

United States District Court,
W.D. Washington, at Seattle.

PRECOR INCORPORATED, a Delaware corporation,
Plaintiff.

v.

BRUNSWICK CORPORATION, a Delaware corporation, and Life Fitness, a division thereof,
Defendants.

No. C00-1392P

July 31, 2001.

Frederick Ross Boundy, Davis, Wright, Tremaine, James Robert Uhlir, Christensen, O'Connor, Johnson & Kindness, Steven V. Gibbons, Gibbons & Associates, Seattle, WA, Steven P. Fricke, Microsoft Corp., Redmond, WA, for Plaintiff.

Bradley S. Keller, Byrnes & Keller, Seattle, WA, Jonathan H. Takei, Linda A. F. Callison, Ricardo Rodriguez, Stephen C. Neal, Cooley, Godward, LLP, Palo Alto, CA, Stephen P. Swinton, Cooley, Godward, LLP, San Diego, CA, for Defendants.

AMENDED ORDER ON CLAIMS CONSTRUCTION

MARSHA J. PECHMAN, District Judge.

This Order amends and supercedes the Court's previously issued Order on Claims Construction. Dkt. No. 86. The Court issues this Amended Order for the purpose of correcting an error included in the former Order. By letter from counsel for Precor Incorporated ("Precor") dated July 30, 2001, it has come to the Court's attention that the previously issued Order on Claims Construction contained an error at page 8, lines 11-12. This Amended Order is issued to conform with the Court's intended ruling.

This matter comes before the Court on cross-motions for claims construction. Dkt. Nos. 53, 57. The Court has reviewed all materials submitted by the parties and has conducted an evidentiary hearing. The claims constructions adopted by the Court are set out below. Also pending before the Court are defendant's motions to strike portions of plaintiff's opening claims construction memorandum. Dkt. No. 62. Having reviewed defendant's motions to strike, plaintiff's responses, and all disputed materials to which the motions to strike refer, defendant's motions to strike are GRANTED in part and DENIED in part.

FACTS

This litigation involves two pending law suits consolidated into one caption. All parties are manufacturers of exercise equipment. Brunswick Corporation ("Brunswick") and its subsidiary Life Fitness FN1 have filed suit against Precor. Life Fitness alleges that Precor's Model 964 treadmill violates U.S. Patent No. 6,095,951

("the '951 patent"), issued to Life Fitness. Precor in turn has filed suit for a declaration of non-infringement arising out of a dispute over the same patent.

FN1. Most of the briefing submitted regarding these motions refer to the Brunswick/Life Fitness parties simply as "Life Fitness" For purposes of clarity, the Court will do the same in its Order.

Specifically at issue before the Court is the construction of four claims in the '951 patent. These are claim numbers 3, 4, 13, and 21.FN2 The disputed claims are reproduced below in their entirety:

FN2. Claims 3 and 4 are dependant claims, meaning that they reference, and are dependant upon, the language in the claims preceding them. Any construction of the elements of claims 3 and 4 will therefore necessarily involve an interpretation of claims 1 and 2. For that reason, claims 1 and 2 are included herein.

1. An exercise treadmill, comprising:

-> a frame structure including two rotatable pulleys, said pulleys being positioned substantially parallel to each other, and a pair of spaced apart longitudinal frame members for providing longitudinal structural support for said frame structure;

-> rotational means including a motor for rotating one of said pulleys;

-> an endless, moveable surface being rotated when one of said pulleys is rotated, and providing an exercise surface on which a user can walk or run while exercising;

-> a deck member secured beneath at least a portion of said exercise surface; and

-> speed control means including a control panel secured to said frame structure and operatively connected to said motor for permitting a user to control the speed of said endless movable surface;

-> an inclination mechanism secured to said frame structure effective to permit selective inclination of said deck member by the user; and

-> a deck support structure including a plurality of laterally spaced resilient support members interposed between said frame structure and said deck member wherein each of said resilient support members are mounted on stationary portions of said frame structure so as to prevent longitudinal movement of said resilient support members and wherein said resilient support members support said deck member on said frame structure so as to permit at least a portion of said deck member to move downwardly with respect to said frame in response to the impact force of the user's feet on said exercise surface thereby resulting in lower impact loads on the user's feet.

2. The exercise treadmill of claim 1 wherein at least one of said resilient support members is mounted proximate to the front of said frame structure proximate to the front end of said deck member.

3. The exercise treadmill of claim 2 wherein at least a portion of said resilient support members are composed of an elastomeric material and abut said deck member and wherein said portion of said resilient support members are configured to provide said portion of said resilient support members with a variable

spring rate.

4. The exercise treadmill of claim 3 wherein said resilient support members additionally serve to limit said downward deflection.

13 An exercise treadmill, comprising

-> a frame structure including two rotatable pulleys, said pulleys being positioned substantially parallel to each other, and a pair of spaced apart longitudinal frame members for providing longitudinal structural support for said frame structure

-> means including a motor for rotating one of said pulleys

-> an endless, moveable surface being rotated when one of said pulleys is rotated, and providing an exercise surface on which a user can walk or run while exercising.

-> a deck including a wood member secured beneath substantially the entire length of said exercise surface.

-> an inclination mechanism secured to said frame structure effective to permit selective inclination of said deck by the user.

-> speed control means including a control panel secured to said frame structure and operatively connected to said motor for permitting a user to control the speed of said endless moveable surface; and

-> A deck support structure including a plurality of elastomeric support members wherein at least a portion of said support members are configured with an aperture providing said support members with a variable spring rate and wherein said support members are interposed and secured between said frame structure and said deck and located so as to provide support for at least a portion of said deck on said frame structure effective to both support said portion of said deck on said frame structure and to permit said portion of said deck to move downwardly with respect to said frame structure by compressing in response to the impact force of the user's feet on said exercise surface thereby resulting in lower impact loads on the user's feet.

21. An exercise treadmill, comprising:

-> a frame structure including two rotatable pulleys, said pulleys being positioned substantially parallel to each other, and a pair of spaced apart longitudinal frame members for providing longitudinal structural support for said frame structure;

-> means including a motor for rotating one of said pulleys;

-> an endless, moveable surface being rotated when one of said pulleys is rotated, and providing an exercise surface on which a user can walk or run while exercising;

-> a deck member secured beneath substantially the entire length of said exercise surface;

-> speed control means including a control panel secured to said frame structure and operatively connected to said motor for permitting a user to control the speed of said endless moveable surface;

-> an inclination mechanism secured to said frame structure effective to permit selective inclination of said deck member by the user; and

-> A deck support structure including at least one set of two elastomeric support members having a variable spring constant secured to said frame structure and abutting said deck so as to both provide support for said deck and to permit said deck to move downwardly with respect to said frame structure resulting from compression of said elastomeric support members in response to the impact force of the user's feet on said exercise surface thereby resulting in lower impact loads on the user's feet.

U.S. Patent No. 6,095,951 ("951 patent") (Declaration of Ricardo Rodriguez, Ex. A).

ANALYSIS

1. Sources to which the Court may look in the claims construction process

Claim construction is an issue of law for the Court to decide. *Markman v. Westview Instruments*, 52 F.3d 967, 979 (Fed.Cir.1995), *aff'd*, 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996). In construing claims, the Court looks first to intrinsic evidence, and only if necessary to extrinsic evidence. In reviewing intrinsic evidence, the Court first looks to the "words of the claims themselves." *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed.Cir.1996). "The general rule is that terms in the claim are to be given their ordinary and accustomed meaning." *K-2 Corp. v. Salomon S.A.*, 191 F.3d 1356, 1362 (Fed.Cir.1999). In the alternative, "a patentee may choose to be his own lexicographer and use terms in a manner other than their ordinary meaning, as long as the special definition of the term is clearly stated in the patent specification or file history." *Vitronics*, 90 F.3d at 1582. The patent specification is usually dispositive, as it is "the single best guide to the meaning of a disputed term." *Id.* In addition to the language of the claims and the specification, the final piece of intrinsic evidence available to the Court in claims construction is the prosecution history of the patent. *Id.* "The history contains the complete record of all the proceedings before the Patent and Trademark Office, including any express representations made by the applicant regarding the scope of the claims." *Id.*

The Court looks to extrinsic evidence only if intrinsic evidence is insufficient to "resolve any ambiguity in a claim term" *Id.* at 1583. This is because "the claims, specification, and file history, rather than extrinsic evidence, constitute the public record of the patentee's claim, a record on which the public is entitled to rely." *Id.* Extrinsic evidence may include expert and inventor testimony, dictionaries, and learned treatises. *Markman*, 52 F.3d at 980. Extrinsic evidence is reviewed in claims construction at the discretion of the Court. *Id.* Such evidence may be helpful "to explain scientific principles, the meaning of technical terms, and terms of art that appear in the patent and prosecution history," or "may demonstrate the state of the prior art at the time of the invention." *Id.* "Extrinsic evidence is to be used for the court's understanding of the patent, not for the purpose of varying or contradicting the terms of the claims." *Id.* at 981.

2. Construction of "means-plus-function" claims

The purpose of a claim is to define "the technology which is the exclusive property of the patentee for the duration of the patent." J. Thomas McCarthy, *McCarthy's Desk Book of Intellectual Property* 53-54 (2nd ed.1995). A claim which is lacking sufficient structure to carry out its intended purpose is construed to be a "means-plus-function" claim pursuant to 35 U.S.C. s. 112, para. 6. Such a claim is "construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof." 35 U.S.C. s. 112, para. 6. In other words, if a patent holder does not describe within his or her claim that structure

intended to carry out the claim element's stated function, then the Court reads the specific embodiments contained in the patent's specification to construe the meaning of the claim. When the specification includes multiple structures capable of performing the function identified in the claim, the claim is interpreted to include all of those structures. *Ishida Co., Ltd. v. Taylor*, 221 F.3d 1310, 1316 (Fed.Cir.2000).

The use of the word "means" in a claim creates a rebuttable presumption that 35 U.S.C. s. 112, para. 6 applies. *Personalized Media Communications v. International Trade Comm'n*, 161 F.3d 696, 703 (Fed.Cir.1998). Similarly, the absence of the word "means" creates a rebuttable presumption that 35 U.S.C. s. 112, para. 6 does not apply. *Id.* at 703-04. In analyzing whether either of these presumptions has been rebutted, the Court examines "whether the claim as properly construed recites sufficiently definite structure to avoid the ambit of s. 112, para. 6." *Id.* at 704.

3. The Court's construction of the disputed claims

-> "rotational means including a motor for rotating one of said pulleys"

Claims 3, 4, 13, and 21 refer to a "rotational means including a motor for rotating one of said pulleys." Because of the use of the word "means", this claim element is presumptively in means-plus-function format. The Court concludes that Life Fitness (the patent holder) has submitted insufficient evidence to overcome this presumption.

The phrase "rotational means" clearly indicates a function, but in and of itself articulates no structure. The Court then looks to the phrase "including a motor for rotating one of said pulleys." The use of the word "including" indicates that a motor is only part of the structure necessary to carry out the intended task of "rotation." This phrase seems to indicate that the contemplated "rotation" will be effectuated by a system, which contains a motor as merely one of its component parts.

Having concluded that the disputed claim element is in means-plus-function format, the Court looks to the specification to determine the structure that the patent holder intended to utilize. The specification includes several embodiments for the rotational means discussed in claims 3, 4, 13, and 21. These embodiments can be found at figures 2B, 3B, and 3C, as well as column 11, lines 11-33, 41-48, and column 12, lines 23-53 of the '951 patent.

-> "endless, moveable surface"

Claims 3, 4, 13, and 21 refer to an "endless, moveable surface." Precor urges the Court to adopt a means-plus-function construction of this claim element, while Life Fitness argues that the disputed element should be given its ordinary meaning. The Court concludes that this claim element includes terms which are clearly understood. No further construction is needed, and the Court construes this claim element as invoking its ordinary meaning. The ordinary meaning of this disputed element, as construed by one of ordinary skill in the art, can include a belt and/or a series of slats attached to a band. This construction is supported by the '951 patent itself. '951 patent at column 1, lines 31-39 (background of the invention)

This construction is also supported by the embodiments found in the prior art. *See* U.S. Patent No. 4,616,822 ("822 patent") at column 1, lines 19-20 (Declaration of Ricardo Rodriguez, Ex. I); U.S. Patent No. 4,643,418 ("418 patent") at column 3, line 13 (Rodriguez Dec., Ex. J); U.S. Patent No. 4,842,266 ("266 patent") at column 2, line 47 (Rodriguez Dec., Ex. O); U.S. Patent No. 4,749,181 ("181 patent") at column 2, line 16 (Rodriguez Dec., Ex. L); U.S. Patent No. 4,792,134 ("134 patent") at column 2, lines 48-49

(Rodriguez Dec., Ex. N); U.S. Patent No. 4,708,337 ("337 patent") at column 4, lines 1, 16, 25, and 39-41 (Rodriguez Dec., Ex. R).

-> **"exercise surface"**

Claims 3, 4, 13, and 21 of the '951 patent refer to an "exercise surface." Precor urges the Court to adopt a means-plus-function construction of this claim element, and argues that the "exercise surface" should be limited to the upper run of the "endless, moveable surface" discussed above. Precor provides no compelling basis for such a limitation.

The Court concludes that the disputed claim element is not in means-plus-function format, but is instead a feature of the "endless, moveable surface" recited elsewhere in the same claims.

-> **"inclination mechanism"**

Claims 3, 4, 13, and 21 of the '951 patent refer to "an inclination mechanism secured to said frame structure effective to permit selective inclination of said deck member by the user." Precor urges the Court to adopt a means-plus-function construction of "inclination mechanism," while Life Fitness argues that the disputed element should be given its ordinary meaning.

The Court concludes that this claim element is written in means-plus-function format. The Court recognizes that this disputed claim element does not include the word "means," which is most often used to trigger a means-plus-function construction. However, words other than "means" can invoke the limitations of 35 U.S.C. s. 112, para. 6. *See* Greenberg v. Ethicon Endo-Surgery, Inc., 91 F.3d 1580, 1584 (Fed.Cir.1996). In light of the fact that the disputed claim element sets forth no definite structure, the Court concludes that in this context the word "mechanism" is the linguistic equivalent of the word "means."

The specification refers to several embodiments of the "inclination mechanism." These embodiments can be found at figures 2A, 3A, 3D, and 4, as well as column 13, line 46-column 15, line 7. The Court adopts these varying embodiments in order to define the scope of the disputed claim element.

-> **"between said frame and said deck member"**

Claims 3, 4, 13, and 21 refer to the placement of certain "resilient support members." In claims 3, 4, and 13, those support structures are placed "between said frame and said deck member." Precor urges the Court to construe this language to mean "within the vertical space between the frame and the deck." Life Fitness urges the Court to give the word "between" its ordinary meaning.

The Court concludes that the meaning of the disputed claim element is apparent on its face. "Frame" and "deck member" are clearly defined within the patent. "Between" has an ordinary meaning, and requires no further construction.

-> **"deck support structure"**

Claims 3, 4, 13, and 21 refer to the "deck support structure" portion of Life Fitness' treadmill. Precor asks the Court to construe this claim element as limited to only those deck support structures that necessarily permit limited longitudinal movement of the deck. Life Fitness argues that the phrase "deck support structure" should be given its ordinary meaning.

The Court finds that the patent language does not limit "deck support structure" to those structures which permit certain types of movement. The deck support structure is specifically described by the claim language itself. Precor's proposed construction is an attempt to read the preferred embodiment into the claim. The specification to the patent does not indicate that all embodiments of the claimed invention require a deck support structure which limits longitudinal movement of the deck. The disputed claim element will be given its ordinary meaning. The Court declines to read any additional or limiting meaning into this language.

-> "resilient support members"

Claims 3 and 4 refer to "resilient support members (which) support said deck member on said frame structure so as to permit at least a portion of said deck to move downwardly with respect to said frame in response to the impact force of the user's feet on said exercise surface thereby resulting in lower impact loads on the user's feet." Precor argues that this claim element is supported only by the treadmill embodiment 630 of figures 21-23. Precor argues in support of its proposed construction that the meaning of the disputed claim element "is unclear and it cannot be determined whether the claim language is supported in the specification" as required by 35 U.S.C. s. 112, para. 1. The Court declines to address compliance with 35 U.S.C. s. 112, para. 1 in the context of a *Markman* hearing. Life Fitness' Motion to Strike Precor's proposed construction of this disputed claim element is GRANTED.

Life Fitness in turn asks the Court to construe the phrase "resilient support members" as having its ordinary meaning. Specifically, the ordinary meaning proposed by Life Fitness is as follows: "a partly elastic and rubber-like substance that returns freely to its previous position, shape or condition, and where the elastic rubber-like portion has the characteristic of a variable change in load per unit deflection." Life Fitness' Opening Claim Construction Memorandum, p. 20.

The Court adopts Life Fitness' proposed construction, and finds that the intrinsic and extrinsic evidence is consistent with this construction. The specification of the '951 patent makes clear that the "resilient support members" at issue can be composed of a variety of materials and can appear in a variety of forms. '951 patent at col 9, line 52-col. 10, line 3. Moreover, dictionaries and treatises available at the time of the filing date of the '951 patent provide definitions consistent with those proposed by Life Fitness. *See* Rodriguez Dec., Exs. S, T, U.

-> variable spring rate

Precor argues that the language "variable spring rate" as used in claims 3,4, 13, and 21 "is not inherent in the original application as filed." Precor's Opening Memorandum on Claims Construction, p. 18. Precor argues that the "variable spring rate" concept was first disclosed as part of the "continuation-in-part application No. 08/254,030 filed June 3, 1994 which later issued as U.S. Patent No. 5,484,362." *Id.* Precor has not proposed a particular construction of this disputed claim element. Rather, Precor argues that the proper priority date for the "variable spring rate" element of claims 3, 4, 13, and 21 is June 3, 1994. The Court declines to reach this question in the context of a *Markman* ruling. Life Fitness' motion to strike Precor's proposed "construction" of the term "variable spring rate" is GRANTED.

Life Fitness proposes no construction of its own regarding this disputed claim element. Because Precor's proposed construction rests on improper argument, and because Life Fitness has not independently addressed this claim element, the Court declines to adopt any proposed construction of the term "variable spring rate."

-> "speed control means including a control panel"

Precor urges the Court to apply a means-plus-function construction to the disputed claim element "speed control means including a control panel" found in claims 3, 4, 13, and 21. Life Fitness argues that this disputed claim element should be assigned its ordinary meaning. The Court finds that this disputed claim element should be given its ordinary meaning, and declines to adopt a further construction.

The Court recognizes that the use of the word "means" in this disputed claim element creates a presumption of means-plus-function format. However, the Court finds that the phrase "control panel" discloses sufficient structure to overcome this presumption.

The use of the phrase "control panel" in prior art bolsters Life Fitness' proposed construction. *See* '822 patent at column 3, lines 65-66 (Rodriguez Dec., Ex. I) ("As generally indicated at 25, a control panel is provided at the front end of exercise treadmill 1."); U.S. Patent No. 4,643,418 ("'074 patent") at column 4, lines 29-32 (Rodriguez Dec., Ex. K) ("A control panel 21 extending between and secured to arms 20b, 20c includes a timer having a settable knob 23, and adjustable speed control knob 25 and a speedometer 152."). Moreover, figures and illustrations used in prior art depict many different types of control panels. *See* U.S. Patent Nos. 4,792,134; 4,643,418; 4,659,074; 4,749,181 (Rodriguez Dec., Exs. Y, J, K, L).

Because the disputed claim element discloses structure of a type clearly meaningful to one of ordinary skill in the art, the Court finds that "control panel" has an ordinary meaning and that no further claim construction is required.

4. Motions to strike

As indicated above, Life Fitness' motions to strike Precor's proposed claim construction of the disputed claim elements "variable spring rate" and "resilient support members" are GRANTED. Life Fitness has also moved to strike the Declaration of Don W. Martens. While the Court agrees with Life Fitness that expert testimony on claims construction should be afforded limited weight, such testimony is not inadmissible per se. Life Fitness' motion to strike the Martens declaration is therefore DENIED.

CONCLUSION

The Court adopts the constructions of the disputed claim elements as set forth more fully above. Life Fitness' motions to strike Precor's proposed claim construction of the disputed claim elements "variable spring rate" and "resilient support members" are GRANTED. Life Fitness' motion to strike the Martens declaration is DENIED.

The clerk is directed to distribute a copy of this order to all counsel of record.

W.D.Wash.,2001.

Precor Inc. v. Brunswick Corp.

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