

United States District Court,
E.D. Michigan, Southern Division.

LDM TECHNOLOGIES, INC,
Plaintiff(s).

v.

ROWEN WATERS GROUP, L.L.C,
Defendant(s).

Aug. 25, 2004.

Joseph G. Burgess, Warn, Burgess, Auburn Hills, MI, R. Terrance Rader, Rader, Fishman, Bloomfield Hills, MI, for Plaintiffs.

Andrew Kochanowski, Donald J. Gasiorek, Sommers, Schwartz, Southfield, MI, Bradley W. Butcher, Miami, FL, Howard B. Hill, Grosse Pointe, MI, for Defendants.

ORDER

VICTORIA A. ROBERTS, **District Judge.**

I. INTRODUCTION

This matter is before the Court on the parties' respective Markman briefs, regarding Defendant/Counter-Plaintiff Rowen Waters' counter-claim for patent infringement. FN1 In a conference call with the Court on August 3, 2004, counsel for the parties agreed that Claims 1 and 11 would potentially be dispositive of the patent infringement claims before the Court.

For the reasons stated below, the Court **ADOPTS** Defendant's proposed construction of Claims 1 and 11, but **REJECTS** Plaintiff's proposed construction of those claims, except Plaintiffs unopposed assertion that 1) the elastomer must modify the polyolefin resin matrix, and 2) there is a specific haze level, as defined at column 3, line 28 of the specification.

II. BACKGROUND

LDM filed suit against Defendant Rowen Waters and Defendants Michael Pickholz and Paul Razgunas for their alleged theft and/or improper use and disclosure of Plaintiff's alleged trade secrets. Judgment has entered for Defendants on this claim. Rowen Waters counter-sued for Plaintiff's alleged infringement of a patent to which it has exclusive license-US. Patent No. 6,017,989 (the "'989 patent"). FN2 The counter-suit is the subject of the parties' Markman briefs. FN3

The '989 patent invention allows one to mold a somewhat flexible plastic automotive body component in the color and with the shine of a painted body surface, thus eliminating the need to prep paint components such

as car bumpers, rub strips, and wheel arches. The three primary components of the invention are mixed to form a substance which is injection-molded into an automotive exterior trim component: 1) a clear plastic, i.e., a polyolefin; 2) an elastomer, for flexibility in deformation; and 3) a special effect pigment to give it color.

Plaintiff subsequently developed a formula called "LDM 1028" that was intended to mimic the '989 patent (at least in part) without infringing it. FN4 As does the '989 patent, LDM 1028 uses a base of polyolefin and special effects pigments. It also adds a compound that Plaintiff calls a "plastomer," which, like the '989's elastomer, is for flexibility of the plastic base.

The '989 patent has 18 claims. Defendant alleges that Plaintiff infringes each of the claims, except claim 18. Plaintiff urges a certain construction of one phrase in the patent specification which occurs in claims 1 and 11. FN5 By agreement of the parties, the Court will construe Claims 1 and 11 only.

III. ANALYSIS

The parties have agreed that the phrase "elastomer modified polyolefin resin matrix" in Claim 1, and similar language used in Claim 11 should be construed:

1. An exterior automotive vehicle component comprising an **elastomer modified polyolefin resin matrix** having a haze level of less than about 50% and having a special effects pigment selected from the group consisting of metallic flake pigments, pearlescent pigments and combinations thereof uniformly distributed therein, wherein said exterior automotive vehicle component has a pleasing appearance.

* * *

11. A method of providing a component for an automotive vehicle comprising the steps of:

a) **blending a substantially transparent polyolefin resin and a substantially transparent thermoplastic elastomer to make a matrix**, said matrix having a haze level of less than about 50%;

(emphasis added).

Plaintiff asserts that Claims 1 and 11 must be construed as requiring that:

1) Polyolefins and elastomers are mutually exclusive compounds. Therefore, a compound defined as a polyolefin cannot function as an elastomer within the context of the '989 patent, and vice versa.

2) Polyolefins must include each of the compounds listed in the patent from column 3, line 50 through column 4, line 34.

3). The elastomer component includes those elastomers defined at column 4, line 35 through column 5, line 54.

4) The elastomer must modify the polyolefin,

5) There is a specific haze level, as defined at column 3, line 28 of the specification.

6) Each claim requires at least one polyolefin and one elastomer component.

Defendant contends that there is no support for Plaintiff's proposed narrow construction of the terms polyolefin and elastomer, or for the proposition that the compounds be mutually exclusive. Defendant proposes instead that the phrase in Claim 1 be construed only as a "polyolefin modified with any type of homopolymer or copolymer which is flexible and easily distorted under a load." Pl. br. at p. 9. Defendant also proposes that the term "thermoplastic elastomer" in Claim 11 be construed as "any type of homopolymer or copolymer which is flexible and easily distorted under a load, and which can be processed by melting." Def. br. at p. 9.

Claim construction and interpretation defines the scope of the patentee's rights under the patent and must be decided as a matter of law by the Court. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 970 (Fed.Cir.1995), *aff'd*, 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996). It is "simply a way of elaborating the normally terse claim language: in order to understand and explain, but not to change the scope of the claims." *Scripps Clinic & Research Foundation v. Genentech, Inc.*, 927 F.2d 1565, 1580 (Fed.Cir.1991).

When construing the meaning of claims, a court must first look to the claims themselves. *Pitney Bowes, Inc. v. Hewlett Packard Co.*, 182 F.3d 1298, 1305 (Fed.Cir.1999). In *Texas Digital Systems, Inc. v. Telegenix Inc.*, 308 F.3d 1193 (Fed.Cir.2002), the Federal Circuit reiterated this point stating that "[t]he terms used in the claims bear a 'heavy presumption' that they mean what they say and have the ordinary meaning that would be attributed to those words by persons skilled in the relevant art." 308 F.3d at 1202. A court may use dictionaries, encyclopedias and treatises to assist it in determining the ordinary meaning of claim terms, even if they have not been offered into evidence by a party. *Id.* at 1202-1203.

The Court must next look at the remainder of the intrinsic record, such as the specification, to determine whether the inventor intended that the claim words be interpreted in a different manner. *Id.* at 1204. *See also* *Quantum Corp. v. Rodime, Inc.*, 65 F.3d 1577, 1580 (Fed.Cir.1995), *cert. den.*, 517 U.S. 1167, 116 S.Ct. 1567, 134 L.Ed.2d 666 (1996)("[T]he words of a claim will be given their ordinary meaning to one of skill in the art unless the inventor appeared to use them differently."). "Indeed, the intrinsic record may show that the specification uses the words in a manner clearly inconsistent with the ordinary meaning reflected, for example, in a dictionary definition. In such a case, the inconsistent dictionary definition must be rejected." *Id.* In short, the presumption that the ordinary and customary meaning applies may be rebutted if "the patentee, acting as his or her own lexicographer, has clearly set forth an explicit definition of the term different from its ordinary meaning," or "if the inventor has disavowed or disclaimed scope of coverage by using words or expressions of manifest exclusion or restriction, representing a clear disavowal of claim scope." *Id.* at 1204.

A court must be careful not to improperly read limitations into the claims based on the examples or embodiments disclosed in the specification. *Id.* "[I]f the meaning of the words themselves would not have been understood to persons of skill in the art to be limited only to the examples or embodiments described in the specification, reading the words in such a confined way would mandate the wrong result and would violate our proscription of not reading limitations from the specification into the claims." *Id.* at 1205.

Finally, extrinsic evidence may only be considered when the intrinsic evidence is ambiguous. *Bell & Howell Document Management Products Co.*, 132 F.3d 701, 706 (Fed.Cir.1997). "When the intrinsic

evidence is unambiguous, it is improper for the court to rely on extrinsic evidence such as expert testimony for purposes of claim construction." *Id.* (footnote omitted). FN6

A. Plaintiff's Motion

Applying the approach for claim construction set forth in *Texas Digital*, the claim and specification language does not support several of Plaintiff's proposed constructions, and the extrinsic evidence cited does not rebut the presumption in favor of construing the claims in accordance with the ordinary and customary meaning of the disputed terms.

The issue in this case primarily involves the scope of the words used in the phrase "elastomer modified polyolefin resin matrix," rather than the meaning of the words themselves.FN7 First, Plaintiff asserts that Claims 1 and 11 must be read as requiring that the polyolefin and elastomer compounds be mutually exclusive. Plaintiff specifically argues that "each of the independent claims requires [sic] a matrix that includes at least one elastomer and at least one polyolefin and that elastomer or polyolefin as used in the claims are distinct compounds and no compound or material can function as both an elastomer and a polyolefin." PI. br. at p. 5.

While the express language of the claims unambiguously requires at least one elastomer and at least one polyolefin, there is no language that forecloses one from using a polyolefin that can also be categorized as an elastomer and has the relevant properties, and vice versa. Claim 1 only states that there must be " *an* elastomer modified polyolefin resin matrix." (emphasis added). Claim 11 only requires that there be "a substantially transparent polyolefin resin and a substantially transparent thermoplastic elastomer." (emphasis added). In each sentence "a" and "an" is used as an indefinite article which "denote[s] a single but unspecified person or thing." *Webster's II New College Dictionary* 1 (Houghton Mifflin 1995). This broad wording is not consistent with Plaintiff's narrow interpretation.

The specification language Plaintiff cites also does not support Plaintiff's proposed reading of the claims:

The invention provides a matrix of low haze or transparent composition comprising ***at least one polyolefinic and at least one thermoplastic elastomer or rubber....***

Column 3, lines 25-27 (emphasis added). This language indicates that there must be at least one polyolefinic compound and one thermoplastic elastomer. However, as with the claim language, the inventors did not include any terms that clearly indicate that it was their intention to go further and restrict one from using, for instance, two polyolefins if it has the relevant characteristics of an elastomer, and vice versa. Claim terms are only to be given a narrow meaning when the applicant used "words or expressions of manifest exclusion or restriction, representing a clear disavowal of the claim scope." *Texas Digital*, 308 F.3d at 1204; *Laitram Corp. v. Cambridge Wire Cloth Co.*, 863 F.2d 855, 865 (Fed.Cir.1988), *cert. den.*, 490 U.S. 1068, 109 S.Ct. 2069, 104 L.Ed.2d 634 (1989).

Because the claim language and written description are not ambiguous and are directly contrary to Plaintiff's proposed construction, it is not necessary for the Court to consider the extrinsic evidence Plaintiff relies upon. *Bell*, 132 F.3d at 706. The evidence Plaintiff cites does not further its cause in any event.

From the file history, Plaintiff points out that the patent applicants made several arguments during the application process in order to overcome objections and in response to an office action:

With respect to the process steps of the claims, the reference further does not suggest *blending a polyolefin resin and a thermoplastic elastomer to make a matrix*

* * *

[T]he Ottawa reference does not suggest blending a polyolefin resin and a thermoplastic elastomer to make a matrix....

* * *

Further, the Babler reference FN8 does not teach, mention or suggest compositions that contain an *elastomer modified polyolefin resin matrix*. The Babler reference does not describe any compositions at all involving a *mixture of an elastomer with a non-elastomeric polymer*.

Def. Exh. B, tab 1 at pp. 5-6; tab 2 at p, 2 (emphasis added). The wording in the first two passages is similar to that used in the claims and specification. None of the language on its face or by inference restricts the use of polyolefins and elastomers in the manner Plaintiff suggests.

Plaintiff has also failed to establish that the second sentence in the final passage evidences the inventors' intent that there be mutual exclusivity between the polyolefin and elastomer compounds. This sentence does not clearly indicate that the inventors intended to limit the scope of the claims as Plaintiff proposes, especially when it is considered in conjunction with the claim and specification language to the contrary.

Plaintiff's second and third proposed constructions, likewise, are far more narrow than the claim language and specification require. Plaintiff proposes that the Court find that the only polyolefins and elastomers that may be used are those listed in the specification. The claim language does not include an exhaustive list of polyolefins and elastomers that may be used. Therefore, Plaintiff relies upon various passages in the specification in support of its propositions.

Plaintiff points out that the specification identifies preferred polyolefins and various compounds that may comprise the polyolefin component:

The polyolefin component of the invention *preferably comprises aliphatic polyolefins*.

* * *

The polyolefin component *may* comprise homopolymers or copolymers of ethylene, propylene, 1-butene, 2-butene, 1-pentene, 1-hexene, ... and 1-butene homopolymers and copolymers are preferred.

* * *

Metallocene-catalyzed polyolefins are *preferred* in one embodiment of the invention.

* * *

In one *preferred* embodiment, the polyolefinic material includes low haze or transparent polyethylene,

polypropylene, or polybutene.

See Col. 3, line 57 through Col. 4, line 34 (emphasis added). Certain types of elastomer compounds that may be used are also listed:

The thermoplastic elastomers or rubber may include olefinic elastomers, such as *EPM or special clear, transparent, or low haze grades of EPDM rubbers, or block copolymer elastomers*, especially block copolymer elastomers having polyolefinic and aromatic vinyl blocks.

Col. 4, lines 35-39 (emphasis added). And, the specification describes the invention using similar terms:

The invention provides a matrix of low haze or transparent components comprising at least one polyolefin material and *at least one* thermoplastic elastomer or rubber.

Col. 3, lines 25-27 (emphasis added). Plaintiff interprets these passages as limiting the elastomer component to: 1) an EPM or EPDM rubber; 2) block copolymer elastomers; or 3) thermoplastic elastomers.

An ordinary reading of the wording Plaintiff cites for both the polyolefin and elastomer compounds is inconsistent with Plaintiff's interpretation. In several of the passages, the applicant refers to the polyolefin or elastomer using the terms "a," "an," or "at least one." As stated above, the ordinary meaning of "a" and "an" to describe the compounds is directly contrary to Plaintiff's restrictive interpretation. And, in the context used, the phrase "at least" is defined as "[a]ccording to the lowest possible assessment," *Websters II New College Dictionary* at 625, and merely establishes a threshold. In this instance, the apparent intent of the inventors is merely to convey that there must be, at a minimum, one thermoplastic elastomer.

In the other passages, the applicant prefaces the listed compounds by stating that they are ones that "may" be used or that are "preferred." *Websters II New College Dictionary* at 677 defines "may" as "[t]o be allowed or permitted to," It alternately defines the term as "[t]o be obliged: MUST," and indicates that this definition is used in statutes, deeds, and other legal documents. *Id.* Where there are multiple definitions for a term, the court must look to the intrinsic evidence to determine which definition is most consistent with the use of the words in the intrinsic record. Texas Digital, 308 F.3d at 1203. "If more than one dictionary definition is consistent with the use of the words in the intrinsic record, the claim terms may be construed to encompass all such consistent meanings." *Id.* Although Plaintiff would likely advocate for the latter definition of "may," it is clear from the context in which the term is used throughout the specification that only the former definition was intended since the term is consistently used in a permissive manner, rather than as a mandate such as one might find in a court order.

The term "prefer" means "[t]o choose as more desirable: like better." *Websters II New College Dictionary* at 871. The inventors' assertion that certain compounds are more desirable or better cannot reasonably be interpreted as a mandate that only the preferred compounds be used, and the inventors do not use other language which implies that the compounds listed in the specification are meant to be exhaustive.

Again, it is not necessary for the Court to reach the extrinsic evidence, and, in any event, the evidence that Plaintiff cites is not persuasive. Plaintiff cites an amendment dated December 4, 1998 in which the applicants argued that their claims require a thermoplastic elastomer, contrary to the prior art reference;

Like the Komatsu reference, the Ottawa '289 reference fails to disclose, teach or suggest many elements of

the claims.... Like the Komatsu reference, the Ottawa '289 reference does not suggest blending a polyolefin resin and a *thermoplastic elastomer to make a matrix*.

Pl. Exh. B, tab 1, p. 6 (emphasis added). Per Plaintiff, in making this argument, the applicants limited their interpretation of elastomer as used in the claim to be only those thermoplastic elastomers defined in the specification. There is no support for this assertion. While the argument made may indicate that "a" thermoplastic elastomer is required, Plaintiff does not identify any other language that goes further and dictates that the chosen thermoplastic elastomer can only be one listed in the patent.

Defendant does not make specific objections to Plaintiff's remaining two proposed constructions: 1) that the elastomer must modify the polyolefin resin matrix, and 2) that there is a specific haze level, as defined at column 3, line 28 of the specification. Each is consistent with both the express claim language and the specification. *See Claim 1; Claim 11(a); Col. 3, lines 6-11, 28-30, 50-53*. The Court can presume that the parties agree that these are appropriate constructions.

B. Defendant's Motion

The Court finds that Defendant's proposed construction of the disputed phrase in Claim 1-"elastomer modified polyolefin resin matrix"-is consistent with the claims and specifications. Defendant proposes that the phrase be construed as a "polyolefin modified with any type of homopolymer or copolymer which is flexible and easily distorted under a load." The claims state and the parties (impliedly) agree that the polyolefin must be modified by an elastomer. As set forth above, the claims do not prohibit one from modifying the polyolefin with a compound that may also be a polyolefin but have the relevant characteristics of an elastomer. One purpose of the elastomer component is to provide varying degrees of flexibility to the polyolefinic base. Therefore, a compound that is comprised of a homopolymer or copolymer that has these characteristics would be an acceptable compound to modify the polyolefin. Consequently, Defendant's proposed construction shall be adopted.

Plaintiff offers no specific objection to Defendant's second proposed construction of the term "thermoplastic elastomer." FN9 Defendant proposes that this term be construed as "any type of homopolymer or copolymer which is flexible and easily distorted under a load, and which can be processed by melting." Def. br. at p. 9. The claims do not define this term. However, the specification describes the relevant properties of thermoplastic elastomers as "flexible and easily distorted under an applied load." Col. 4, lines 55-56. The specification also indicates that a thermoplastic elastomer may include polymers and copolymers. Col. 4, lines 35-39; Col. 5, lines 40-44.

The Court notes that the definitions of the terms elastomer and polymer reveal that a polymer is also referred to as a homopolymer. For instance, *Websters II New College Dictionary* at 362 states that an elastomer is "[a]ny of various **polymers** with elastic properties resembling those of natural rubber." (emphasis added). Likewise, the Dictionary of Composite Materials Technology defines an elastomer as "[a]n amorphous, cross-linked high polymer above its T_g which will stretch rapidly under tension, reaching high elongations (500 to 1000%) with low damping...." Stuart Lee, Dictionary of Composite Materials Technology (CRC Press 1995)(emphasis added). The Dictionary of Composite Materials Technology further indicates in its definition of a polymer that "[t]he product of polymerization of one monomer is called a homopolymer, mono-polymer or simply a polymer" id (emphasis added).

Therefore, the Court will also adopt Defendant's proposed construction of "thermoplastic elastomer" as a

"polyolefin modified with any type of homopolymer or copolymer which is flexible and easily distorted under a load," because it is consistent with intrinsic record.

VI. CONCLUSION

The Court **ADOPTS** Defendant's proposed construction of Claims 1 and 11, but **REJECTS** Plaintiff proposed construction of those claims, except Plaintiff's unopposed assertion that 1) the elastomer must modify the polyolefin resin matrix, and 2) there is a specific haze level, as defined at column 3, line 28 of the specification.

IT IS SO ORDERED.

FN1. For ease of reference, Plaintiff/Counter-Defendant LDM Technologies, Inc. and Defendant/Counter-Plaintiff Rowen Waters Group, L.L.C. will be referred to as "Plaintiff" or "LDM" and "Defendant" or "Rowen Waters," respectively.

FN2. The '989 patent is entitled, "Exterior Automotive Component of an Elastomeric Modified Polyolefin Material Having Pleasing Appearance." It was originally assigned to the Standard Products Company, which assigned it to its successor in interest, Cooper-Standard Automotive, Inc.. On July 22, 2002, Cooper-Standard assigned its rights to a wholly-owned subsidiary of Rowen Waters, MaterialWerks, which assigned it to Rowen Waters.

FN3. Rowen Waters also asserts claims against Plaintiff for violation of the Lanham Act and intentional interference with a business expectancy. Plaintiff's consultant and co-inventor of the '989 patent, Kris Winowiecki, was also named as a defendant in the counter-suit. However, on November 25, 2003, he was dismissed by stipulation of the parties.

FN4. Plaintiff's patent application for LDM 1028 is pending.

FN5. Claim 11(a) actually only includes several of the same terms as the phrase at issue in Claim 1.

FN6. Note that the Bell court included in its definition of extrinsic evidence dictionaries and technical treatises. 132 F.3d at 706 n. 5. The Federal Circuit, however, no longer regards these references as extrinsic evidence, and has held that a court may consult them in its initial analysis of the claim language. See Texas Digital, 308 F.3d at 1202-1203.

FN7. There is no dispute that the polyolefin compound is the plastic base, and that the elastomer compound is added to give the polyolefin varying degrees of elasticity.

FN8. Per Plaintiff, the applicants were attempting to define over the Babler reference, which supported a

rejection of each of the 18 claims in the application.

FN9. In its Reply, Plaintiff offers an apparent "catchall" objection for the proposed definitions that it did not address specifically, stating that it relies on the arguments provided in its main brief. In its main brief, Plaintiff did not address the definition of a thermoplastic elastomer, except with regard to its claim that it is one of the only types of elastomers allowed, and that it cannot be a polyolefin.

E.D.Mich.,2004.

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