendant is liable for infringement . . . either literally or under the Doctrine of Equivalents” (Compl. ¶ 26 (alteration added)), but it points to no equivalent that might satisfy any of the above described Limitations. Furthermore, the differences between the Accused Products as alleged and the Limitations as described in Claim 1 are, in fact, substantial. The Court therefore concludes there is no claim for infringement under the doctrine of equivalents.

#### IV. CONCLUSION

For the foregoing reasons, it is

**ORDERED AND ADJUDGED** that the Motion [ECF No. 17] is **GRANTED**. The Complaint is **DISMISSED**. Plaintiff has until **June 28, 2017** to file an amended complaint.

**DONE AND ORDERED** in Miami, Florida, this 21st day of June, 2017.

  
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**CECILIA M. ALTONAGA**  
**UNITED STATES DISTRICT JUDGE**

cc: counsel of record