

United States District Court,
D. Massachusetts.

PALOMAR MEDICAL TECHNOLOGIES, INC. and,
v.
ALTUS MEDICAL, INC.

No. Civ.A. 02-10258-RWZ

Feb. 24, 2004.

Daniel M. Esrick, Merriann M. Panarella, Wayne L. Stoner, Hale & Dorr LLP, Boston, MA, for Plaintiffs.

James L. Messenger, Patrick J. O'Toole, Jr., Weil, Gotshal & Manges, LLP, Boston, MA, Jonathan A. Marshall, Timothy E. DeMasi, Weil, Gotshal & Manges LLP, New York, NY, for Defendant.

MEMORANDUM OF DECISION AND ORDER

ZOBEL, J.

A patent for removing hairs has this Court splitting them. Plaintiffs Palomar Medical Technologies, Inc., and the General Hospital Corporation allege that defendant Altus Medical, Inc., has infringed United States Patent No. 5,735,844 ("the '844 patent"), "Hair Removal Using Optical Pulses." The parties dispute the construction of 12 claim terms from claims 12, 27, and 32 of the '844 patent.

The construction of patent claims is a matter of law for this Court to decide. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388-89, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996). Normally, "there is a strong presumption that the ordinary and accustomed meaning of a claim term governs its construction." *Boehringer Ingelheim Vetmedica, Inc. v. Schering-Plough Corp.*, 320 F.3d 1339, 1347 (Fed.Cir.2003). However, the presumption may be overcome if the patent specification or prosecution history "clearly and deliberately set[s] forth" a different meaning. *K-2 Corp. v. Salomon S.A.*, 191 F.3d 1356, 1363 (Fed.Cir.1999); *Boehringer*, 320 F.3d at 1347. Such a circumstance arises where "the patentee has chosen to be his or her own lexicographer by clearly setting forth an explicit definition for a claim term" or "where the term or terms chosen by the patentee so deprive the claim of clarity that there is no means by which the scope of the claim may be ascertained from the language used." *Johnson Worldwide Associates, Inc. v. Zebco Corp.*, 175 F.3d 985, 990 (Fed.Cir.1999). If the intrinsic evidence fails to resolve ambiguity in the claim language, evidence extrinsic to the patent file and history such as expert and inventor testimony, dictionaries, and technical treatises and articles may be considered "to help the court come to the proper understanding of the claims; it may not be used to vary or contradict the claim language." *Vitronics Corp. v. Conceptoronic, Inc.*, 90 F.3d 1576, 1584 (Fed.Cir.1996). A "means-plus-function" claim "shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof." 35 U.S.C. s. 112 para. 6.

For most of the disputed claim terms in this case, defendant's definitions improperly limit the scope of the patent. At the same time, plaintiff has proposed certain overly broad definitions that are untenable in light of the ordinary and accustomed meaning of the claim language in context. Accordingly, having considered in light of the applicable legal standard the parties' written submissions as well as the argument of counsel at a hearing, the Court construes the disputed claim terms as follows:

Term	Court's Construction
simultaneous removal of a plurality of hairs from a skin region (claims 12, 27, 32)	Removing more than one hair at the same time from an area of skin.
skin region (claims 12, 27, 32)	An area of skin.
applicator (claims 12, 27)	A device for applying optical radiation.
in contact with the skin surface in said skin region (claim 12)	Touching the skin surface in the area of skin from which a plurality of hairs is to be simultaneously removed. "Contact" includes touching skin upon which a topical liquid or emollient has been applied.
applying optical radiation ... through said applicator to said skin region (claim 12)	Applying optical radiation through the applicator that is in contact with the skin surface to the area of skin from which a plurality of hairs is to be simultaneously removed.
pressure being applied to the applicator ... so as to cause the applicator to deform the skin region thereunder (claim 12)	Pressure being applied to the applicator so as to cause the applicator to compress the area of the skin under it.
in pressure contact with a portion of the skin surface (claim 27)	Touching with pressure a portion of the skin surface.
means for applying the optical	This is a means-plus-function

radiation
from said source to said
applicator (claim
27) (the parties are in
agreement except
as to the second disclosed
structure)

limitation
under 35 U.S.C. s. 112, para.
6. The claimed
function is applying the
optical radiation
from the source to the
applicator. The
structures disclosed in the
specification
for performing the claimed
function are:
(1) "a series of beam-
manipulating optics
14 which may be coupled to a
fiber
optic cable (or other fiber
optic
device)" (col.4, II.24-27) and
equivalents thereof;
(2) a fiber optic or other
optical coupler or
structural equivalents thereof
(col. 4,
II. 60-64);
(3) "a fiber optic cable 16 (or
other fiber
optic device) containing one
or more
fibers or fiber optic bundles"
(col. 5, II.
25-28) and equivalents
thereof;
(4) "one or more reflecting
mirrors 44"
(col.5, II.31-33) and
equivalents
thereof; and
(5) "a fiber optic bundle 114
which
divides" (col.14, II.60-62) or
equivalents thereof.

the optical radiation being
passed
through the applicator to said

Optical radiation going by
way of an
applicator to the area of skin

skin region (claim 27)	from which a plurality of hairs is to be simultaneously removed.
element (claim 32)	A device or component of a device for converging optical radiation.
positioning an element over said skin surface in said skin region through which optical radiation may be passed (claim 32)	Positioning an element through which optical radiation may be passed over the surface of the area of skin from which a plurality of hairs is to be simultaneously removed.
applying optical radiation ... through said element to said region (claim 32)	Applying optical radiation through the element that is positioned over the surface of the area of skin from which a plurality of hairs is to be simultaneously removed.

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