

United States District Court,  
C.D. California.

**WATER FUN PRODUCTS CORP., an Alberta, Canada corp,**  
Plaintiff.

v.  
**PROSLIDE TECHNOLOGY, INC., an Ottawa, Canada corp,**  
Defendant.

No. CV 04-9041 RSWL (CWx)

**Aug. 22, 2005.**

**ORDER CONSTRUING DISPUTED TERMS IN CLAIMS 1-6 AND 9-12 OF UNITED STATES  
PATENT NO. 5,137,497 ('497 PATENT)**

**RONALD S.W. LEW, District Judge.**

On August 15, 2005, this Court held a *Markman* Hearing to hear oral arguments for proposed claim constructions regarding certain language in United States Patent No. 5,137,497 ('497 patent). Appearing on behalf of Plaintiff Water Fun Products Corporation ("Plaintiff" or "Water Fun") were attorneys Breton Bocchieri and Jintung Su. Appearing on behalf of Defendant ProSlide Technology, Inc. ("Defendant" or "ProSlide") were attorneys Paul Tripodi II and John Halbleib. Also present in Court was the CEO of ProSlide, Richard Hunter. Having read and considered all papers and argument submitted with regards to claim construction, **THE COURT NOW FINDS AND RULES AS FOLLOWS:**

**I. INTRODUCTION**

On November 1, 2004, Plaintiff Water Fun Products Corporation ("Plaintiff" or "Water Fun") filed a Complaint against ProSlide Technology, Inc. ("Defendant" or "ProSlide") alleging patent infringement of U.S. Patent No. 5,137,497 ('497 patent) issued to David Dubeta on August 11, 1992 for a "slide apparatus."

The parties filed competing claim construction briefs in anticipation of a *Markman* Hearing to be held on August 15, 2005, with regards to Claims 1-6 and 9-12 of the '497 patent. FN1 Based on the following reasons, the Court **CONSTRUES** the disputed terms in these claims of the '497 patent as follows.

FN1. In the Joint Claim Construction Statement for the '497 patent, Plaintiff construes Claims 2, 3, 9, 10, 11, and 12. Defendant ProSlide contends that these claims have not been asserted in this Action by Water Fun and thus do not require interpretation. Although not addressed in the Joint Claim Construction Statement, Defendant does respond to Plaintiff's construction of these claims in its brief. As such, the Court construes all terms referenced in the claims in dispute ( *i.e.*, Claims 1-6 and 9-12).

## **II. BACKGROUND**

Plaintiff Water Fun has been a pioneer in water park slides and other products for years. During the course of its business, Water Fun acquired the '497 patent issued to David Dubeta for a "slide apparatus."

In the patent itself, Dubeta states that his slide apparatus, while "primarily intended as a so-called water slide ... could be used with or without water." (Patent, 1:5-7.) FN2 He states that this new invention was made primarily to: (1) solve the problem of user safety on water slides "by providing a relatively simple, open topped slide apparatus which can accommodate more than one rider at a time;" (2) provide "a slide which is interesting in terms of both shape or configuration and the forward and backward path of travel"; and (3) "provide an open slide surface all areas of which are visible to the slide operator or attendant thus giving the operator a clear view of all riders on the slide." (Patent, 1:General Description.)

FN2. Citations to the Patent are made to column and line number as "Patent, \_\_:\_\_\_-\_\_\_."

Defendant ProSlide makes, uses, offers for sale, sells, and induces others to make, use offer for sale and sell, a water slide product which it refers to as its "Tornado" slide apparatus (the "Infringing Product"). Plaintiff alleges that this "Tornado" slide apparatus infringes on the '497 patent, and ProSlide contributes to the use and possible sale/offer for sale, by others of the Infringing Product.

On November 1, 2004, Plaintiff filed a Complaint alleging one cause of action for patent infringement and requesting a jury trial. On December 8, 2004, Defendant ProSlide filed an Answer. This case is currently set to go to trial on May 9, 2006.FN3

FN3. At this point in time, the scheduling current dates for this Action are: (1) Discovery cut-off is set for December 30, 2005; (2) Motion cut-off is set for February 13, 2006; (3) Expert cut-off is according to the code; and (4) Final pre-trial conference is set for April 10, 2006.

At the beginning of June 2005, both parties filed a Joint *Ex Parte* Application for Scheduling Order and Conference re: *Markman* Hearing on Patent Claim Construction. The Court, in an effort to promote judicial economy, adopted Plaintiff's order seeking one set of claim constructions for all claims versus Defendant's piecemeal approach.

Accordingly, before the Court are competing claim constructions of the '497 patent.

## **III. DISCUSSION**

### **A. The Court Adopts The Following Claim Constructions**

The parties disagree over whether, as a matter of law, Defendant infringed on the '497 patent for a "slide apparatus." The parties disagree over claim construction of Claims 1-6 and 9-12 of the '497 patent. Specifically, the parties present different interpretations of the following terms FN4:

FN4. This is a list of the disputed terms as laid out by the Plaintiff in the last brief submitted and provides the clearest layout for claim construction purposes.

- (1) Trough means (Claims 1, 4, 5, 6, 9, 10, and 12)
- (2) Slide surface (Claims 1, 2, 4, 10, and 12)
- (3) Cross section (Claims 1, 4, and 10)
- (4) Substantially parabolic (Claims 1, 4, and 10)
- (5) Transversely (Claim 1)
- (6) Upwardly opening (Claims 1, 4, and 10)
- (7) Top and bottom (Claim 1)
- (8) Longitudinal axis (Claim 1)
- (9) Slide entrance (Claims 1 and 2)
- (10) Inlet ramp means (Claims 1 and 2)
- (11) Upper wall (Claim 1)
- (12) Paragraph (g) of Claim 1 "whereby a user travels on said slide surface"
- (13) Taper forwardly (Claims 4 and 12)
- (14) Sloping downwardly (Claims 1, 4, and 10)
- (15) Wider (Claims 4 and 10)
- (16) Disposed on (Claim 1)

## **B. Legal Standard: Claim Construction**

An infringement analysis involves a two-step inquiry: (1) determining the meaning and scope of the patent claims asserted to be infringed; and (2) comparing the properly construed claims to the accused device. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed.Cir.1995), *aff'd*, 517 U.S. 370 (1996).

### **1. Principles of claim construction**

Claim construction of a patent, including terms of art within claims, is exclusively within the province of the court, not the jury. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388-89 (1996).

It is well-settled that, in interpreting an asserted 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. *See Markman*, 52 F.3d at 979, 34 U.S.P.Q.2d at 1329. Such intrinsic evidence is the most significant source of the legally operative meaning of disputed claim language.

Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed.Cir.1996).

The first step is to look to the words of the claims themselves, both asserted and nonasserted, to define the scope of the patented invention. *Id.* Second, it is necessary to review the specification to determine whether the inventor has used any terms in a manner inconsistent with their ordinary meaning. *Id.* The specification acts as a dictionary when it expressly defines terms used in the claims or when it defines terms by implication. *Id.* "Claims must be read in view of the specification, of which they are a part." *Id.* ( *citing* Markman, 52 F.3d at 979). The specification is always highly relevant to the claim construction analysis, and usually, it is dispositive; it is the single best guide to the meaning of a disputed term. *Id.* The drawings or figures of the patent are considered with the specification in interpreting claim language. Wright Medical Tech., Inc. v. Osteonics Corp., 122 F.3d 1440, 1443 (Fed.Cir.1997). Third, the court may also consider the prosecution history of the patent, if in evidence. Vitronics Corp., 90 F.3d at 1582.

In addition, the Court should not read into a patent limitations that do not exist in the claims. As the Federal Circuit recently held, "[t]he danger of improperly importing a limitation is even greater when the purported limitation is based upon a term not appearing in the claim." Amgen, Inc. v. Hoechst Marion Roussel, Inc., 314 F.3d 1313, 1325 (Fed Cir.2003) (internal citations omitted).

Moreover, like contract interpretation, the Court should first give claim terms their ordinary and accustomed meanings.

Claim terms take on their ordinary and accustomed meanings unless the patentee demonstrated *an intent to deviate from the ordinary and accustomed meaning of a claim term by redefining the term or by characterizing the invention in the intrinsic evidence using words or expressions of manifest exclusion or restriction, representing clear disavowal of claim scope.*

Apex, Inc. v. Raritan Computer, Inc., 325 F.3d 1364, 1377 (Fed.Cir.2003) (emphasis added) (citation omitted).

In fact, the Federal Circuit has issued a ruling instructive on this issue. In Rexnord Corp. v. Laitram Corp., 274 F.3d 1336, 1343-44 (Fed.Cir.2001) the Federal Circuit overruled the district court's holding that the claim term "portion" was to be accorded a meaning narrower than its customary meaning, by finding that the district court had improperly relied on the *preferred* embodiment, the drawings, and one passage in the prosecution history to overcome the presumption.

Finally, if an analysis of the intrinsic evidence alone will resolve any ambiguity in a disputed claim term, it is improper to rely on extrinsic evidence. *Id.* at 1583. Extrinsic evidence is that evidence which is external to the patent and file history, such as expert testimony, inventor testimony, dictionaries, and technical treatises and articles. *Id.* at 1584. Extrinsic evidence in general, and expert testimony in particular, may be used only to help the court come to the proper understanding of the claims; it may not be used to vary or contradict the claim language. *Id.*

This approach was affirmed in the Federal Circuit's most recent *en banc* decision, Phillips v. AWH Corp., 2005 WL 1620331 (Fed.Cir. July 12, 2005) (No. 03-1269-1286). In that case, the Court reiterated that "[w]e have viewed extrinsic evidence in general as less reliable than the patent and its prosecution history in determining how to read claim terms." *Id.* at \*19.

## 2. Analysis of Claim Construction

### a. Trough means

The parties first disagree over the phrase "trough means" which is used in Claims 1, 4, 5, 6, 9, 10, and 12 of the '497 patent. Plaintiff Water Fun asserts that a "trough means" is a trough or conduit. Plaintiff makes this argument on the grounds that this is the ordinary and accustomed meaning of the term.

In response, Defendant ProSlide argues that a "trough means" is a structure having a long, narrow, open depression with a substantially uniform cross section throughout its length. ProSlide contends that the trough is open, as opposed to a closed tube, since the patentee, Dubeta, knew the difference between troughs and tubes. In characterizing the "typical" prior art slide in the background of the '497 patent, Dubeta indicated that these prior art slides were "usually elongated tubes or troughs following a circuitous path downward from an elevated starting platform." (Def's Ex. 1 at 1:15-18). The use of the word "or," Defendant argues, indicates a difference because if the definition of trough was broad enough to include a tube, then Dubeta's characterization of the prior art would be redundant.

Plaintiff Water Fun disagrees arguing instead that the word "or" is used for "connecting two words denoting the same thing." *The Oxford Dictionary* (2d ed.1989). In the recent *Phillips* decision, the Federal Circuit cautioned against use of dictionaries in interpretation of ordinary meanings, reaffirming that "the specification 'acts as a dictionary when it expressly defines terms in used in the claims or when it defines terms by implication.'" (citations omitted) *Id.* at \*24.

Arguably the word "or" can refer to two things that are similar or it can refer to two different things. In *Phillips*, the Federal Circuit warned of looking to dictionaries for defining such terms stating that "[t]he main problem with elevating the dictionary to such prominence is that it focuses the inquiry on the abstract meaning of words rather than on the meaning of claim terms within the context of the patent. Properly viewed, the 'ordinary meaning' of a claim term is its meaning to the ordinary artisan after reading the entire patent." *Id.* at \*25.

Here, a reading of the patent indicates that Dubeta intended tubes and troughs to be different things. This is contrary to Plaintiff's argument that the '497 patent frequently uses more than one word or description to refer to the same thing (*i.e.*, "the front outlet *or* discharge end;" "a discharge *or* dismount area"). These examples, however, take the terms out of context and are the abstracts warned against by the Federal Circuit. In the case of water slides, common vernacular in the industry suggests that a tube indicates a closed slide, while a trough indicates an open slide. This is also consistent with Dubeta's own description of the slide apparatus, which uses the word "open." (*See* Patent, 1:General Description.) Thus, ProSlide is correct that it would be redundant for the definition of trough to be broad enough to include a tube.

Specifically, the parties disagree over whether the trough is open. Defendant claims it is open, because safety requires so as set forth in the '497 patent which provides for a "relatively simple, open topped slide apparatus which can accommodate more than one rider at a time." (Def's Ex. 1 at 1:38-41.) Because the slide apparatus is "open" (*i.e.*, "open topped"), Defendant contends that the slide operator has "a clear view of all riders on the slide" and no longer has to wait until the user exits the slide to admit the next rider. (*Id.* at 1:46-49 and 1:27-32.).

Plaintiff refutes this interpretation stating that nothing in the patent indicates that the entire slide structure be "open" or "open topped." Instead, Plaintiff argues that this is a limitation that cannot be read into the

specification, since the language of the claims references "open" only to the slide surface, not the entire structure ( *i.e.*, "slide surface having a ... upwardly opening cross section").

However, as the patent itself indicates the "slide surface disposed on said trough" has a "substantially parabolic, upwardly opening cross section." (Claim 1(b) and (c) of '497 patent.) Because the slide surface is on the trough and that surface has an "upwardly opening" the ordinary meaning would appear to be that the trough is open.

The next point of contention is whether there is a "narrow depression." There is, however, no limitation to that effect in the '497 patent. The words "narrow" and "depression" do not appear anywhere in the claims or the ' 497 patent. Further, nothing but conjecture suggests that the trough must have a narrow depression in order for the rider to utilize the momentum from his downward run to move across the trough and up the other side.

Claim interpretation begins with an examination of the intrinsic evidence, *i.e.*, the claims, the rest of the specification and, if in evidence, the prosecution history. *Gart v. Logitech, Inc.*, 254 F.3d 1334, 1339-40, 59 USPQ.2d 1290, 1293-94 (Fed.Cir.2001); *O.I. Corp. v. Tekmar Co. Inc.*, 115 F.3d 1576, 1581, 42 USPQ.2d 1777, 1780 (Fed.Cir.1997).

As Plaintiff properly points out, however, a definition is not imported unless an express limitation in the specification exists. In this case, there is an absence of an express limitation in the terms defining a "trough means" that includes a narrow depression. Thus, the ordinary meaning of the term "trough means" controls. *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366 (Fed.Cir.2002) (finding that courts "indulge a 'heavy presumption' that a claim term carries its ordinary and customary meaning.") As such, the limitation of narrow depression is rejected.

Finally, the parties disagree over whether there is a requisite "uniform cross section" in the "trough means." Defendant asserts this is necessary in order for the rider to continue the forward and backward motion throughout the length of the slide. Defendant also argues this was contemplated in the patent, because Dubeta summarized his invention in the abstract by stating that his slide apparatus had the same generally parabolic cross section "throughout its length." (Def's Ex. A, Abstract.)

In response, Plaintiff argues that this is a mischaracterization of the Abstract, since to have the *same* generally parabolic cross section is not the same as saying that the cross section is the *same* throughout its length. Additionally, Plaintiff contends that Claim 4(d) contradicts this interpretation since it specifically claims a slide surface which does not have a substantially uniform shape throughout its length, namely a slide surface that is "wider at the rear end, and taper[s] forwardly to the front, outlet end such as in a conic section." Because, Plaintiff is correct that such limitation cannot be read from the intrinsic evidence, the Court declines to adopt this limitation.

Based on this, the Court construes the term "trough means" to be an open, non-tube like structure or conduit.

## **b. Slide surface**

With respect to this term, which is used in Claims 1, 2, 4, 10, and 12 of the '497 patent, the parties also disagree over its construction. Plaintiff argues that a "slide surface" is the surface on which the user is

intended to slide. Conversely, Defendant claims it is a material having a smooth exterior. Defendant bases its argument on the grounds that the '497 patent indicates that the slide surface "*can be* fiberglass/plastic sprayed onto the base, and sanded, painted and polished to a finish comparable to a prefabricated panel finish." (emphasis added). Alternatively, the slide surface "*can be* sheets of plastic bonded to the base." (Def's Ex. 1 at 4:8-12.) (emphasis added). Thus, Defendant argues that the common feature in these examples is that the slide surface be a material with a smooth exterior.

In response, Plaintiff states that this is an improper limitation. Plaintiff argues that Defendant ignores the ordinary meaning to one skilled in the art of water slides. The specification of the '497 patent expressly adopts the Whitehouse '733 patent as a "typical" water slide. The claims of the Whitehouse '733 patent, in turn, use the term "water slide surface" without any independent or antecedent definition or description thereof in the specification. Plaintiff thus argues that the intrinsic record shows that the term "water slide surface" was commonly understood by persons skilled in the art without any separate definition and asks that the Court reject the limitation sought by Defendant ProSlide. Because Plaintiff is correct in noting that additional limitations should not be read into the claim and because both examples supplied by Defendant are only optional as they contain the phrase "can be," the Court declines to read in the limitation that the "slide surface" be a material having a smooth outer surface.

Thus, the Court construes the term "slide surface" to be the surface on which the user is intended to slide.

### **c. Cross section**

The parties next disagree over the term "cross section" appearing in Claims 1, 4, and 10 of the '497 patent. Defendant asks the Court to define this as the section taken by cutting the trough with a vertical plane at a right angle (*i.e.*, transverse) to the longitudinal axis of the trough. In contrast, Plaintiff asks the Court to define it as the cutting of anything across.

Defendant argues that there is support for its more narrow definition. However, Defendant's primary support is through demonstrative exhibits, extrinsic patents, and dictionary definitions. Defendant further contends that the term "cross section" for troughs has been known in the water slide industry for over a century. As an example, Defendant states that one of the "References Cited" during prosecution of the Whitehouse patent—the patent cited as a "typical prior art" slide by Dubeta—was U.S. Patent No. 419,860 issued to Libbey in January of 1890. (Def's Ex. 24.) There, Libbey patented a water slide consisting of "trough A and reservoir B." In particular, Figure 2 of Libbey's 1890 patent "is a cross-section through the trough."

However, as is made clear by Defendant's argument, the Libbey patent, even if used as prior art, does not require that the cross section be taken at any angle, nor does it limit a cross section to having a longitudinal axis or axis of symmetry. Because the Court must look first to intrinsic evidence and because there is no indication that these limitations should be read into this patent, the Court adopts Plaintiff's definition of "cross section" which is the cutting of anything across.

### **d. Substantially parabolic**

The disputed term, "substantially parabolic," referenced in Claims 1, 4, and 10 of the '497 patent, is also at issue. Defendant claims that it means approximately, although not perfectly, in the shape of an upwardly opening parabola. Defendant defines "parabola" by the equation  $x^2=4ay$ . In contrast, Plaintiff asks that the Court define this as approximately parabolic (*i.e.*, approximately has the form of, or resembles, a parabola).

Plaintiff defines "parabola" as the plane curve formed by the intersection of a cone with a plane parallel to a side of the cone.

Both parties seem to agree to the definition of substantially as approximately or not perfectly. In fact, Plaintiff admits this in its Reply brief. ( *See* Pltf's Reply at 14.) The focus then is on the definition of "parabola." Plaintiff contends that "parabola" should be the plane curve formed by the intersection of a cone with a plane parallel to a side of the cone. Plaintiff provides a drawing of this in its Opening brief. ( *Id.* at 17.) To the contrary, Defendant offers a precise mathematical formula, arguing that Plaintiff's definition—which could include any "conical section shape" is inappropriate as it would encompass circles, ellipses, parabolas, and hyperbolas.

In response, Plaintiff argues that Defendant has not refuted the admission that "the intersection of a plane with a right circular cone can be used to generate a 'section' that is a parabola" as Plaintiff proposes. An examination of the two proposed definitions makes it clear that Defendant's more precise definition is the one contemplated by the '497 patent. As Defendant points out, the broad definition that a "parabola" is a plane curve formed by the intersection of a cone with a plane parallel to the side of the cone can refer to many conical shapes including ellipses, circles, etc. Since the term conical shape was not used, but rather the term parabola, and since the term parabolic is already modified by the term "substantially" the Court adopts the more precise technical definition offered by the Defendant. Thus, the Court construes the term "substantially parabolic" to be approximately in the shape of  $x^2=4ay$ .

#### **e. Transversely**

The next term at issue is the term "transversely" used in Claim 1 of the '497 patent. Defendant defines it as crosswise at a right angle to the longitudinal axis. Plaintiff defines it as across, athwart. Plaintiff argues that as explained in the analysis on the term "cross section" there is no requirement in the '497 patent's claims, specification or prosecution history for a "right angle."

As Plaintiff properly notes, Defendant's only support for its "right angle" requirement is the demonstrative exhibit DX 34. ( *See* Def's Brief at 24.) Because this is argument and not intrinsic evidence, and for the reasons stated above in the analysis on "cross section" the Court adopts Plaintiff's definition of "transversely" as across, awhart.

#### **f. Upwardly opening**

The next term raised is "upwardly opening" used in Claims 1, 4, and 10 of the '497 patent. Plaintiff defines this as expanding or widening out upwardly. Defendant does not address this term in its brief and only discusses "upwardly opening parabola." ( *See* Def's Brief at 16.) However, as noted by Plaintiff, the phrase "upwardly opening parabola" does not appear in the patent. ( *Cf.* "upwardly opening cross section" in Claim 1(c), 4(c), and 10(c)).

As Plaintiff properly points out, the "slide surface" and not the entire water slide is claimed to be "upwardly opening." Since Plaintiff's ordinary meaning applies commonly to the term "upwardly opening" referenced in the claims regarding the slide surface, this Court adopts Plaintiff's definition of "upwardly opening" as expanding or widening out upwardly.

#### **g. Top and bottom**

Next at issue are the terms "top" and "bottom" used in Claim 1 of the '497 patent. Plaintiff argues that the top of the trough is where the user enters the slide surfaces and begins his or her travel on the slide surface. The bottom of the trough is where the user exits the slide surface. It is Plaintiff's contention that these locations or the top and the bottom are clearly described in the claim language itself. Plaintiff asserts that Claim 1(d) recites "a longitudinal axis extending downwardly and forwardly from said top to said bottom." Claim 1(f) recites "a slide entrance disposed ... at the top of said trough." Claim 1(g) recites that "the user exits at the bottom of said slide surface."

In contrast, Defendant construes that the "top" of the trough is the slide surface and the "bottom" of the trough is "the deepest part of the trough ( *i.e.*, the area where the water collects)." (Def's Brief at 20-22.) FN5 Plaintiff argues that this interpretation contradicts the plain language of claim 1 such as "a longitudinal axis extending downwardly and forwardly from said top to said bottom." Plaintiff asserts that the plain language must control. *See* Elekta Instrument v. O.U.R. Scientific Intern., 214 F.3d 1302, 1308 (Fed.Cir.2000) (finding that "the unambiguous language of the amended claim controls over any contradictory language in the written description.")

FN5. Defendant also argues that as used in the remaining limitations of claims 1-3, "top" and "bottom" of the through means are inconsistent with the specification and lead to a nonsensical result thereby rendering claim 1 invalid.

In response, Defendant argues that there are many different references to the word "top." In particular, Defendant argues that a distinction is made between (1) top of the apparatus; (2) the top of the slide; (3) the top of the rear end of the side wall; and (4) the top of the trough. Defendant argues that used in reference to Claim 4(b), "top of said trough means" is not the same as in Claim 1. Additionally, Defendant argues that "bottom" is clear in the specification of the '497 patent in that the "bottom" of the trough is the deepest part of the trough and runs between the rear end and the front end of the trough. (Def's Ex. 1 at 1:38-44, 3:43-46, and 3:46-49.)

Plaintiff responds that patent law does not require that similar or the same words be used in each and every claim. Further, Plaintiff argues that there is no requirement that words found in the written description be used in the same way in the claims. Here, Plaintiff asserts that the claims should be construed exactly as they appear in the '497 patent:

Claim 4: "a slide surface defining a top of said trough means;" whereas in

Claim 1: "a fixed trough means having a bottom and a top: a slide surface disposed on said trough."

Here, the parties are engaging in a semantical word game. There does not need to be any definition given to the terms "top" and "bottom" as they must be read into the context of the given claim. These are ordinary terms requiring no technical interpretation, but only a common application to the language in the claims. As such, as noted by Plaintiff and consistent with the language in the claims of the '497 patent, the top of the trough is where the user enters the slide surface and begins his or her travel on the slide surface and the bottom of the trough is where the user exits the slide surface.

## **h. Longitudinal axis**

The parties next disagree over the term "longitudinal axis" used in Claim 1 of the '497 patent. Defendant defines it as a line that runs along the length of the slide surface from the rear end of the slide apparatus to the front end of the slide apparatus along the lowest part ( *i.e.*, the bottom) of the trough. Plaintiff defines it as extending down and in a forward direction from the top of the trough, where the user enters the slide surface and begins his or her travel on the slide surface, to the bottom of the trough, where the user exits the slide surface.

Defendant bases its reasoning on the premise that the '497 patent clearly indicates that, "because of the longitudinal indication of the trough, the rider moves backwardly and downwardly towards the front end 12 of the apparatus." (Def's Ex. 1 at 3:34-39.) In describing the path of the rider, the '497 patent indicates that "[m]omentum carries the tube 55 and the rider past the upwardly and rearwardly extending longitudinal axis and up the opposite side 7." (Def's Ex. 1 at 3:28-31.) Thus, Defendant claims that the longitudinal axis is a line that runs along the length of the slide surface from the rear end of the slide apparatus to the front end of the slide apparatus in the lowest part ( *i.e.*, the bottom) of the trough.

In response, Plaintiff argues that because Defendant's definition of "longitudinal axis" rests on constructions of "top" and "bottom" that are not consistent with the claim language, the Court should use Plaintiff's simple definition of "longitudinal axis." Here, Plaintiff plain meaning definition fits within the context of the claims and does not presume unnecessary limitations. Further, Plaintiff's construction makes sense in light of the Court's construction of the terms "top" and "bottom." As such, the Court adopts Plaintiff's definition of "longitudinal axis" as extending down and in a forward direction from the top of the trough, where the user enters the slide surface and begins his or her travel on the slide surface, to the bottom of the trough, where the user exits the slide surface.

#### **i. Slide entrance**

Next, the parties dispute the term "slide entrance" used in Claims 1 and 2 of the '497 patent. Plaintiff defines "slide entrance" as a passage or a passageway to a slide. Defendant defines it as the loading area allowing entry onto the slide surface.

Defendant contends that the term "slide entrance" does not appear anywhere in the '497 patent other than the claims. The only "slide entrance" identified in the patent, according to Defendant, is simply a loading area from which the rider is released into the slide. ( *See* Def's DX 32 and 33.) Defendant argues that in light of the specification of the '497 patent, the slide entrance must be a "loading area." Additionally, Defendant states that in connection with prosecution of a later patent application, Dubeta confirmed that this interpretation is the only one supported by the patent.FN6

FN6. Defendant states that Dubeta was attempting to distinguish the ' 497 patent from a slide apparatus that included an entry slide, rather than a loading area. In doing so, he argued that the '497 patent "does not disclose a substantially straight slide as required by the claims in question, but instead only has a loading area (26) to allow entry onto the one slide surface in question ..." (Response to Office Action, Ex. 18.)

In response, Plaintiff argues that nothing in the '497 patent limits a "slide entrance" to anything other than a passage or passageway to a slide. Plaintiff contends that Defendant itself admits as much, by pointing out that the term "slide entrance" does not appear in the '497 patent outside the claims.

Further, Plaintiff asserts that Defendant attempts to derive a meaning for "slide entrance" based on the file history of U.S. Patent No. 6,743,107 (the '107 patent), which is a patent not at issue and completely unrelated to the patent-in-suit. This '107 patent referenced above in footnote 6, Plaintiff claims, is not irrelevant to claim construction on the present case. *See e.g.*, *Goldenberg v. Cytogen*, 373 F.3d 1158, 1167 (Fed.Cir.2004) (holding that unrelated patents cannot be used to construe claims of patent at issue); *Texas Digital v. Telegenix, Inc.*, 308 F.3d 1193, 1211 (Fed.Cir.2002) (finding that unrelated patents "shed no light" on claims of patent-in-suit).

Here, Plaintiff correctly points out that there is no reason to look to the '107 patent as it is unrelated to the '497 patent. Additionally, nowhere in Claims 1 and 2 where "slide entrance" is used is there a reference to a loading area. As such, the Court gives this term its plain and ordinary meaning and adopts Plaintiff's interpretation of the term "slide entrance" as a passage or a passageway to a slide.

#### **j. Inlet ramp means**

The term "inlet ramp means" used in Claims 1 and 2 of the '497 patent is also raised by Plaintiff. Plaintiff claims that an "inlet" is "a way of admission; an entrance." (Plt's Ex. F-11.). A "ramp," Plaintiff states is "a slope; an inclined plane connecting two different levels." (Plt's Ex. F-12.) Thus, Plaintiff concludes that an "inlet ramp means" is an inlet ramp or an entrance ramp.

Defendant does not dispute this definition in its brief. Because Plaintiff's construction offers a plain meaning and is not disputed by Defendant, the Court adopts *in toto* Plaintiff's definition of "inlet ramp means."

#### **k. Upper wall**

Next, Plaintiff raises the term "upper wall" reference in Claim 1 of the '497 patent. Plaintiff argues that phrase "upper wall" should be interpreted according to its plain meaning as stated in the claim. Defendant contends that the "first upper wall" is an "inclined flat side wall" and the "second upper wall" is also an "inclined flat side wall." (Def's Ex. H at 6:6-16.) However, Plaintiff asserts that nothing in the '497 patent limits the first or second upper wall to being either "inclined" or "flat."

Because Defendant's only basis for concluding that the "upper walls" are "inclined flat side walls" is a demonstrative exhibit (Def's DX 31) which is conjecture, the Court adopts Plaintiff's plain meaning definition of "upper wall."

#### **l. Paragraph (g) of Claim 1 "whereby a user travels on said slide surface ..."**

In this disputed phrase, the parties disagree over how this is defined in Claim 1(g) of the '497 patent. Plaintiff suggests that this means exactly what Claim 1(g) states. Claim 1(g) states:

"(g) whereby, a user or a conveyance carrying a user enters said slide entrance, travels on said slide surface *from said first upper wall downwardly toward said longitudinal axis, crosses said longitudinal axis, then travels upwardly toward said opposed second upper wall, and then the user or the conveyance carrying a user travels backwardly downwardly past said longitudinal axis and upwardly toward said first upper wall, said surface thereby causing a back and forth motion of the user or a conveyance carrying a user to be repeated one or more times until the user exits at the bottom of said slide surface.*"

(emphasis added to terms in dispute).

In contrast, Defendant argues that "from said first upper wall downwardly toward said longitudinal axis" means from the first upper wall of the trough means in the direction of the longitudinal axis of the trough means. Defendant claims that "crosses said longitudinal axis" means that the user travels passes over the longitudinal axis of the trough means. Defendant argues that "upwardly toward said opposed upper wall" means in the direction from the longitudinal axis an [sic] up the opposite side of the trough. Defendant states that "backwardly downwardly past said longitudinal axis" means in the direction from opposite side of the trough past the longitudinal axis. Finally, Defendant claims that "upwardly toward said first upper wall" means in the direction from the longitudinal axis of the trough means to the first upper wall. Defendant bases its interpretation of these terms on its demonstrative exhibit DX 35 and contends that the discussion in the '497 patent is consistent with the definitions set forth.

A review of Claim 1(g) reveals that Plaintiff's proposed claim construction interprets the claim language according to its plain meaning. Plaintiff states that the "back and forth" motion is along the slide surface up and down the slide walls, while the "backwardly downwardly" describes reverse directions. Further, as Plaintiff points out, this interpretation is consistent with the "underdamped oscillation" rider path described in the specification. As such, the Court adopts Plaintiff's interpretation.

#### **m. Taper forwardly**

Next, the parties dispute construction of the term "taper forwardly" which appears in Claims 4 and 12 of the '497 patent. Plaintiff contends that "taper forwardly to said front, outlet end" means to taper in a forward direction to the front, outlet end. Defendant claims that it means that the trough means and slide surface each narrow toward their respective upper ends.

Defendant argues that as illustrated in its demonstrative exhibit DX 25, the patentee Dubeta indicated that "[t]he sides 6 and 7 of the slide slope upwardly and outwardly, tapering to a narrow upper end on one side 7 and to a loading area generally indicated at 26 on the other side 6." (Def's Ex. 1 at 2:45-51.) Defendant argues that this is the only tapering discussed in the '497 patent and therefore the claim term "taper to front end" could only be consistent with the specification of the '497 patent if it means that the trough means and slide surface each narrow toward their respective upper ends.

Plaintiff concedes that the term taper means to narrow or diminish gradually in breadth or thickness towards one end; to grow smaller by degrees in one direction. Plaintiff, however, contends that claims 4 and 12 recite that the trough means and slide surface are "wider at said rear end, and taper forwardly to said front, outlet end." This, Plaintiff argues, clearly means that the trough means and slide surface are wider at the rear end and taper in a forward direction to the front, outlet end.

Plaintiff further argues that Defendant's construction attempts to redraft the claims by deleting the key term "forwardly," and by proposing a construction for "taper to front outlet end instead of "taper forwardly to said front, outlet end." Since Plaintiff is correct that Defendant's construction attempts to redraft the claims by deleting terms contrary to the plain language of the claim, this Court adopts Plaintiff's construction of the term "taper forwardly."

#### **n. Sloping downwardly**

The parties also disagree over the term "sloping downwardly" which appears in Claims 1, 4, and 10 of '497

patent. Defendant contends this means inclined slightly. Plaintiff argues that nothing in the '497 patent limits the "slide surface sloping downwardly" to a slide surface that is inclined only "slightly." Because, as Plaintiff suggests, the plain language of this term does not require interpretation, this Court declines to limit the term "sloping downwardly" to be inclined only "slightly."

#### **o. Wider**

Further, the term "wider" is also disputed by the parties as it appears in Claims 4 and 10 of the '497 patent. Defendant argues that to be consistent with the '497 patent, the term "wider" refers to the cross section taken at its highest point. Defendant claims that as illustrated in its demonstrative exhibit DX 25, limitation 4(d) requires that the trough means and slide surface be "wider" at the rear, inlet end and taper to the front, outlet end. Meanwhile, Defendant states that DX 26-28 show three cross sections along the length of the slide starting near the rear, inlet end and moving toward the front, outlet end. Defendant argues that as shown in these figures, the radius of the parabolic cross section and the corresponding "width" of the bottom of the trough do not change. Thus, Defendant asserts that the only possible interpretation of "wider" requires that the sides extend further upward at the rear end of the slide than at the front end of the slide. Defendant states that the "width" then is the measurement taken from the top of one side wall to the top of the opposite side wall.

In response, Plaintiff asserts that Defendant's definition is not consistent with a trough means and slide surface which are "wider at said rear end, and taper forwardly to said front, outlet end." Plaintiff contends that this is because Defendant ProSlide argues that the radius does not change. Plaintiff states that a "radius" is defined as a straight line drawn to the circumference of a circle or the surface of a sphere from the centre, all lines so drawn being equal in length. This being said, Plaintiff claims it is unclear why Defendant is referring to a "circle" or "sphere" here, because in the '497 patent, "wider at said rear end" is used to describe a slide surface having a "substantially parabolic cross section." Plaintiff also refutes Defendant's contention that "the corresponding 'width' at the bottom of the trough does not change." Plaintiff argues that to support this argument, Defendant uses demonstrative exhibits (*i.e.*, drawings it created itself) that are not found in or supported by the '497 patent.

A review of the term "wider" as used in Claim 4(d) shows that is used as follows:

"(d) wherein said trough means and slide surface are *wider* at said rear end, ..."

(emphasis added to term in dispute).

As shown in the context of the claim, the phrase "wider" does not require a limitation that it be the width of the cross section taken at its *highest* point. The term used was not widest, but "wider" which merely indicates a greater degree of width at one point than another. As such, the Court defines "wider" as indicating a greater degree of width at one point than another.

#### **p. Disposed on**

Lastly, there is a disagreement over construction of the term "disposed on" which appears in Claim 1 of the '497 patent. Defendant states that "disposed on" means that the slide surface is separate from and "placed upon" the trough means. Defendant draws this interpretation from its view of the claims. Defendant argues that in certain claims, the slide surface is said to be "disposed on" the trough (Claims 1-3) and in others the slide surface is said to be "defining a top of said trough means" (Claims 4-11). Defendant contends that

looking to the specification of the '497 patent, there appears to be various examples where the slide surface is placed upon the "trough" rather than formed as an integral part thereof. (Def's Ex. 1 at 2:21-22; 2:35-37; 2:26-28; 4:7-10; and 4:11-12.). Thus, Defendant believes that "disposed on" requires that the slide surface be separated from, but placed upon, the trough means.

In response, Plaintiff argues that "disposed on" means situated on. Plaintiff contends that Defendant's proposed definition means that the slide surface is separate from the trough means. However, Plaintiff asserts that nothing in the '497 patent requires that the slide surface be separate from the trough means. In fact, Plaintiff points out that Defendant itself cites language in the '497 patent that explicitly states that the slide surface may be formed as an integral part of the trough: "The slide surface can be fiberglass/plastic sprayed onto the base, and sanded, painted and polished to a finish comparable to a prefabricated panel finish." (Def's Brief at 22.) Thus, Plaintiff argues that the Court should adopt Plaintiff's common interpretation that "disposed on" means situated on. Since Plaintiff correctly points out that there is no evident limitation that the slide surface be separate from the trough means, the Court adopts Plaintiff's definition for "disposed on."

#### **q. Miscellaneous Terms**

Lastly, Plaintiff points out that Defendant provides no argument or proposed constructions for the terms "convex" and "transition area," as used in Claims 2, 10, and 11 of the '497 patent.

Plaintiff defined "convex" as curved like the outside of a circle or sphere; having a curvature that bulges toward the point of observation. Plaintiff defined "transition area" as an intermediate area. Both these terms are not in dispute and thus the Court adopts *in toto* Plaintiff's definitions of "convex" and "transition area."

#### **IV. CONCLUSION**

For the reasons stated above, the Court **CONSTRUES** these disputed terms in Claims 1-6 and 9-12 of the '497 patent as laid out above.

#### **IT IS SO ORDERED.**

C.D.Cal.,2005.

Water Fun Products Corp. v. Proslide Technology, Inc.

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