United States District Court,
S.D. Texas, Houston Division.

CLOCK SPRING LP,
v.
WRAPMASTER, INC.

Civil Action No. H-05-82

May 2, 2007.

John Timothy Headley, Wright Brown & Close, Alexander Carl Chae, Gardere Wynne et al, Houston, TX, for Clock Spring LP.

Ira Phillip Domnitz, Winstead PC, Houston, TX, William Loening Prickett, Seyfarth Shaw LLP, Boston, MA, Kent A. Rowald, Law Offices of Kent A. Rowald, P.C., Tomball, TX, for Wrapmaster, Inc., Glenn Davis, Applied Consultants, Inc.

ORDER

VANESSA D. GILMORE**, District Judge.**

I.

On January 10, 2005, Plaintiff Clock Spring Company, L.P. ("Clock Spring" or "Plaintiff") filed this suit against Defendants Wrapmaster, Inc. ("Wrapmaster"), Glen Davis ("Davis"), personally and including his marital estate, and Applied Consultants, Inc. ("Applied Consultants") (collectively "Defendants") for allegedly wilfully infringing on Clock Spring's United States Patent No. 5,632,307 ("the '307 Patent"). (Instrument No. 1, at 1). On September 29, 2006, this Court issued an Order rejecting Judge Milloy's Memorandum and Recommendation, which suggested that this Court should adopt Judge Milloy's finding that Defendants' Supplemental Motion for Summary Judgment on the issue of *res judicata* be granted. (Instrument No. 69). As a result of this Court's Order rejecting the Magistrate Judge's Recommendation, the Court granted Plaintiff's Motion for a Claim Construction hearing. (Instrument No. 60).

On May 27, 1997, the '307 Patent issued related to "Methods for Using High Tensile Strength Reinforcement to Repair Surface Defects in a Pipe." (Id., at 2). Clock Spring is the exclusive licensee of the '307 Patent. (Id.). Clock Spring "designs, manufactures, sells, installs, and services a composite sleeve reinforcement system used to repair corrosion, mechanical, and third party defects in pipes." (Id., at 1). Similarly, Defendants are also engaged in the same type of work as Plaintiff. (Id., at 2). Specifically, Plaintiff alleges that Defendants' system utilizes the same high-tensile strength component as Plaintiff, which Plaintiff argues is in direct violation of its ' 307 Patent pursuant to 35 U.S.C. s.s. 271 and 281. (Id.). Further, Plaintiff alleges that Defendants' actions constitute contributory infringement of the '307 Patent, as Defendants are engaged in both the sale and installation of their pipe reinforcement system. (Id.).

Pipelines buried in the ground are subject to deterioration from various elements that are dissimilar to the steel or other materials from which the pipelines are made. (Instrument No. 95, at 29). These corrosive materials, over time, cause pits and crevices to form in the pipe. (Id.). The claimed invention in the '307 Patent serves as a technique to reinforce pipeline using the application of a high tensile strength material to the pipeline by winding to form a plurality of convolutions around the defective region of the pipe. (Id.). Generally, the reinforcing pipeline technique covered in the ' 307 Patent is a five-step process:

[T]he surface of a deteriorated portion of the pipeline is prepared in a conventional manner. A filler material is then applied to fill in any dents, gouges, and corrosion pitting to provide the pipeline with a smooth outer surface.[ ][T]he filler material is permitted to cure to a rigid state before the reinforcement process continues. When the filler material has cured, an adhesive is applied over the filler material and over the entire circumference of the pipeline in the region of the defect. A coiled band of a high tensile strength composite is wound around the pipeline with a layer of adhesive applied between adjacent convolutions. The pipeline can be brought to normal operating pressures once the adhesive has cured to a sufficient strength.

(Instrument No. 95, at 29, lines 10-25).

The Abstract description of the patent-in-suit offers a more detailed description of the claimed invention:

In a method for reinforcing defective portions of a pipeline, the defective portions are identified by conventional techniques, soil is excavated from around the pipeline to expose the deteriorated portions, any corrosion protection material is removed and the surface of the pipeline is cleaned. Gouges, dents and corrosion pitting are filled with uncured filler material and, while the filler material is in an uncured workable state, a plurality of convolutions of a high tensile strength material are wrapped around the defective portion of the pipeline with a layer of a curable adhesive applied between adjacent convolutions. The adhesive then cures to a strongly adhesive state and the filler material cures to a rigid state capable of transferring the fluid pressure load within the pipeline almost instantaneously to the reinforcement band. Optionally, a layer of adhesive may be applied between the pipeline surface and the first convolution of the reinforcement band, in which case the adhesive must be compatible with the filler material so that both materials are able to cure fully, and also compatible with any corrosion protection material remaining on the pipeline. The method may be employed to reinforce both straight and bent portions of a pipeline.

(Id., at 21, Abstract).

At issue is the interpretation of disputed terms in the contested claims of the '307 Patent. In anticipation of the *Markman* hearing that was held on March 30, 2007, the parties exchanged proposed constructions. The following claim terms are in dispute: (1) pipe; (2) filler material; (3) cured; (4) E-type glass; (5) shear strength; (6) elongation. (Instrument Nos. 95, 96). The former three of the claim terms at issue in the '307 Patent are included in the independent claims-1, 38, 39, 42, and 43. (Instrument No. 96, at 3). The latter three claim terms at issue are contained within claims that are dependent, meaning that they "contain a reference to a claim previously set forth and then specify a further limitation of the subject matter claimed." 35 U.S.C. s. 112.

The language contained in claims 1, 38, 39, 42, and 43 is virtually identical. Essentially, all of those claims track the following language:

1. A method for repairing a ***pipe*** adapted to carry an internal load directed radially outward therefrom, said pipe having a defective region defined by at least one cavity extending from an outer surface of said pipe toward the center of said pipe but not extending completely through the wall of said pipe, said method comprising the steps of:

providing a ***filler material*** having a workable uncured state and a rigid ***cured*** state, filling said cavity to at least said outer surface of said pipe with said filler material in said workable state,

providing at least one band having a plurality of elastic convolutions of high tensile strength material,

while said filler material is in said workable state, wrapping said plurality of convolutions of said high tensile strength material about said pipe to form a coil overlying stud filler material,

tightening said coil about said pipe so that said filler material completely fills that portion of said cavity underlying said coil,

securing at least one of said convolutions to an adjacent one of said convolutions, and

permitting said filler material to cure to said rigid state, whereby a load carried by said pipe is transferred substantially instantaneously from said pipe to said coil.

(Instrument No. 95, at 34, lines 9-34) (emphasis added).

Claims 7, 18, 33, 23 and 24 in the '307 Patent include the other claim terms at issue in this case.

7. The method as claimed in claim 6, wherein said glass fibers comprise ***E-type glass fibers.***

18. The method as claimed in claim 17, where in said glass fibers comprise ***E-type glass fibers.***

33. The method as claimed in claim 32, wherein said glass fibers comprise ***E-type glass fibers.***

23. The method as claimed in claim 22, wherein said adhesive in said cured state has a ***shear strength*** of at least about 900 psi.

24. The method as claimed in claim 22, where in said adhesive in said cured state has an ***elongation*** of about 30%.

(Id., at 34-35, para.para. 7, 18, 33, 23, and 24) (emphasis added).

Plaintiff Clock Spring, LP's and Defendants Wrapmaster, Inc, Glenn Davis, and Applied Consultants, Inc.'s proposed construction of these disputed terms are set out in the following chart.

DISPUTED TERM	CLOCK SPRING'S PROPOSED CONSTRUCTION	WRAPMASTER'S PROPOSED CONSTRUCTION
Pipe (located throughout	"a high pressure transmission pipeline"	" storage drums, pressure tanks and canisters, and any other axially extending structure

Patent)		having an internal force directed radially outward therefrom"
Filler Material (located throughout Patent)	"any material having a workable fluid state and a rigid cured state"	"a material having a workable fluid state and a rigid cured state which, when applied over the defective region in the fluid state completely fills in any pits, gouges or dents"
Cured (located throughout Patent)	no special interpretation needed for the jury	"to fully change from a fluid, workable state to a solid, unworkable state"
E-type glass (Claims 7, 18, 33)	needs a footnote only that states "E-type glass fibers are glass fibers which have high electrical resistivity"	"electrical glass, borosilicate glass fibers, which have high electrical resistivity, most often used in conventional polymer matrix composites"
Shear Strength (Claim 23)	"the method wherein the adhesive in its cured state can sustain a maximum shear stress of at least about 900 psi"	"the maximum shear stress that a material is capable of sustaining"
Elongation (Claim 24)	"the method wherein the adhesive in its cured state, when placed in tension, can increase in length by a certain percentage of its length before it was placed in tension"	"the fractional increase in length of a material loaded in tension, when expressed as a percentage of the original length, it is called percent elongation"

(*See generally* Instrument Nos. 95, 97).

Although Plaintiff had previously submitted additional terms to be construed, the parties agreed at the *Markman* hearing that the terms above are the only terms that need to be construed by the Court. Additionally, Defendants and Plaintiff asserted that no other elements of the disputed claims needed to be construed by this Court given the fact that the remaining terms all have common meanings. (Instrument No. 95, at 18; Instrument No. 98, at 7-8).

II.

Whoever without authority makes, uses, or sells any patented invention within the United States during the term of the patent therefor, infringes the patent. 35 U.S.C. s. 271. The determination of whether a claim of a patent has been infringed is a two-step process. First, the Court must determine the meaning and scope of the patent claims asserted to be infringed. *See* Bell Atl. Network Servs., Inc. v. Covad Comms. Group, Inc., 262 F.3d 1258, 1267 (Fed .Cir.2001); Markman v. Westview Instruments, Inc., 52 F.3d 967, 976 (Fed.Cir.1995), *aff'd,* 116 S.Ct. 1384 (1996). This step is commonly known as claim construction or interpretation. Second, the court must compare the claims alleged to be infringed to the accused device. *See* Bell Atlantic, 262 F.3d at 1267; Markman, 52 F.3d at 976.

Claim interpretation is a matter of law involving the review of patent specifications, prosecution history, language of the patent claims, and, if necessary, extrinsic evidence. *See* Texas Instruments v. U.S. Int'l Trade Com'n, 988 F.2d 1165, 1171 (Fed.Cir.1993). The court must decide and explicate its findings regarding claim construction on the record. *See* Genentech, Inc. v. Wellcome Foundation Ltd., 29 F.3d 1555

(Fed.Cir.1994).

"[A]s a general rule, all terms in a patent claim are to be given their plain, ordinary and accustomed meaning to one of ordinary skill in the relevant art." Rexnord Corp. v. Laitram Corp., 274 F.3d 1336, 1342 (Fed.Cir.2001). *See also* Toro Co. v. White Consol. Indus., Inc., 199 F.3d 1295, 1299 (Fed.Cir.1999) ("[W]ords in patent claims are given their ordinary meaning in the usage of the field of the invention, unless the text of the patent makes clear that a word was used with a special meaning."). In addition, unless required to do otherwise, a court should give a claim term "the full range of its ordinary meaning as understood by an artisan of ordinary skill." Rexnord, 274 F.3d at 1342 (citing Johnson Worldwide Assocs., Inc. v. Zebco Corp., 175 F.3d 985, 989 (Fed.Cir.1999)).

In construing patent claims, the Court looks to the intrinsic evidence of claim meaning-the claims, the specification of the patent, and the prosecution history of the patent. *See* Vitrionics Corp. v. Conceptronic Inc., 90 F.3d 1576, 1582-83 (Fed.Cir.1996). If the intrinsic evidence is clear, "it is improper to rely on extrinsic evidence in construing the patent claims." Id. at 1583. In fact, when the meaning of a disputed claim term is clear from the intrinsic evidence, *i.e.,* the intrinsic evidence is unambiguous, then that meaning and no other must prevail; it is improper for the court to rely on extrinsic evidence to alter or supersede that meaning. *See* Bell & Howell Document Mgmt. Prods. Co. v. Altek Sys., 132 F.3d 701, 706 (Fed.Cir.1997).

It is well established that "the language of the claim defines the scope of the protected invention." Bell Communications Research, Inc. v. Vitalink Communications Corp., 55 F.3d 615, 619 (Fed.Cir.1995). The Court first must look at the claim language and ascribe the plain and ordinary meaning to the phrase. *See* Hockerson-Halberstadt, Inc. v. Avia Group Int'l, Inc., 222 F.3d 951, 955 (Fed.Cir.2000). The Federal Circuit has indicated that the claim language itself defines the scope of the claim, and a construing court does not accord the specification, prosecution history and other relevant evidence the same weight as the claims themselves. *See* Eastman Kodak Co. v. Goodyear Tire & Rubber Co., 114 F.3d 1547, 1552 (Fed.Cir.1997), *overruled on other grounds by* Cybor Corp. v. FAS Techs. Inc., 138 F.3d 1448, 1456 (Fed.Cir.1998). "A court must therefore 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." Johnson Worldwide Assocs., Inc., 175 F.3d at 989.

Although the focus should be on the ordinary meaning, the specification and prosecution history cannot be ignored. *See* Transmatic, Inc. v. Gulton Indus., Inc., 53 F.3d 1270, 1277 (Fed.Cir.1995) (claim terms are given their ordinary meaning unless the specification, prosecution history, and other claims indicate a contrary intent). This principle is consistent with *Johnson Worldwide Assocs., Inc.,* which explains that there are "two situations where a sufficient reason exists to require the entry of a definition of a claim term other than its ordinary and accustomed meaning." 175 F.3d at 990. The "addition of features does not avoid infringement, if all the elements of the patent claims have been adopted." Northern Telecom, Inc. v. Datapoint Corp., 908 F.2d 931, 945 (Fed.Cir.1990).

Use of the specification and the prosecution history, however, must be balanced with the principle that it is impossible to read a particular embodiment into the claim. *See* Comark Communications, Inc. v. Harris Corp., 156 F.3d 1182, 1186-87 (Fed.Cir.1998). In other words, while claims should be read in view of the specification, it is improper to limit the scope of a claim to the preferred embodiment or specific examples disclosed in the specification. *See* Ekchian v. Home Depot, Inc., 104 F.3d 1299, 1303 (Fed.Cir.1997). The Federal Circuit has consistently found that a patent is not restricted to the examples but is defined by the words of the claims. *See* Specialty Composites v. Cabot Corp., 845 F.2d 981, 987 (Fed.Cir.1988).

What is important is what the elements of the claim require, not what they "do not cover." *See, e.g.,* NeoMagic Corp. v. Trident Microsystems, Inc., 287 F.3d 1062, 1074 (Fed.Cir.2002). Claims are not to be interpreted in view of the accused infringing device. *See* Young Dental Mfg. Co. v. Q3 Special Prods., Inc., 112 F.3d 1137, 1141 (Fed.Cir.1997). Courts have routinely rejected an accused infringer's attempt to show that his device is outside the scope of the claims by asserting a distinction that is not specifically claimed. *See, e.g.,* Shamrock Techs., Inc. v. Med. Sterilization, Inc., 903 F.2d 789, 793 (Fed.Cir.1990).

In Markman v. Westview Instruments, Inc., 52 F.3d 967 (Fed.Cir.1995), aff'd, 116 S.Ct. 1384 (1996), the Federal Circuit majority, in an opinion by Chief Judge Archer, held that claim interpretation or construction was exclusively a matter of law. Id. at 970-71. The majority opinion discussed the principles governing claim interpretation, including the role of the specification, prosecution history, and "extrinsic evidence." It emphasized that extrinsic evidence serves a limited purpose; it facilitates a judge's understanding of the meaning of patent claim language.

The court clarified the concept of extrinsic evidence:

Extrinsic evidence consists of all evidence external to the patent and prosecution history, including expert and inventor testimony, dictionaries, and learned treatises. This 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. Extrinsic evidence may demonstrate the state of the prior art at the time of the invention. It is useful "to show what was then old, to distinguish what was new, and to aid the court in the construction of the patent."

Id. at 980 (internal citations omitted). "The court may, in its discretion, receive extrinsic evidence in order 'to aid the court in coming to a correct conclusion' as to the 'true meaning of the language employed' in the patent." *Id*. (quoting Seymour v. Osborne, 78 U.S. (11 Wall.) 516, 546 (1871) (reviewing a decree in equity).

The Federal Circuit recently clarified the role of extrinsic evidence in claim construction. In Phillips v. AWH Corp., 415 F.3d 1303, 2005 U.S.App. LEXIS 13954 (Fed.Cir. July 12, 2005), the Federal Circuit recognized that it has "viewed extrinsic evidence in general as less reliable than the patent and its prosecution history in determining how to read claim terms." 415 F.3d 1303, 2005 U.S.App. LEXIS 13954, at *40. The court explained:

First, extrinsic evidence by definition is not part of the patent and does not have the specification's virtue of being created at the time of patent prosecution for the purpose of explaining the patent's scope and meaning. Second, while claims are construed as they would be understood by a hypothetical person of skill in the art, extrinsic publications may not be written by or for skilled artisans and therefore may not reflect the understanding of a skilled artisan in the field of the patent. Third, extrinsic evidence consisting of expert reports and testimony is generated at the time of and for the purpose of litigation and thus can suffer from bias that is not present in intrinsic evidence.... Finally, undue reliance on extrinsic evidence poses the risk that it will be used to change the meaning of claims in derogation of the indisputable public records consisting of the claims, the specification and the prosecution history, thereby undermining the public notice function of patents.

415 F.3d 1303, *Id*. at *40-41 (internal citations and quotations omitted).

Thus, the *Phillips* court concluded, "[i]n sum, extrinsic evidence may be useful to the court, but it is unlikely to result in a reliable interpretation of patent claim scope unless considered in the context of the intrinsic evidence." 415 F.3d 1303, *Id*. at *41-42. The *Phillips* court did not completely invalidate the use of extrinsic evidence "because extrinsic evidence can help educate the court regarding the field of the invention and can help the court determine what a person of ordinary skill in the art would understand claim terms to mean." 415 F.3d 1303, *Id*. at 42. However, the court recognized that "the specification is 'the single best guide to the meaning of a disputed term,' and ... the specification 'acts as a dictionary when it expressly defines terms used in the claims or when it defines terms by implication.' " 415 F.3d 1303, *Id*. at *47-48 (quoting Vitronics Corp v. Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed.Cir.1996); *see also* Irdeto Access, Inc. v. Echostar Satellite Corp., 383 F.3d 1295, 1300 (Fed.Cir.2004) ("Even when guidance is not provided in explicit definitional format, the specification may define claim terms by implication such that the meaning may be found in or ascertained by a reading of the patent documents.").

III.

A.

Defendants state that independent claims 1, 38, 39, 42, and 43 all contain the term "pipe." (Instrument No. 95, at 8). Defendants submit that all references to the word pipe be construed as "storage drums, pressure tanks and canisters, and any other axially extending structure having an internal force directed radially outward therefrom." (Exhibit A, Col.2, ll 58-62). Based on the prosecution history of the '307 Patent, Plaintiff argues that the term pipe's construction must be limited to mean "a high pressure transmission pipeline." (Instrument No. 101, at 3). Specifically, Plaintiff states that on February 9, 1996, the Patent Examiner "rejected the claims of the '307 patent application in view of Fawley's (one of the inventor's on the '307 patent) Canadian patent number 2,028,524, and in view of two other patents, known as *Shaw and Settineri* " (Id.). On July 12, 1996, the '307 Patent applicants filed a Responsive Amendment to the Examiner's Rejection of the Claims of the '307 Patent Application. (*See* id., at Exhibit B). In that response, the applicants distinguished their patent from the three patents mentioned in the Examiner's rejection of the claims.

To suggest that *Fawley* does not require the filler material to be cured before installation of the reinforcement bands would ignore the express teachings of the reference. For that reason alone, applicants submit that one would not be motivated to apply the teachings of *Shaw* ... to the methods of *Fawley* ....

Furthermore, applicants note that *Fawley,* on the one hand, and *Shaw* and *Settineri,* on the other hand, are directed to methods for repairing vastly different types of pipelines. The *Fawley* reference is directed to the reinforcement of heavy duty gas and liquid transmission pipelines which operate under high pressures....

To the contrary, both *Settineri* and *Shaw* are directed to methods for repairing pipelines in which the requirements are not as stringent. Thus, as stated in the abstract thereof, *Settineri* is directed to a kit for sealing leaks in low-pressure gas lines.... With regard to *Shaw,* that reference is directed to the repair of a pipe which is defined to include 'pipe of all sorts, tubing, and a variety of hollow conduits and ducts having the general characteristics of pipe' (citation omitted). It is thus clear from the foregoing that *Shaw* is directed to the repair of pipes which are manifestly different from the large-scale transmission pipelines being repaired in accordance with *Fawley* .... In light of the foregoing, applicants submit that one desiring to improve upon the repair method of *Fawley* would not consider the teachings of either *Shaw* or *Settineri* to be useful.

(Id., at 3). Persuasively, Plaintiff argues that, upon reading the prosecution history, it is clear that "both the Canadian patent and the '307 patent application were directed to high pressure transmission pipelines, and the applicants forthe '307 patent clearly limited their claimed invention to high pressure transmission pipelines, in order to argue that *Shaw* and *Settineri* should not be used to reject their claims." (Id., at 3-4). Where "an analysis of the intrinsic evidence alone will resolve any ambiguity in a disputed claim term ... it is improper to rely on extrinsic evidence." Vitronics Corp. v. Conceptronic Inc., 90 F.3d 1576, 1583 (Fed.Cir.1996). "When construing a claim, a court should look first to the intrinsic evidence, i.e. the claims themselves, the written description portion of the specification, and the prosecution history." Bell & Howell Document Mgmt. Products Co. v. Altek Sys., 132 F.3d 701, 705 (Fed.Cir.1997). "[T]he prosecution history (or file wrapper) limits the interpretation of claims so as to exclude an interpretation that may have been disclaimed or disavowed during prosecution in order to obtain claim allowance." Standard Oil Co. v. American Cyanamid Co., 774 F.2d 448, 452 (Fed.Cir.1985). Here, as Plaintiff has pointed out, it is clear from the prosecution history that the '307 Patent applicants distinguished their Patent from others that included low-pressure gas lines and pipe of all sorts. Based on the Court's review of the '307 Patent claim language and the prosecution history of the '307 Patent, the Court concludes that the term "pipe" should be construed to mean, " ***a part of a high pressure transmission pipeline*** "

B.

Again, the independent claims 1, 38, 39, 42, and 43 all contain the term "filler material." Defendants point to a number of passages contained in the ' 307 Patent itself that could aid the Court in determining the proper construction of filler material. (Instrument No. 95, at 9). Specifically, Defendants note that the Patent contains the following, "[a] method according to the invention includes the step of providing a filler material having a workable fluid state and a rigid cured state, and then filling the cavity to at least the outer surface of the pipe with the filler material in the fluid state." (Exhibit A, Col.2, ll 62-65). Further the Patent states, "filler material is applied over the defective region to completely fill in, and in fact to overfill, any pits, gauges or dents, such as a cavity. (Id., at Col.6, ll 11-13). As a result, Defendants propose the term "filler material" be construed as "a material having a workable fluid state and a rigid cured state which, when applied over the defective region in the fluid state completely fills any pits, gouges or dents ." (Instrument No. 95, at 9). Plaintiff agrees with Defendants' claim construction of the term "filler material" to the extent that it is only construed as "material having a workable fluid state and a rigid cured state." (Instrument No. 97, at 2). Plaintiff points out that Defendants' claim construction of this term renders the claim repetitive in that Defendants' construction describes not only what filler material is, but what the filler material is meant to accomplish, which is unnecessary with respect to construing the term. Moreover, while Plaintiff agrees with Defendants determination that the term "filler material" is a material having a workable fluid state and a rigid cure state, Plaintiff argues that given this fact, it would be unnecessary to alter the claims to contain that definition, as the independent claims already define the term in that way. Based on this and the '307 Patent, the Court agrees that "filler material" means material having a workable fluid state and a rigid cured state. However, as Plaintiff points out, it is nonsensical to add this language, as the language is already contained in the claims containing the term "filler material." Therefore, it is unnecessary to change the term in the independent claims.

C.

The term "cure" found in the relevant independent claims in the '307 Patent. While Defendants concede that the '307 Patent does not define "cure," Defendants do note that there are several references throughout the Patent to "the fluid state" during the uncured time and a "rigid state" after curing has occurred. (Instrument

No. 95, at 10). (Exhibit A, Col.2, 1.63-Col.3, 1.6). Further, Defendants argue that the same distinction between the two states is used with respect to adhesives in the '307 Patent. (Instrument No. 95, at 10). Specifically, the Patent states "the adhesive will remain in this uncured fluid state for a sufficient length of time to complete the installation process, after which it will cure to a harder, more strongly adhesive state." (Exhibit A, Col.6, ll., 51-54). Based on these references found within the Patent, Defendants contend that the term "cure" should mean "to fully change from a fluid, workable state to a solid, unworkable state." (Instrument No. 95, at 10). On the contrary, Plaintiff believes the term "cure" should be left alone, as the meaning of such differs with respect to the filler material and the adhesive because the materials are chemically and structurally different. (Instrument No. 97, at 4). Plaintiff points to claim 26 in the Patent as most demonstrative of this distinction:

26. The method claimed in claim 25, wherein said adhesive has an uncured fluid state and a cured adhesive state, said adhesive application step being conducted in said uncured fluid state of said adhesive, said adhesive being compatible with said filler material so that said adhesive does not prevent said filler material from curing to said rigid state and said filler material does not prevent said adhesive from curing to said adhesive state.

(Exhibit A, Claim 26). Specifically, Plaintiff states that the above claim is careful in that when referring to the adhesive, the claim speaks of an adhesive state, and when referring to the filler material, the claim speaks of a rigid state. (Instrument No. 97, at 5). Plaintiff believes that the inclusion of the word "solid" into the meaning of "cure" constitutes an extraneous limitation. (Id ., at 6). It is important to note that Plaintiff has cited to the preferred embodiments of the '307 Patent, which do not limit in scope the disclosed preferred embodiment. Burke, Inc. v. Bruno Indep. Living Aids, Inc., 183 F.3d 1334, 1341 (Fed.Cir.1999) ("[A]n attribute ofthe preferred embodiment cannot be read into the claim as a limitation."). The meaning of a term, however, in a claim must be defined in a manner that is consistent with its appearance in other claims in the same patent. CVI/Beta Ventures, Inc. v. Turn LP, 112 F.3d 1146, 1159 (Fed.Cir.1997). As noted above, throughout the '307 Patent, the term "cure" is used in relation to a fluid state and a rigid state. Therefore, the Court construes the term "cure" to mean, "**to fully change from a fluid state to a rigid state.**"

D.

The term "E-type Glass" is contained in claims 7, 8, and 33 of the ' 307 Patent. Because the patent does not contain an express definition for "E-type Glass," Defendants resort to the ordinary meaning of the term as defined by the relevant industry using the Composite Sourcebook's 2007 website, www.compositesworld.com. (Instrument No. 95, at 10).CompositesWorld.com is, according to the website, "the # 1 website for composites materials and services." Additionally, publications such as: *High Performance Composites, Composites Technology,* and the *SOURCEBOOK* supplier directory are all found on this website, which are publications of Ray publishing, the leading print publication for the composites industry. Defendants contend that "E-type Glass" should be construed to mean, "electrical glass, borosilicate glass fibers, which have high electrical resistivity, most often used in conventional polymer mix composites." (Id., at 11). Plaintiff does not disagree with Defendants' construction of E-type Glass *per se,* but Plaintiff argues that the long definition would confuse the jury, so a footnote should be added instead to those claims containing the term. (Instrument No. 97, at 6). As stated, the patent specifications do not include a definition of the term E-type glass. While the Federal Circuit has viewed extrinsic evidence in general less reliable, in terms of claim construction, than intrinsic evidence, the court in *Phillips* did not completely invalidate the use of extrinsic evidence "because extrinsic evidence can help educate the court

regarding the field of the invention and can help the court determine what a person of ordinary skill in the art would understand claim terms to mean." 415 F.3d 1303, 2005 U.S.App. LEXIS 13954, at *42. Because the '307 Patent itself does not include any explicit definitions of the term E-type Glass, nor any specific language from which the definition of the term can be discerned, the Court will rely on the ordinary meaning of the term as proposed by the parties. Accordingly, the Court construes "E-type Glass" to mean, "**glass fibers which have high electrical resistivity.**"

E.

Claim 23 of the '307 Patent includes the term "shear strength." Specifically, claim 23 states "the method as claimed in 22, wherein said adhesive in said cured state has a shear strength of at least about 900 psi." (Exhibit A, Col. 13, Claim 23). Again, because this term is not defined in the Patent, Defendants rely on the Composites Sourcebook 2007 (www.compositesworld.com) to give the term its ordinary meaning, "the maximum shear stress that a material is capable of sustaining." (Instrument No. 95, at 11). Again, Plaintiff for the most part agrees with Defendants' construction of the term "shear strength," as Plaintiff proposes the following: "the method as claimed in claim 22, wherein the adhesive in its cured state can sustain a maximum shear stress of at least 900 psi." (Instrument No. 97, at 6-7). There is no real difference between the Plaintiff's and Defendants' proposed definitions. Therefore, the Court construes the term "shear strength" to mean, " ***the maximum shear stress that a material is capable of sustaining.***"

F.

Claim 24 of the '307 Patent includes the term "elongation." Claim 24 states "the method claimed in claim 22, wherein said adhesive in said cured state has an elongation of about 30%." (Exhibit A, Col. 13, Claim 24). Again, because the term is not defined in the Patent, Defendants rely on the Composites Sourcebook 2007 (www.compositesworld.com) to give the term "elongation" its ordinary meaning, "the fractional increase in length of a material loaded in tension. When expressed as a percentage of the original length, it is called percent elongation." (Instrument No. 95, at 11). Plaintiff proposes that "elongation" should be interpreted to mean, "the method wherein the adhesive in its cured stated when placed in tension, can increase in length." Based on the ordinary meaning of the term, this Court construes the term "elongation" to mean, " ***the method wherein the adhesive in its cured state, when placed in tension, can increase in length.***"

IV.

Accordingly, based on the foregoing, IT IS HEREBY ORDERED that the disputed terms shall have the following claim constructions:

DISPUTED TERM	CLAIM CONSTRUCTION
Pipe	"a part of a high pressure transmission pipeline"
Filler Material	"any material having a workable fluid state and a rigid cured state"
Cured	"to fully change from a fluid state to a rigid state"
E-type glass	"glass fibers which have high electrical resistivity"
Shear Strength	"the maximum shear stress that a material is capable of sustaining"
Elongation	"the method wherein the adhesive in its cured state, when placed in tension, can increase in length"

The Clerk shall enter this Order and provide a copy to all parties.

S.D.Tex.,2007.
Clock Spring LP v. Wrapmaster, Inc.