

United States District Court,
E.D. New York.

VAN BLARCOM CLOSURES, INC,
Plaintiff.

v.

OWENS-ILLINOIS, INC,
Defendant.

No. 04-CV-1993 (RJD)(SMG)

July 29, 2005.

Jeremy A. Kaufman, Martin B. Pavane, Lisa Ferrari, Roger Sherman Thompson, Cohen, Pontani, Lieberman & Pavane, New York, NY, for Plaintiff.

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REPORT AND RECOMMENDATION

GOLD, S., United States Magistrate Judge.

Introduction

Plaintiff, Van Blarcom Closures, Inc., ("VBC") brings this action against defendant, Owens-Illinois, Inc., ("OI"), for infringement of U.S. Patent No. 5,579,934. The '4 patent describes a convertible child resistant container cap. Depending upon how it is set, the cap may operate either in a child-resistant mode, in which the cap is difficult for a child but not an adult to open, or in a non-child-resistant mode, in which the cap is easy for all to open. *See* Pl's Opening Brief at 1; Ex. A to Pl's Opening Br. at 8. The invention's most practical application is as a closure for a bottle or other container holding drugs or other items unsafe for children to handle without adult supervision.

The parties dispute how three of the terms used in the patent claim should be construed. On June 23, 2005, this Court conducted a claim construction hearing. *See* *Markman v. Westview*, 52 F.3d 967 (Fed.Cir.1995), *aff'd* 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996). I scheduled the *Markman* hearing in light of my understanding that the parties had consented to a Magistrate Judge resolving their claim construction disputes, but was subsequently advised by counsel that they had not done so. Docket Entry 28. Accordingly, my construction of the disputed claim terms is set forth in this Report and Recommendation.

Discussion

A. Principles of Claim Construction

The claim language in a patent "generally carries the ordinary meaning of the words in their normal usage in the field of invention" as understood by persons skilled in the art. *Alloc, Inc. v. Int'l Trad Com'n*, 342 F.3d 1361, 1368 (Fed.Cir.2003); *see also* *Metabolite Labs., Inc. v. Lab. Corp. of Am. Holdings*, 370 F.3d 1354, 1360 (Fed.Cir.2004); *Texas Digital Sys., Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1201-1202 (Fed.Cir.2002). When construing patent claims, "the most important indicator of the meaning of a [claim term] is its usage and context within the claim itself." *Middleton, Inc. v. Minnesota Mining and Manufacturing Co.*, 311 F.3d 1384, 1387 (Fed.Cir.2002); *see also* *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1115-16 (Fed.Cir.2004) (collecting cases); *Thermalloy, Inc. v. Aavid Engineering, Inc.*, 121 F.3d 691, 692 (Fed.Cir.1997) ("the language of the claim frames and ultimately resolves all issues of claim interpretation"). As an example of the importance of context to determining the meaning of a claim term, the court in *Phillips v. AWH Corp.*, No. 03-1269, 2005 WL 1620331 (Fed.Cir. July 12, 2005), noted that the claim in issue referred to "steel baffles," and inferred that the term "baffles" therefore did not inherently indicate an object made of steel. *Phillips*, 415 F.3d 1303, 2005 WL 1620331, at * 6.

Although the claim language itself is the court's most important consideration, "the person of ordinary skill ... is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification." *Phillips*, 415 F.3d 1303, 2005 WL 1620331, at *5. Thus, "[i]n determining the proper construction of a claim, 'the court should look first to the intrinsic evidence of record, *i.e.*, the patent itself, including the claims, the specification, and if in evidence, the prosecution history.' " *CVI/Beta Ventures, Inc. v. Tura LP*, 112 F.3d 1146, 1152 (Fed.Cir.1997), quoting *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed.Cir.1996). These sources, including the specification and drawings, "provide a context to illuminate the meaning of claim terms ... throughout the interpretation process ." *Thermalloy*, 121 F.3d at 693.

When the meaning of a claim term to a person skilled in the art is difficult to discern, courts may as a result look to " 'those sources available to the public that show what a person of skill in the art would have understood the disputed claim language to mean.' " *Phillips*, 415 F.3d 1303, 2005 WL 1620331, at *6, quoting *Innova*, 381 F.3d at 1116. Such 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.*

The most relevant source of guidance, along with the claim language, is the specification, which the Federal Circuit regards as "the single best guide to the meaning of a disputed term." *Phillips*, 415 F.3d 1303, 2005 WL 1620331, at *7, quoting *Vitronics*, 90 F.3d at 1582; *see also* *Standard Oil Co. v. Am. Cyanamid Co.*, 774 F.2d 448, 452 (Fed.Cir.1985) ("[t]he specification is, thus, the primary basis for construing the claims"); *Metabolite Labs.*, 370 F.3d at 1360 ("[i]n most cases, the best source for discerning the proper context of claim terms is the patent specification wherein the patent applicant describes the invention"). The specification's importance derives from its statutory role, which is to "describe the claimed invention in 'full, clear, concise, and exact terms.' " *Phillips*, 415 F.3d 1303, 2005 WL 1620331, at *8, quoting 35 U.S.C. s. 112; *see also* *Network, LLC v. Centraal Corp.*, 242 F.3d 1347, 1352 (Fed.Cir.2001) ("[t]he claims are directed to the invention that is described in the specification; they do not have meaning removed from the context from which they arose").

In some cases, the "specification may reveal a special definition given to a claim term by the patentee that differs from the meaning it would otherwise possess." *Phillips*, 415 F.3d 1303, 2005 WL 1620331, at *8. However, a heavy presumption favors the ordinary meaning of the claim language. Thus, although "the

specification ... of a patent may alter the meaning of a claim term from its conventional usage," Alloc, 342 F.3d at 1368, this may occur only if the "text of the patent makes clear that a word was used with a special meaning." *Toro Co. v. White Consol. Industries, Inc.*, 199 F.3d 1295, 1299 (Fed.Cir.1999); *see also* *Hoechst Celanese Corp. v. BP Chems. Ltd.*, 78 F.3d 1575, 1578 (Fed.Cir.1996) ("[a] technical term used in a patent document is interpreted as having the meaning that it would be given by persons experienced in the field of the invention, *unless it is apparent from the patent and the prosecution history that the inventor used the term with a different meaning*") (emphasis added); *Johnson Worldwide Assoc., Inc. v. Zebco Corp.*, 175 F.3d 985, 989 (Fed.Cir.1999) ("a court must presume that the terms in the claim mean what they say, and, unless otherwise compelled, give full effect to the ordinary and accustomed meaning of claim terms"). Thus, only if a term is "consistently and clearly use[d] ... in a manner either more or less expansive than its general usage in the relevant art, [may a patent applicant] expand [] or limit[] the scope of the term in the context of the patent claims." Alloc, 342 F.3d at 1368.

B. The Claim Language

The disputed claim terms are each found in the first claim of the patent, which reads as follows, with the same punctuation and indentations as below:

1. A convertible child resistant closure for use with a container having a threaded portion and an axis extending therethrough about which said closure is rotatable, said closure comprising:

an inner cap including:

a cover wall; and

a circumferential side wall extending from said cover wall and having an inner surface with a threaded portion for engagement with the threaded portion of the container, and an outer surface including a child resistant portion comprising a series of angular abutments extending thereabout and a non-child resistant portion axially offset from said first child resistant portion and including a row of longitudinally extending knurlings; and

an outer cap including:

a second cover wall; and

a second circumferential side wall extending axially from said second cover wall and having a second inner surface provided with a second child resistant region including a plurality of angular abutment surfaces complementary to said series of angular abutments on said inner cap and a second non-child resistant region axially offset from said second child resistant region and including a second row of longitudinally extending knurlings complementary to said plurality of knurlings on said inner cap, said inner cap being coaxially positioned and nested within said outer cap and axially movable between said second child resistant region and said second non-child resistant region, and when in said second child resistant region said plurality of angular abutment surfaces engage said series of angular abutments upon rotation of said outer cap to rotate said inner cap in said closing direction and in the absence of an axial force, cam over and past said series of angular abutments upon rotation of said outer cap member in said opening direction to prevent rotation of said inner cap, and when in said second non-child resistant region said second row of knurlings are interengaged with said first row of knurlings so that upon rotation of said outer cap in both said opening and

closing directions said inner cap turns.

C. "Cover Wall"

The first disputed claim term is "cover wall." The dispute centers on the "second cover wall" of the outer cap. Plaintiff proposes that "cover wall" be construed as "[t]he top wall of the cap." *See* Pl's Reply Br. at 8. Defendant proposes that the cover wall be defined as "[t]he wall of the cap that extends over the top of the threaded portion of the container." *See* Def's Opening Br. at 5.

The ordinary meaning of a "cover" suggests a lid or top, or something placed over something. There is nothing in the phrase "cover wall" suggesting a wall which necessarily extends to the outer perimeter of the item covered. Plaintiff's proposed construction is thus consistent with the claim term's ordinary meaning.

The dependent claims, the text of the specification and the drawings also support this construction. Defendant seems to argue that the word "cover" implies complete coverage, and thus warrants a construction requiring that the claimed cover wall extend to the outer perimeter of the cap. Def's Opening Br. at 6. However, dependent claim 4 describes a cover wall with "a hole extending therethrough to expose" the inner cap. A cover wall with a hole in it, exposing a portion of the area it is designed to "cover," seems inconsistent with defendant's argument that a cover wall must, by definition, cover the entirety, including the outer perimeter, of the item upon which it rests. In addition, the portion of the specification entitled "Detailed Description of the Presently Preferred Embodiments," in an apparent reference to the cover wall, provides that "[t]he outer cap 14 has circular *top wall portion 40* preferably with a central opening 41 as can best be seen from Fig. 3," thereby using the very same phrase to describe the cover wall as proposed by plaintiff. Col. 4, ln. 43-45 (emphasis added). Finally, the lead line from 40 points to a component of the outer cap depicted in Figure 3 which covers only a portion of the top of the container, and which does *not* extend to the top of the container's threaded portion. Although as discussed below the usefulness of Figure 3 as an aid to claim construction is somewhat unclear, the drawings at a minimum fail to support defendant's proposed construction.

For all these reasons, I respectfully recommend that plaintiff's proposed construction of the "cover wall" as the "top wall of the cap" be approved.

D. "Second Circumferential Side Wall"

The parties also dispute the meaning of a "second circumferential side wall." Plaintiff proposes that the term "circumferential side wall" be construed as "[a] side wall which defines a circumference of the outer cap, and which may include a radially inwardly extending portion." Pl's Opening Br. at 4. Defendant, on the other hand, proposes "[t]he wall of the cap that hangs down from the cover wall." Def's Opening Br. at 7.

Given its ordinary meaning, the phrase "side wall" describes a wall which forms the side of an object, and would not ordinarily be understood to include a "radially inwardly extending portion." Moreover, the claim itself describes a "circumferential" side wall "extending axially" from the cover wall. The "circumference" of a circular object is its outer perimeter, and the term "circumferential" would not ordinarily be used to describe a wall with a "radially inwardly extending portion." Similarly, the term "axially" means "extending in a direction essentially perpendicular to the plane of a cyclic structure." *See* Merriam-Webster's Online Dictionary *available at* <http://www.m-w.com>; *see also* Tr. of Cl. Const. Hr'g, June 23, 2005, at 24-25, 58 (reflecting counsels' agreement that the term "extending axially" refers to extending down from and perpendicular to the cover wall). I therefore conclude that the plain meaning of the claim language describes

a side wall which comprises the side of the closure by extending in a perpendicular direction from the cover wall, and not one with "a radially inwardly extending portion."

This construction finds further support in the text of the specification. For example, the specification's description of the preferred embodiment refers to the outer cap's "cylindrical skirt depending from the top wall." Col. 4, ln. 45-46. Similarly, the summary of the invention in the patent describes the outer cap as having a "side wall or skirt depending from the cover wall." Col. 2, ln. 36. In addition to its ordinary meaning as a garment or covering which hangs down vertically from a person's waist or the rim of an object, the term "skirt" is defined in the Closure Manufacturers Association's Guide to Plastic Closures 53, a technical dictionary, as "the *vertical* wall of a closure." *See* Ex. B to Def's Reply Br., Closure Manufacturers Association, Guide to Plastic Closures 53 (1993) (emphasis added).

Plaintiff has failed to identify any claim language, specification text, or even extrinsic evidence which supports its contention that a "side wall" should be understood to include a "radially inwardly extending portion." Rather, plaintiff's proposed construction is based on the drawings in the patent specifications. *See* Ex. A to Pl's Opening Br. The side wall of the outer cap is designated by lead line 42. *See* Col. 4, ln. 12. As plaintiff correctly points out, the portion of the diagram indicated by lead line 42 in Figures 1, 2 and 3 is a cross-hatched area which appears to be a circumferential side wall and which includes a radially inwardly extending portion.

Nevertheless, I conclude that the drawings are insufficient to support plaintiff's proposed construction. First, "it is well established that patent drawings do not define the precise proportions of the elements," *Hockerson-Halberstadt, Inc. v. Avia Group Int'l, Inc.*, 222 F.3d 951, 956 (Fed.Cir.2000), a principle which suggests that shapes in patent drawings do not generally provide a proper basis upon which to expand the plain meaning of claim terms. In addition, certain aspects of the drawings in the "4 patent are ambiguous. As noted above, the specification text indicates that the outer cap's cover wall is indicated by lead line 40, and its side wall by lead line 42. However, if the area designated as 40 is indeed the cover wall, it is depicted in cross-section and should be cross-hatched, but it is not. *See* 37 CFR Section 1.84(h)(3) (stating that "[h]atching must be used to indicate section portions of an object"). Although plaintiff attempts to explain the absence of hatching by suggesting that the cover wall might be hollow, this is mere speculation, unsupported by the claims or specification. Moreover, the areas indicated as 40 in Figures 1, 2 and 3 are so narrow that it is hard to imagine they were intended to depict a "cover wall." Finally, the figures depicting the inner cap have narrow areas similar to those indicated in the outer cap drawings as 40, but the areas in the inner cap drawings are separate from the inner cap's cover wall and have no lead lines at all. Taken together, these circumstances at least raise a question about whether the areas indicated as 40 in the drawings of the outer cap were in fact intended to depict the cover wall, or whether a drafting error occurred, and the cover wall was actually intended to be the "radially inwardly extending portion" of the area designated as 42.

Given these uncertainties, the drawings are simply insufficient to support plaintiff's proposed construction. Moreover, the portion of the area designated as 42 which does extend inward plays no role in depicting the claimed invention; that is, the abutments and knurlings described in the claims which engage with the inner cap appear, in each of the drawings, in the portion of the area designated as 42 which is on the side of the outer cap and not in any "radially inwardly extending portion" of the outer cap. Indeed, plaintiff's counsel conceded during oral argument that the radially inwardly extending portion of 42 depicted in the patent drawings "is not necessarily functional." Tr. at 16. The minimal significance of the inwardly extending portion of 42 further weakens the support provided by the drawings for plaintiff's proposed broad

construction of the term "side wall." *See Merck & Co., Inc., v. Teva Pharmaceuticals USA, Inc.*, 395 F.3d 1364, 1370 (Fed.Cir.2005) (noting that, "[w]hen a patentee acts as his own lexicographer in redefining the meaning of particular claim terms away from their ordinary meaning, he must clearly express that intent").

The plain language of the claim term "side wall" in no way suggests a radially inwardly extending portion, there is no textual support for plaintiff's proposed construction in the specification, and the limited support for plaintiff's proposed construction in the drawings is ambiguous and not particularly compelling. However, if I reject defendant's argument that a cover wall must extend to the outer perimeter of the outer cap and also reject plaintiff's argument that a side wall includes a radially inwardly extending portion, a dilemma arises: if the cover wall need not extend to the point where it covers the threaded perimeter of the outer cap, and the side wall may not have a radially inwardly extending portion, how are the two to meet?

To resolve this problem, I recommend that plaintiff's proposal that a side wall may include a radially inwardly extending portion be accepted, but with the addition that the portions of the outer cap which engage with the inner cap, in either the child-resistant or non-child-resistant position, may not be located on the radially inwardly extending portion. This construction has the benefits of being consistent with the patent's drawings and allowing for physical joinder of the side and cover walls, but without providing patent coverage broader than warranted by the plain meaning of the claim terms.

I recognize that the parties have not had an opportunity to be heard with respect to this proposed construction. They will, however, of course be permitted to respond to this recommendation in their objections to my report. In the alternative, counsel may contact my chambers within the time for filing objections and seek leave to file a motion for reconsideration with respect to this aspect of my report.

E. The Position of the "Angular Abutment Surfaces" of the Outer Cap

The final dispute concerns the location of the "angular abutment surfaces" of the outer cap. Plaintiff proposes that the outer cap be described as having "[a] region in which angular abutment surfaces are positioned, but the angular abutment surfaces need not be connected to the inner surface of the outer wall." Defendant proposes that "[t]he angular abutments of the outer cap must be located on the inner surface of the side wall." Plaintiff's proposed construction runs contrary to the ordinary meaning of the claim terms.

Claim 1 provides in pertinent part as follows, with the same punctuation and indentation indicated:

an outer cap including:

a second cover wall; and

a second circumferential side wall ... having a second inner surface provided with a second child resistant region including a plurality of angular abutment surfaces ...

The very structure of the sentence makes clear that the outer cap comprises two components: a cover wall and a side wall. By definition, then, the angular abutment surfaces of the outer cap must be part of one or the other. The claim language plainly indicates that the angular abutments are part of the side wall.

Plaintiff argues that the claim language requires only that the angular abutments of the outer cap be placed in the second child resistant "region" and does not require that they be located on the inner surface of the

side wall. But this second child resistant region is not an arbitrary area where the angular abutments may be placed at random. It has a fixed location. The claim language clearly specifies that the outer cap's side wall has an inner surface "provided with" a "second child resistant region" and "a second non-child resistant region." The claim further states that it is the "second child resistant region" which "*includes*" the angular abutment surfaces. This language indicates that the abutment surfaces, as part of the "second child resistant region" with which the inner surface of the side wall is provided, must be, as defendant's proposed construction provides, located in the inner surface of the side wall.

In support of its argument, plaintiff attempts to distinguish between the claim language describing the "child resistant *portion*" of the inner cap and the child resistant *region* of the outer cap. Plaintiff contends that, although the term "portion" may suggest a physical part of the cap, the term "region" does not necessarily have the same connotation. *See* Tr. at 37.

Plaintiff's attempt to distinguish between a "portion" of the inner cap and a "region" of the outer cap fails. First, in listing the characteristics of the outer cap, the claim refers to a "second child resistant region," thus indicating that this is the second of two similar aspects of the claimed invention. The only child resistant area previously mentioned in the claim is the child resistant portion of the inner cap. Moreover, the patent abstract uses the term "portion" to describe the "regions" identified in the claim, as follows:

The outer cap is also defined by a cover wall and a side wall depending from the cover wall. The side wall includes an inner surface divided into a first child resistant portion and a second non-child resistant portion ... The first portion includes a plurality of angular abutment surfaces.

The natural inference, therefore, is that the words "portion" and "region" are used as synonyms in the claims.

Defendant's proposed construction is supported by the specification and drawings as well. For example, the Summary of the Invention refers to "[t]he abutment surfaces *of the outer cap skirt*," Col. 2, ln. 60 (emphasis added). Similarly, in describing the preferred embodiments, the specification explains that "the inner surface of the skirt of the outer cap *has* a plurality of extending abutment surfaces positioned in the first or child resistant region." Col. 4, ln. 63-65 (emphasis added, numerical designations omitted). Finally, Figure 3 clearly depicts the angular abutment surfaces as being located on the inner side wall of the outer cap.

For all these reasons, I conclude that the angular abutments of the outer cap must be located on the inner surface of the side wall, and recommend that this aspect of defendant's proposed claim construction be approved.

Conclusion

For the reasons stated above, I respectfully recommend that plaintiff's proposed construction of the claim term "cover wall" be adopted; that plaintiff's proposal that a side wall may include a radially inwardly extending portion be accepted, but with the addition that the portions of the outer cap which engage with the inner cap, in either the child-resistant or nonchild-resistant position, may not be located on the radially inwardly extending portion, and that defendant's proposed construction of "angular abutment surfaces" be adopted.

Any objections to the recommendations in this report must be filed with the Clerk of the Court and the

Chambers of the Honorable Raymond J. Dearie within ten days of receiving this Report and Recommendation, and in any event, no later than August 19, 2005. Failure to file timely objections may waive the right to appeal the District Court's Order. *See* 28 U.S.C. s. 636(b)(2); Fed.R.Civ.P. 6(a), 6(e), 72; *Small v. Secretary of Health and Human Servs.*, 892 F.2d 15, 16 (2d Cir.1989).

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