United States District Court,
C.D. California.

TOFASCO OF AMERICA, INC,
Plaintiff.
v.
ATICO INTERNATIONAL, U.S.A., INC., et al,
Defendants.

No. CV 07-04120 ABC (JWJx)

April 8, 2008.

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ORDER RE: CLAIM CONSTRUCTION

AUDREY B. COLLINS**, District Judge.**

Pending before the Court are the parties' motions for an order construing the claims of United States Patent No. 5,975,626 ("'626 patent") pursuant to Markman v. Westview Instruments, Inc., 52 F.3d 967, 976 (Fed.Cir.1995). The parties timely filed their claim construction briefs and appeared for a hearing on April 7, 2008. Having considered the materials submitted by the parties and the argument of counsel, the Court rules as indicated herein.

I. BACKGROUND

The '626 patent, issued on November 2, 1999, involves a cross-member support for foldable furniture. In general, it claims a particular apparatus for supporting the legs of a foldable chair or stool. The legs pass through inclined slots in the cross-member support when the chair is unfolded. The cross-member support also contains vertical holes for the legs to pass through when the chair is folded. The cross-member support is designed to allow the legs to pivot from the unfolded, inclined position to the folded, vertical position.

Plaintiff, Tofasco of America, Inc., is the assignee of the '626 patent. It is suing Defendants, Atico International, U.S.A., Inc., Williams-Sonoma, Inc., Long's Drug Stores California, Inc., and Motorsports Authentics, Inc., as either producers or sellers of products that infringe upon the '626 patent.

Defendants filed an opening claims construction brief on February 14, 2008. Plaintiff filed an opening brief the next day. Oppositions were filed on February 25, 2008. Replies were filed on March 10, 2008. The Court

heard oral argument of counsel on April 7, 2008.

II. LEGAL STANDARD

In Markman v. Westview Instruments, Inc., 52 F.3d 967, 976 (Fed.Cir.1995) (en banc), *aff'd,* 116 S.Ct. 1384 (1996), the Federal Circuit held that claim construction is a matter of law to be decided by the court. "[T]he court has the *power and obligation* to construe as a matter of law the meaning of language used in the patent claim." Id. at 979 (emphasis added). Under *Markman,* a patent infringement analysis involves a two-part test: (1) a court must first construe the patent claims at issue, and (2) the trier of fact must determine whether the accused device or process infringes the patent. *See id*. at 976.

Claim construction begins first with the language of the claims. Usually, a court will give disputed terms their "ordinary and accustomed" meaning unless the patent and prosecution history reveal that the inventor has assigned an idiosyncratic meaning to the terms. *See* Phillips v. AWH Corp., 415 F.3d 1303, 1312-14 (Fed.Cir.2005). In determining the plain meaning of a claim, the court first looks to intrinsic evidence (*e.g.,* the claims, the specification, and the prosecution history if in evidence). Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed.Cir.1996). If analysis of the intrinsic evidence does not resolve the ambiguity in the disputed claim terms, the Court may then receive extrinsic evidence, *e.g.,* technical treatises and expert testimony, to determine the scope of the patented invention. Id. at 1583 ("In most situations, an analysis of the intrinsic evidence alone will resolve any ambiguity in a disputed claim term. In such circumstances, it is improper to rely on extrinsic evidence"). The court may use extrinsic evidence " 'to aid the court in coming to a correct conclusion' as to the 'true meaning of the language employed' in the patent." Markman, 52 F.3d at 980. However, extrinsic evidence may only be used to help the court come to the proper understanding of the claims; it may not be used to vary or contradict the claim language. *See* Phillips, 415 F.3d at 1318-19. Though extrinsic evidence may assist the court in determining the legal meaning of claim terms, it should be accorded less weight than the applicable intrinsic evidence. *Id*.

III. CLAIM CONSTRUCTION

The parties request that the Court construe the meaning of the following terms and phrases: "at least two vertical connecting holes," "at least two inclined supporting holes," "at least two supporting through slots," "substantially equal to," "supporting groove surface," "said two supporting through slots are parallelly [sic] provided," and "perpendicular to said supporter body."

A. "At Least Two Vertical Connecting Holes"

A central dispute between the parties is the meaning of "vertical connecting hole" in the context of the '626 patent. The parties differ on three issues: (1) whether a hole must be bounded by material in all directions, (2) whether the hole must be circular in shape, and (3) whether vertical means exactly perpendicular to the relevant plane or "substantially" perpendicular to the relevant plane.

1. *A "Hole" Need Not Be Bounded in All Directions by Material*

Defendants argue that a hole must be "bounded in all directions by material." Defendants' argument that the "hole" must be bounded in all directions by material is premised on a perceived distinction between a hole and an "opening" and on portions of the prosecution history that Defendants claim emphasize this distinction. Plaintiff counters that the holes described in the '626 patent are not bounded in all directions by material, and, if they were, the invention would not work as described. The Court agrees with the Plaintiff.

Most importantly, the claims and specification of the '626 patent do not support a definition of "hole" that is limited to openings bounded in all directions by material. As a most basic matter, the stems described in the patent, *i.e.*, the legs of the chair, pass through the holes so the holes cannot be bounded in literally all directions by material. Second, the claims and specification clearly describe the intersection of the vertical holes and the inclined holes, which indicates that there is an open boundary of each hole at that intersection. (*See* '626 Patent at 3:34-44; Claim 1.) Figure 2 of the ' 626 patent, a cross-section view, also shows that the vertical and inclined holes form one larger opening without any physical boundary between the vertical and inclined holes. Also, the invention would not operate as described in the specification if the holes were bounded in all directions. For example, Figure 2 of the '626 patent indicates that the stems pivot from an inclined position to a vertical position. (*See also* '626 Patent at 3:57-63.) This would not be possible if the vertical hole was bounded in all directions by material.

The Court understands a vertical and an inclining "hole" in the '626 patent as essentially abstractions that together define a single opening created by the intersecting vertical and inclining holes-the "supporting through slots" of the patent. This is why, contrary to Defendants' argument, Plaintiff's definition is not meaningless. The larger "supporting through slot" created by the intersecting holes is well-defined and bounded by material even if each abstract vertical and inclining hole is not bounded by material in all directions.

Defendants' "common sense" objection that "a 'hole' must be bounded by some material otherwise it is not a 'hole,' " while true, does not prove what they are trying to prove-that the hole described in the '626 patent in bounded in all directions. The standard "hole in the ground" is presumably a hole, but it is not typically bounded in all directions by earth. Defendants' illustration on page 9 of their opening claims construction brief is initially appealing only because it is presented in two-dimensional space. If the illustration were three-dimensional, the "litigation-inspired hole" would appear as an open trench extending into and out of the paper. It is not clear at all that such a trench would not meet a "common sense" definition of a hole, albeit a long cylindrical hole.

Defendants' prosecution history argument centers around the following statement by the patentee to the Patent and Trademark Office:

However, [the] Wiles [prior art] merely describes a friction-block D for a camp-stool, which has four *openings* E, through which the legs pass. The said openings have tapering sides E' and E", against which the legs bind when opened.... In other words, Wiles in fact merely suggests four openings each having a *tapering sides* [sic] but not the circular holes or slots fitting with the diameter of the respective stem as claimed in the presently amended claim 1.

(Chapman Decl., Ex. E at 99 (emphasis in original).)

Defendants argue that this passage demonstrates both that the holes have to be circular and that a "hole," which is bounded on all sides by material in Defendants' view, is distinct from an "opening," which is presumably not.

The Court is unpersuaded that the patentee was drawing a distinction between "holes" and "openings" in this passage. First, these words mean essentially the same thing in common language and it is unlikely that the examiner would have been persuaded to issue the '626 patent if the only difference between the ' 626

invention and the prior art is that one has "holes" and the other has "openings." A much more persuasive reading of the quoted prosecution history is that the patentee was drawing a distinction between generic openings in the prior art and "holes or slots fitting with the diameter of the respective stem." Thus, it is the size and shape of the "hole" that is important because, allegedly unlike the prior art, the hole is fitted to the stem. This interpretation is supported on the next page f the prosecution history where the patentee notes that:

the stems [in the prior art] are still free to move in all directions since the size of the openings, apertures, or ring is not fitted with the diameter of the stem. The room formed around the stems results unsteady and inrigidity construction [sic] of the stool or foldable chair that would greatly reduce the service life span of the products.

(Chapman Decl., Ex. E at 100.)

2. *A "Hole" Need Not Be Circular*

The Court also disagrees that the above quoted prosecution history means that the patentee disclaimed any non-circular holes. A disclaimer of scope in the prosecution history of a patent requires a "clear and unmistakable statement[ ] of disavowal." Cordis Corp. v. Medtronic AVE, Inc., 339 F.3d 1352, 1368 (Fed.Cir.2003). The use of "circular holes or slots" in this context was not a "clear and unmistakable statement of disavowal" of other shapes. There is nothing in the record to suggest that the shape of the holes had any significance in the prosecution history of the '626 patent. It is perfectly reasonable to believe that the patentee referred to "circular holes or slots" for clarity of communication with the examiner because that is what is illustrated in the embodiments described in the specification.

3. "*Vertical" Means Substantially Perpendicular*

The parties further dispute the meaning of vertical in the context of the "vertical connecting holes." Plaintiff claims that vertical means "substantially perpendicular to the top surface of the cross-member body" while Defendants assert that the holes have to be precisely perpendicular to that surface.

Claim 4 of the '626 patent specifically further claims a cross-member supporter where "at least two vertical connecting holes are perpendicular to said supporter body." ('626 Patent, 6:39-41.) This implies that "vertical" and "perpendicular" are not synonyms because "the presence of a dependent claim that adds a particular limitation gives rise to a presumption that the limitation in question is not present in the independent claim." Phillips, 415 F.3d at 1315. As such, the Court accepts Plaintiff's contention that vertical in this context means substantially perpendicular.

Based on this analysis, the Court defines "at least two vertical connecting holes" as "two or more openings extending through the thickness of the cross-member supporter body, the axes of which are substantially perpendicular to the top surface of the cross-member supporter body."

B. "At Least Two Inclined Supporting Holes"

The only dispute as to this phrase is resolved by the Court's discussion, above, of whether a "hole" must be bounded in all directions by materials.

The Court defines "at least two inclined supporting holes" as "two or more openings extending through the

thickness of the cross-member supporter body, the axes of which are neither vertical nor horizontal."

C. "At Least Two Supporting Through Slots"

The central dispute regarding this phrase is whether the two through slots have to be two separate and distinct slots or whether the two slots can intersect to essentially form one large slot. Plaintiff argues that the slots need not have distinct boundaries; Defendants argue that " 'two' means 'two.' " The Court agrees with Defendants: two means two separate and distinct slots.

Nothing in the intrinsic record of the '626 patent indicates that the "two" slots can, in fact, be one opening that is a combination of "two" openings. Plaintiff's "common sense" analogy of drilling a hole and drilling another hole that overlaps with the first is inapposite because it confuses the production process with the end result. It is correct that you would have drilled twice, but the end result is only one hole. Contrast this to the "hole" situation discussed above where the specification and claims clearly establish that the invention necessarily involves the intersection of the vertical and inclined holes. In that case, the specification makes clear that the vertical and inclined holes are abstractions used to describe the shape of the supporting through slot. There is no such abstraction in the description of the need for "at least two" supporting through slots.

The Court defines "at least two supporting through slots" as "two or more openings in the cross-member supporter body defined by the combination of a vertical connecting hole and an inclined supporting hole." FN1

FN1. This is in large part the Defendants' proposed definition. The Court substitutes "openings" for the unnecessarily obscure "apertures." The Court views "opening" and "aperture" to be synonyms in this context.

D. "Substantially Equal To"

While the parties essentially agree that "substantially equal to" means close to, but not exactly, equal to, they disagree on the precise shading to be given to the phrase. Plaintiff seeks an open-ended definition of "insignificantly different from." Defendants would rather define the phrase by the relationship between the stem and holes: "Equal in size based on visual inspection. There is no room formed between the stem and holes."

The Court agrees with the defendant that "substantially equal to" should be given a more precise definition. Plaintiff's definition merely replaces one question-"How substantial is substantial?"-with another-"How insignificant is insignificant?" Defendants' definition is more useful and utilizes important concepts from the specification and prosecution history to give substance to "substantially."

As discussed above, a key way in which the patentee distinguished the '626 invention from the prior art during the prosecution of the patent was through the similarity of the diameter of the stems and holes which diminished lateral movement of the stems. However, the Court declines to adopt the exact definition offered by Defendants because there is no support for the limitation that the stems and holes must appear equal in size on visual inspection and due to the valid concern by the Plaintiff that Defendants' definition would prevent the stem from appropriately resting on the groove surface within the hole. With this in mind, the Court defines "substantially equal to" as "close to equal such that the stem is rigidly and firmly supported on

the groove surface with minimal lateral movement." FN2

FN2. This wording is adopted from Plaintiff's proposed definition for "supporting groove surface," discussed below.

E. "Supporting Groove Surface"

Plaintiff claims that a "supporting groove surface" is "an interior surface of a supporting through slot, defined by the inclined supporting hole, which partially envelops the stem such that the stem is rigidly and firmly supported without unwanted lateral movement." Defendants argue that the phrase means "a non-flat surface that supports an elongated stem along the entire surface."

The Court agrees with Plaintiff's definition of this phrase. Defendants' definition is deficient in at least two ways. First, a "groove" in normal language means something different and more precise than "non-flat." Not every non-flat surface is a groove, *e.g.,* a bump is not flat, but it is not a groove either. The plain meaning of "groove" is a depression, channel, or trench. *See Merriam-Webster Online Dictionary,* http://www.merriam-webster.com/dictionary/groove. There is no indication that the '626 patent uses the term groove in anything other than its ordinary meaning.

Second, the Court is not convinced that the stem has to be supported along the entire supporting groove surface. The groove surface can support the stem even if the entire surface is not in contact with the stem. The stem might rest on, and be supported by, a part of the groove surface, but the groove surface could extend into other areas where it does not come in contact with the stem. The Court sees no evidence in the claims, specification, or prosecution history to indicate that this scenario is not covered by the '626 patent. Defendants quote a portion of the prosecution history where the patentee discloses that one difference between the '626 invention and the prior art is that the '626 invention provides a "much larger contact area" between the stem and supporting surface. (*See* Chapman Decl., Ex. E at 101.) The Court agrees that these statements disclaim de minimis contact between the groove surface and the stem. However, the statements do not necessarily support the opposite extreme urged by the Defendants that the entire groove surface must be in contact with the stem.

The Plaintiff's construction is consistent with descriptions given in the specification language and the diagrams. (*See* '626 Patent at 3:45-56; 3:64-4:10; Figure 2.) However, the Court replaces "without unwanted lateral movement" with "with minimal lateral movement." "Unwanted" is vague and alters the scope of the patent based on varying subjective considerations. There is ample evidence that a benefit of the '626 invention was minimization of lateral movement. (*See* Chapman Decl., Ex. E at 100-101.) The use of "minimal," while not ideal, attempts to capture the desire to minimize lateral movement with the possibility that some minor lateral movement is inevitable.

The Court defines "supporting groove surface" to mean "an interior surface of a supporting through slot, defined by the inclined supporting hole, which partially envelops the stem such that the stem is rigidly and firmly supported with minimal lateral movement." FN3 If and when it becomes relevant to an infringement analysis, the Court may revisit the issue of how much contact between the groove surface and stem is necessary.

FN3. The Court sees no need for additional definitions of the "upper" and "lower" supporting groove

surfaces at this time.

F. "Said Two Supporting Through Slots Are Parallelly Provided"

The parties agree that this phrase means that the supporting through slots are to be provided in parallel, *i.e.*, the slots are parallel to each other. They also agree that the basic concept of "parallel" should be given its common and ordinary meaning. The dispute centers on a fine distinction between whether the planes of the axes of the slots need to be parallel or the "entirety of the through slots" need to be parallel. The importance of this distinction is not made clear by either party. Until the relevance of the dispute becomes evident, the Court finds that this phrase needs no further construction and should be given its plain and ordinary meaning.

G. "Perpendicular to Said Supporter Body"

The parties dispute whether "perpendicular" means at a 90 degree angle, *i.e.*, exactly perpendicular, or whether it means "substantially perpendicular." The Court agrees with Defendants that perpendicular has its plain and ordinary meaning of "at a 90 degree angle." Plaintiff's construction of "substantially perpendicular" contradicts its argument made earlier regarding the term "vertical." As discussed above, the presence of the term "perpendicular" in dependent Claim 4 means that "vertical" and "perpendicular" must mean different things. As such, the Court agreed with Plaintiff that "vertical" means "substantially perpendicular." Now Plaintiff argues that "perpendicular" also means "substantially perpendicular." Distinct claims in a patent are assumed to claim different subject matter. *See* Phillips, 415 F.3d at 1314-15. Thus, as a matter of basic claims construction principles, the Court finds that vertical and perpendicular do not mean the same thing because otherwise Claim 4 would have no purpose. As such, the Court adopts Defendants' construction of "the axes of the vertical connecting holes are at a 90 degree angle to a plane of the supporter body defined by the top or bottom of the supporter body." FN4

FN4. The Court is not insensitive to Plaintiff's argument that ordinary construction error should not allow a defendant to escape patent infringement. The Court agrees that a very minor deviation from 90 degrees attributable to construction error would not prevent a finding of infringement, especially if it could be shown that the accused device was designed to have a 90 degree angle.

IV. CONCLUSION

Based on the foregoing, the Court construes the disputed claim terms as follows:

1. "At least two vertical connecting holes" as "two or more openings extending through the thickness of the cross-member supporter body, the axes of which are substantially perpendicular to the top surface of the cross-member supporter body."

2. "At least two inclined supporting holes" as "two or more openings extending through the thickness of the cross-member supporter body, the axes of which are neither vertical nor horizontal."

3. "At least two supporting through slots" as "two or more openings in the cross-member supporter body defined by the combination of a vertical connecting hole and an inclined supporting hole."

4. "Substantially equal to" as "close to equal such that the stem is rigidly and firmly supported on the groove surface with minimal lateral movement."

5. "Supporting groove surface" as "an interior surface of a supporting through slot, defined by the inclined supporting hole, which partially envelops the stem such that the stem is rigidly and firmly supported with minimal lateral movement."

6. "Said two supporting through slots are parallelly provided" needs no further construction at this time.

7. "Perpendicular to said supporter body" as "the axes of the vertical connecting holes are at a 90 degree angle to a plane of the supporter body defined by the top or bottom of the supporter body."

SO ORDERED.

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