United States District Court,
E.D. Texas, Marshall Division.

VISTO CORPORATION,
v.
SMARTNER INFORMATION SYSTEMS, LTD.

Civil Action No. 2:05-CV-91

Dec. 29, 2006.

Samuel Franklin Baxter, McKool Smith, Marshall, TX, Anthony Matthew Garza, Gary Scott Kitchen, Jill Frances Lynch, Theodore Stevenson, III, William Ellsworth Davis, III, McKool Smith, Patrick Joseph Conroy, Shore Chan Bragalone, Dallas, TX, Peter John Ayers, Steven John Pollinger, McKool Smith, Austin, TX, for Visto Corporation.

Henry Charles Bunsow, Howrey Simon Arnold & White, Korula T. Cherian, Howrey LLP, San Francisco, CA, Elizabeth L. Derieux, Sidney Calvin Capshaw, III, Capshaw Derieux, LLP, Longview, TX, James Charles Pistorino, James F. Valentine, Jason T. Anderson, Matthew E. Hocker, Michelle A Madriaga, Robert E. McAlhany, Jr., Howrey LLP, East Palo Alto, CA, Louis L. Campbell, Finnegan Henderson Farabow Garrett & Dunner, Palo Alto, CA, for Smartner Information Systems, Ltd.

ORDER

T. JOHN WARD**, District Judge.**

This order resolves the parties' claim construction disputes. The court has applied the claim construction principles set forth by the Federal Circuit in Phillips v. AWH Corp., 415 F.3d 1303 (Fed.Cir.2005).

1. The court previously issued two claim construction orders in *Visto Corporation v. Seven Networks, Inc.,* 2:03-CV-333 (E.D. Tex .), construing the same patents that are at issue in this suit. The defendant in this case contends that the court should revisit certain constructions adopted in that case. The plaintiff argues that the defendant should be estopped from re-litigating those constructions. The court declines to apply the doctrine of collateral estoppel. Nevertheless, the court adopts its prior claim construction rulings because the court remains persuaded that its constructions of the terms were correct.

2. Notwithstanding the court's prior orders, certain terms have not been construed. The court will now turn to those issues.

A. Global firewall

Visto seeks to construe this term to mean "software and/or hardware for protecting a global server against external threats, such as hackers, coming from another network, such as the Internet." Smartner seeks to

define the term to mean "a firewall that protects the global server." The court adopts Visto's construction because it is more consistent with the court's previous construction of firewall.

B. Communicating

Visto seeks to construe this term as "transmitting or transferring information." Smartner seeks a construction that limits the term to "using Hyper Text Transfer Protocol." The court adopts Visto's proposed construction. The court also incorporates the holding in the Memorandum Opinion and Order dated December 19, 2006 in *Visto Corporation v. Seven Networks, Inc.*, 2:03-CV-333 (E.D.Tex.). There, the court determined that claim 11 of the '192 patent, which required "one of an HTTP and SSL port," required the accused products to communicate using the relevant protocol.

C. Synchronizing

Visto seeks to construe this term as "providing for data consistency." Smartner seeks a definition of the term to mean "providing for data consistency *by reconciling workspace elements* to have *all the same information at the same time*." As reflected by the proposed constructions, the parties agree that synchronization provides for data consistency. In addition, during prosecution, Visto stated that language in the Cardinal reference, U .S. Patent No. 5,799,318, "defines synchronization." The court has reviewed that reference and concludes that the description of synchronization provided in that patent is consistent with the meaning of the term in the patents-in-suit. The Cardinal patent states "[s]ynchronization refers to a process by which a user reconciles modifications to stored information." '318 patent, col. 16, ll. 18-19. Accordingly, the court construes the term to mean "providing for data consistency by reconciling modifications to stored information."

D. Firewall positioned between a trusted network and the Internet

This term needs no construction, other than the court's prior construction of "firewall."

E. Other issues

The court declines to revisit the other terms advocated by Smartner at oral argument on this matter, including "independently modifiable copy," "workspace element," and "store." The court remains persuaded that its previous constructions were correct and that no further constructions are warranted.

3. The parties are ordered that they may not refer, directly or indirectly, to each other's claim construction positions in the presence of the jury. Likewise, the parties are ordered to refrain from mentioning any portion of this opinion, other than the actual definitions adopted by the court, in the presence of the jury. Any reference to claim construction proceedings is limited to informing the jury of the definitions adopted by the court.

E.D.Tex.,2006.
Visto Corp. v. Smartner Information Systems, Ltd.