United States District Court,
N.D. Texas, Dallas Division.

**RFR INDUSTRIES,**
INC. Plaintiff.
v.
**CENTURY STEPS, INC. d/b/a Century Precast,**
et al. Defendants.

No. 3-98-CV-0988-BD(G)

**Sept. 23, 1999.**

***MEMORANDUM OPINION AND ORDER***

KAPLAN**, Magistrate J.**

This patent case is before the Court on the issue of claim construction. The parties have submitted their briefs and presented oral argument at a *Markman* hearing on July 29, 1999. For the reasons stated herein, the Court interprets the relevant claims as follows:

**I.**

Plaintiff RFR Industries holds two patents on an "embedded railway track system" for use at railroad crossings. The first patent describes a "flangeway filler" that fills the gaps between concrete crossing panels and track rails. FN1 ( U.S. Patent No. 5,577,662). The second patent is directed to a method of installing the flangeway filler. ( U.S. Patent No. 5,535,947). Plaintiff alleges that a filler product sold by Defendant Century Steps infringes one or more claims of each patent. (Plf. Second Am. Complaint para.para. 10 & 12). Defendant denies any infringement, and maintains that the parents-in-suit are invalid and unenforceable for a variety of reasons. (Def. Second Am. Answer para.para. 19-23).

FN1. When a railway crosses a public road, gaps must exist between the rail and surrounding surface so the wheels of the train can pass through the embedded crossing without obstruction. These gaps can fill with fluids and other foreign objects that impeds traffic on the railway and damage the crossing system. The "flangeway filler" is made of resilient material that can be inserted between the rail and surrounding surfacs to fill these gaps. (Plf.Brief, Exh. 1, col.1, In.14-31).

**II.**

The threshold issue in any patent infringement case is claim construction. This is a question of law for the Court to decide. *See* Markman v. Westview Instruments, Inc., 517 U.S. 370, 372, 116 S.Ct. 1384, 1387, 134 L.Ed.2d 577 (1996). In construing the scope of a patented invention, the Court must first look to the "intrinsic" evidence of record. Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed.Cir.1996);

Markman v. Westview Instruments, Inc., 52 F.3d 967, 979 (Fed.Cir.1995), *aff'd,* 116 S.Ct. 1384 (1996). This includes: (1) the claim; (2) the specification; and (3) the prosecution history. Vitronics, 90 F.3d at 1582.

Claim interpretation always begins with language of the claim itself. Johnson Worldwide Associates, Inc. v. Zebco Corp., 175 F .3d 985, 989 (Fed.Cir.1999); Renishaw PLC v. Marposs Societa' per Azioni, 158 F.3d 1243, 1248 (Fed.Cir.1998). In general, these terms must be given their ordinary and accustomed meaning to one skilled in the art. Quantum Corp. v. Rodime, PLC, 65 F.3d 1577, 1580 (Fed.Cir.1995), *cert. denied,* 116 S.Ct. 1567 (1996); Hoganas AB v. Dresser Industries, Inc., 9 F.3d 948, 951 (Fed.Cir.1993). However, "a patentee may choose to be his own lexicographer and use terms in a manner other than their ordinary meaning, as long as the special definition is clearly stated in the patent specification or file history." Vitronics, 90 F.3d at 1582; *see also* Johnson Worldwide Associates, 175 F.3d at 990. Thus, it is necessary to review the specification to determine whether the inventor has used any terms in a manner inconsistent with their ordinary meaning. The specification acts as a dictionary when it expressly defines terms used in the claims or when it defines terms by implication. Vitronics, 90 F.3d at 1582. The court may also consider the prosecution history in determining the meaning of disputed terms. Id. at 1582-83; CVI/Beta Ventures, Inc. v. Tura LP. 112 F.3d 1146, 1158 (Fed.Cir.1997), *cert. denied,* 118 S.Ct. 1039 (1998). This history contains a complete record of all proceedings before the Patent and Trademark Office, including any express representations made by the applicant regarding the scope of the claims. Vitronics, 90 F.3d at 1582.

Most patent claims can be construed solely on the basis of intrinsic evidence. However, extrinsic evidence may be considered "for background and education on the technology implicated by the presented claim construction issues ...". Key Pharmaceuticals v. Hercon Laboratories Corp., 161 F.3d 709, 716 (Fed.Cir.1998). Such evidence consists of expert and inventor testimony, dictionaries, technical treatises, and prior art. *Id.;* Mantech Environmental Corp. v. Hudson Environmental Services, Inc., 152 F.3d 1368, 1373 (Fed.Cir.1998). However, extrinsic evidence cannot be used to arrive at a construction of the claim that is clearly contrary to the public record. Key Pharmaceuticals, 161 F.3d at 716; Vitronics, 90 F.3d at 1584.

**III.**

The parties disagree as to the proper construction of the following terms used in the '662 Patent: (1) "cantilevered," (2) "resilient," (3) "web," (4) "rail end," (5) "profile," and (6) "when installed." FN2 In addition, the following terms used in the "7 Patent are in dispute: (1) "rotating," and (2) "pressing." The Court will address each patent in turn.

FN2. Originally, the parties also disputed the proper construction of "abutting" as used in Claim 1 of the '662 Parent. However, they have since agreed that "abutting" means "contracting." This comports with the ordinary and accustomed definition of "abut." *See* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY at 5 (10th ed.1993).

**A.**

Claim 1 of the '662 patent states:

"What is claimed is:

A rail crossing seal system comprising an elongated insert installed between a panel and a rail, said rail

being of the kind having a head, a web, and a base, said elongated insert being formed of *resilient* material and having a *profile* comprising:

a main body having a panel side abuttable against said panel;

said main body having a top surface offset downwardly when said main body is installed from the top of said rail a distance sufficient to accommodate the flange of a wheel on said rail;

a *cantilevered leg* projecting outwardly from said main body toward said rail and abutting the *web* thereof *when installed;* and

a *cantilevered resilient arm* projecting upwardly and outwardly from said main body toward said rail and upwardly toward the head of the rail, said *resilient* arm being positioned above said leg, said *resilient* arm further having a rail end wedged under and against said rail head *when installed*."

(Plf.Brief, Exh. 1, col.6, In.25-46) (emphasis added). Claim 11 of the same patent provides, in relevant part:

"a cantilevered leg extending from the rail side of said main body, said leg having a *rail end,* a bottom side extending from the rail end to said main body, and a top side extending from the rail end to said main body ..."

( Id., Ex. 1, col. 8, In. 1-4) (emphasis added).

**1. "*Cantilevered*"**

Plaintiff contends that the term "cantilevered leg" means "a leg that extends outwardly and under a space that exists between the leg, the arm, and the rail." (Plf. Brief at 5). Similarly, plaintiff argues that a "cantilevered [ ] arm" is "an arm extending outwardly and over a space existing between the leg, the arm, and the rail." (Plf. Brief at 10). Defendants maintain that the term "cantilevered" should be given its ordinary and accustomed meaning of being supported only at one end. (Def. Brief at 11-12).

In ordinary usage, the term "cantilever" refers to "[a] projecting structure, as a beam, supported at one end" or "[a] structural member, as a beam, that projects beyond a fulcrum and is supported by a balancing member or a downward force behind the fulcrum." WERSTER'S II NEW COLLEGE DICTIONARY at 163 (1995 ed.); *see also* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY at 168 (10th ed.1993) (defining "cantilever" as "a projecting beam or member supported at only one end"). Thus, it is not the creation or definition of a space that characterizes a cantilevered object. Rather, the defining characteristic is that the object is supported only at one end.

The specification does not indicate that any contrary usage of the term was intended. The description in Figure 2, a cross-sectional view of the embedded railway system, defines the cantilevered leg and arm in terms of their relation to the main body of the gauge insert:

"Referring still to FIG. 2, the leg 340 of the gauge insert 300 extends in a cantilever arrangement from the rail side 322 of the main body 320....

* * *

Referring still to FIG. 2, the resilient arm 380 extends in a cantilever arrangement upwardly from the main body 320 and in the same direction as the leg 340."

(Plf. Brief, Exh. 1, col. 4, In. 10-12 & 33-35). This language suggests that the term "cantilever" was used to describe the manner in which the leg and arm project outward from, and are supported by, the main body of the insert. The fact that this arrangement creates a space between the leg and the arm is incidental.

Nevertheless, plaintiff insists that the prosecution history reveals that a different usage was intended. The inventors originally claimed the leg of the insert as "an elongated leg projecting from said main body toward said rail ...," and the arm as "an elongated resilient leg projecting from said main body toward said rail and upwardly toward the head of said rail ..." The patent examiner noted that this language was too broad and was anticipated by the earlier Grant Patent. (U.S. Patent No. 4,606,498) ( Id., Exh. 3, Office Action Summary of Sept. 13, 1995 para. 7). The Grant insert was contoured to fit snugly against the rail and base. ( Id., Exh. 4, col. 3, In. 50). The examiner suggested that "additional *positively recited* structural limitations to the claims detailing ... in particular the free end cantilever arrangement of the legs and arms ... may receive favorable consideration...." ( Id., Exh. 3, Office Action Summary of Sept. 13, 1995 para. 14) (emphasis in original). The applicants therefore added the term "cantilever" to the claim language and noted that "[i]n contrast, the legs and arms of Grant are not cantilevered, but are portions of a mass that also form the main body." ( Id., Exh. 3, Amend. of Jan. 16, 1996, Remarks para. 4 at 13).

The Court is not convinced that this prosecution history requires a different construction of the term "cantilevered." The applicants sought to distinguish the Grant Patent based on the relation of the leg and arm to the *body of the insert*-not on their relation to the *rail*. The fact that the applicants did not refer to the leg and arm as a "free end cantilevers," as suggested by the examiner, is irrelevant. At best, the modifier was redundant, as a cantilever must necessarily have a free end.

Moreover, plaintiff's proposed construction would effectively render the term "cantilever" meaningless. Even without this term, the leg and arm of the insert would still define a space between one another and the rail. The Court must give meaning to all the terms of the claim. Exxon Chemical Patents, Inc. v. Lubrizol Corp., 64 F.3d 1553, 1557 (Fed.Cir.1995), *cert. denied,* 116 S.Ct. 2554 (1996). Accordingly, a "cantilevered leg" and "cantilevered [ ] arm" must be defined as a leg or arm that is supported by the main body of the insert and has a free end.

**2. "*Resilient*"**

Plaintiff argues that a "cantilevered resilient arm" is one that "is elastic enough to be pressed without being force fit downward toward the rail web and under the rail head during installation, and has a tendency to spring back to its original shape after being pressed into position." (Plf. Brief at 10). Defendants generally agree with this definition. However, they object to the proposed limitation of "without being force fit." (Def. Reply at 5). The Court agrees that this limitation should not be part of the claim. Resilience is a physical property or characteristic. *See* WEBSTER'S II NEW COLLEGE DICTIONARY at 943 (defining "resilience" to mean "[t]he property of a material that enables it to regain its original shape or position after being bent, stretched, or compressed"). It has nothing to do with any particular method of installation. The claim is silent as to how the flangeway filler device is to be installed. Indeed, there is a separate patent covering the installation process.

Plaintiff also contends that the cantilevered leg is less resilient than the cantilevered arm and is rigid enough to support the gauge insert. (Plf. Proposed Claim Constructions at 1-2). This argument is based on the fact that the claim uses the term "resilient" to describe the arm but not the leg. Of course, the entire insert is made out of resilient material. (Plf.Brief, Exh. 1, col.1, In.43). The leg must therefore have some resiliency. On the other hand, the claim cannot be construed to mean that the leg is just as resilient as the arm. This would render the limitation meaningless. *See* Exxon Chemical Patents, Inc., 64 F.3d at 1557. It is not logical to suggest that the arm might be resilient in a different manner than the leg, since both components are made of the same material. Nor is there any basis to imply that the leg might be more resilient than the arm. This leads to only one possible conclusion-the arm is more resilient than the leg. The Court therefore construes the term "cantilevered resilient arm" to mean that the arm is elastic enough to be pressed beneath the rail head and regain its original shape and is more elastic than the cantilevered leg.

However, the Court is not convinced that the leg must be rigid enough to support the insert. The construction advocated by plaintiff is belied by the specification:

"... the leg 540 also includes a lobe 545 extending below the leg 540. It is preferred that the lobe 545 extend below the leg 540 with sufficient length to rest on the rail base 142 of the rail 140, or abut against the rail anchor 150, or both. In this manner, the leg 545 will support the gauge insert 500, or prevent the gauge insert 500 rotating, or both."

( *Id.,* Exh. 1, col. 5, In. 52-58). The "cantilevered leg" and the "lobe" are two different components of the gauge insert. It is clear from the specification that the "lobe" supports the insert, not the "cantilevered leg." FN3 The Court declines to incorporate this limitation into the claim construction statement.

FN3. Although the quoted portion of the specifications states that "the leg 545 will support the gauge insert," this structure is not the "cantilevered leg" as issue in this case. The "cantilevered leg" is labeled as 540 in Figure 5 of the '662 Patent. The lobe is labeled as 545. (Plf.Brief, Exh. 1, Fig.5).

**3. "*Web*"**

Claim 1 describes the cantilevered leg as abutting the "web" of the rail. Both parties agree that the web includes the thin section of track between the bead and the base. However, they disagree as to how far the web extends. Plaintiff maintains that the web includes one-half of the curved junction between the web and the base of the rail, or "fillet." (Plf. Brief at 14). Defendants argue that this term should be narrowly construed to exclude the "fillet." (Def. Brief at 13-15).

The precise issue before the Court is where the web starts and the base ends. This question is not answered by the claim, specification, or prosecution history. The term "web" refers only to that portion of the rail abutting the cantilevered leg when installed. ( Id., Exh. 1, col. 6, In 38-40). No distinction is made between the web and the fillet. Nor was any such mathematical precision necessarily required. *See* Modine Manufacturing Co. v. United States International Trade Commission, 75 F.3d 1545, 1557 (Fed.Cir.), *cert. denied,* 116 S.Ct. 2523 (1996), *quoting* Shatterproof Glass Corp. v. Libby-Owens Ford Co., 758 F.2d 613, 624 (Fed.Cir), *cert. dismissed,* 106 S.Ct. 340 (1985) ("if the language is as precise as the subject matter permits, the courts can demand no more").

Defendants point out that the patent drawings show the leg contacting the web somewhere near the middle and well above the fillet. (Plf. Brief, Exh. 1, Fig. 2 & 5). In addition, the specification provides that "[t]he bottom side 344 of the leg 340 is preferably parallel with the bottom surface 324 of the main body 320." ( *Id.,* Exh. 1, col. 4, In. 18-19). This configuration effectively prevents contact with the fillet. However, a claim is not limited to a preferred embodiment unless it clearly so states. *Johnson Worldwide Associates,* 175 F.3d at 973; Virginia Panel Corp. v. MAC Panel Co., 133 F.3d 860, 866 (Fed.Cir.1997), *cert. denied,* 119 S.Ct. 52 (1998). Although a narrow disclosure may limit the scope of the claim in some instances, such is not the case here. *Cf.* Gentry Gallery, Inc. v. Berkline Corp., 134 F.3d 1473, 1479 (Fed.Cir.1998) (where patent for sectional sofa clearly identified console between dual recliners as the only possible location for controls, claim could not be read to include controls located elsewhere). The broad language used in the claim and specification is sufficient to include a definition of web that incorporates some or all of the fillet.

The Court is unable to determine how far the web extends based solely on intrinsic evidence. Under these circumstances, reliance on extrinsic evidence is proper. *See* Bell & Howell Document Management Products Co. v. Altek Systems, 132 F.3d 701, 706 (Fed.Cir.1997) (court may rely on extrinsic evidence only when claim language remains "genuinely ambiguous" after consideration of intrinsic evidence). Plaintiff has offered the declaration of William K. Hull, one of the inventors, to assist in the interpretation of this term. Hull explains that a person of ordinary skill in the art of embedded railway track assemblies and elastomeric railway inserts would understand the term 'web' of the rail to mean the portion of the rail between the 'head' of the rail and the 'base' of the rail .... extend[ing] down to approximately the middle of the curved junction between the web and the base of the rail." (Hull Decl. para. 6). Defendants have presented no evidence to the contrary.FN4 Accordingly, the Court finds that the "web" of the rail includes one-half of the curved junction between the web and base of the rail, or "fillet."

FN4. In their post-submission brief, defendants cite several cases for the proposition that the opinion of an inventor is entitled to no weight. This is true when the intrinsic evidence is sufficient to allow the Court to construe the disputed terms. *See, e.g.,* Bell & Howell Document Management Products, 132 F.3d at 706 ("any expert testimony that is inconsistent with unambiguous intrinsic evidence should be accorded no weight"); Senmed Inc. v. Richard-Allan Medical Industries, Inc., 888 F.2d 815, 819 n. 8 (Fed.Cir.1988) (trial court improperly relied on inventor's testimony because disputed term was "clearly neither a technical term nor a word of art having special meaning to those skilled in the art"). In this case, the Court is unable to interpret the term "web" based solely on intrinsic evidence.

**4.** "***Rail end***"

Claim 11 of the '662 patent describes "a cantilevered leg extending from the rail side of said main body, said leg having a *rail end,* a bottom side extending from the rail end to said main body, and a top side extending from the rail end to said main body." (Plf.Brief, Exh. 1, col.8, In.1-4). The specification provides that "[a] rail end 342 of the leg 340 contacts the rail web 144 of the rail 140." ( Id., Exh. 1, col. 4, In. 12). Defendants maintain that "rail end" must be construed to mean an end in contact with, or abutting, the rail web. (Def. Brief at 17). Plaintiff suggests a broader definition that allows contact at any point on the rail. (Plf. Reply at 15-16).

The Court agrees with defendants. The specification and patent drawings clearly illustrate that the rail end abuts the web of the rail. Plaintiff argues that the Court should draw a distinction between claim 1, which specifically refers to the web of the rail, and claim 11, which does not. This is known as the doctrine of

claim differentiation. *See* Tandon Corp. v. United States International Trade Commission, 831 F.2d 1017, 1023 (Fed.Cir.1987) (when applicant uses different words or phrases in different claims, it is presumed that the claims have different meanings). However, this presumption is merely "a guide, not a rigid rule." ATD Corp. v. Lydall, Inc., 159 F.3d 534, 541 (Fed.Cir.1998), *quoting* Autogiro Co. of America v. United States, 384 F.2d 391, 404 (Ct.Cl.1967). More importantly, it cannot expand the scope of a claim beyond that which is supported by the specification. *Id.;* Tandon, 831 F.2d at 1024. The Court therefore construes the term "rail end" to mean the end of the cantilevered leg that contacts the web of the rail.

**5. "*Profile*"**

The parties offer different interpretations of the term "profile" as used in claim 1. Plaintiff argues that "profile" means "an outline of an object." (Plf. Brief at 16). Defendants suggest that the term "profile" is synonymous with "cross-sectional view." (Def. Brief at 11). This distinction is important because an outline of the gauge insert would not include voids in the filler, such as the pin cavity. However, the pin cavity would be included in a cross-sectional view of the insert.

In common usage, profile can mean either an outline or a cross-section. *See* WEBSTER'S II NEW COLLEGE DICTIONARY at 883 ("1 ... b. A representation of an object or structure seen from the side. 2. An outline of an object."); MERRIAM WEBSTER'S COLLEGLATE DICTIONARY at 931 ("1: a representation of something in outline ... 3: a side or sectional elevation ..."). However, the claim is better understood as using the term synonymously with "cross-section." The specification refers to Figures 2 & 5, which show "cross-sectional views" of the gauge insert. (Plf. Brief, Exh. 1, col. 2, In. 27 & 35; *id.,* col. 5, In. 42). The drawings themselves are not outlines, but show the entire structure of the insert, including the pin cavity. Therefore, the Court finds that "profile" means cross-section.

**6. "*When installed*"**

Claim 1 provides that the cantilevered leg abuts the web of the rail "when installed." ( *Id.,* Exh. 1, col. 6, In. 41-46). Since the size of the gap between the panel and rail may fluctuate under actual operating conditions, there may be times when the leg does not contact the rail. According to plaintiff, "infringement that occurs some of the time is still infringement ..." Plaintiff therefore reasons that "when installed" necessarily means "at any time when installed." ( *Id*. at 15).

This argument obfuscates the important distinction between claim construction and infringement. The Court must first construe the patent claims before the fact finder determines whether infringement has occurred. The ordinary and accustomed meaning of "install" is "[t]o set in position or adjust for use." WEBSTER'S II NEW COLLEGE DICTIONARY at 574; *see also* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY at 606 ("to establish in an indicated place, condition, or status ..."). Neither the specification nor prosecution history suggest a different interpretation. Therefore, the filler is installed when it is placed in its intended positionabutting the web of the rail.

**B.**

The "7 Patent is directed to a method of installing the flangeway filler described in the '662 Patent. Claim 1 of the "7 Patent reads as follows:

"A method of installing an elongated member having a profile with a main body, a leg, and a resilient arm, in a space between a rail and the surrounding surface, said method comprising the steps of:

inserting the elongated member into the space between the rail and the surrounding surface by *rotating* the alongated member until the main body and the leg are between the rail and the surrounding surface and *pressing* the elongated member downward until the main body and the leg of the elongated member are vertically positioned between the rail and the surrounding surface; and positioning the resilient arm of the elongated member by pressing the resilient arm below a head of the rail."

(Plf.Brief, Exh. 2, col.6, In.33-50) (emphasis added). The parties disagree as to the proper construction of the terms "rotating" and "pressing."

**1. "*Rotating*"**

The parties agree that "rotating" means turning about an axis or center. (Plf. Brief at 16; Def. Reply at 9). Their dispute focuses on whether "rotating" and "pressing" are distinct steps in the installation process. The claim itself clearly shows that they are. The insert cannot be pressed into position "until" it has been rotated into position. ( Id., Exh. 2, col. 6, In. 44). The specification further states that "[t]he gauge insert 300 is rotated *and then* pressed downward into a position 300"." ( Id ., Exh. 2, col. 5, In. 18-19) (emphasis added). Although preferred embodiments cannot limit the claims, the language of the specification is not recited as a preferred embodiment. The Court finds that "rotating" and "pressing" are separate and distinct elements of the installation process.

**2. "*Pressing*"**

Plaintiff argues that the term "pressing" means "to push downward into a position without the need to force fit." ( Id. at 17). Defendants object to this proposed definition to the extent it seeks to modify the claim language. In particular, defendants point out that neither the claim nor the specification address the method or process by which the filler is to be pressed into the space between the rail and the panel. Therefore, the term "pressing" should not exclude installation procedures that require force fitting.

The common and ordinary meaning of "press" implies nothing about the degree of force necessary to accomplish an action. *See* WEBSTER'S II NEW COLLEGE DICTIONARY at 875 ("to exert steady force or weight against"); MERRIAM WEBSTER'S COLLEGIATE DICTIONARY at 922 ("to act upon through steady pushing or thrusting force exerted in contact"). However, the prosecution history tends to support plaintiff's argument. On August 19, 1995, the patent examiner noted that the invention claimed both a product and a process of installation and needed to be restricted to one or the other. He distinguished the product from the process because "the insert could be installed by an entirely different process, *such as force fitting* without rotating a leg ..." (Plf. Brief, Exh. 3, Office Action Summary of Aug. 19, 1995 at 2) (emphasis added).FN5 The prosecution history thus injects a degree of ambiguity into the meaning of the term "pressing."

FN5. The examiner clearly was referring to the pressing step of the installation process, not the rotating step. Defendants' argument to the contrary is not persuasive.

Both sides rely on extrinsic evidence to resolve this ambiguity. Defendants have submitted the declaration of Chris Gaudet, an expert in the field of railroad crossing materials and accessories. Gaudet states that "press" and "pressing" are not terms of art and have no special significance in the railroad industry. (Gaudet Decl. para. 2). However, these terms must be construed in light of the relevant claim and specification. *See*

Vitronics, 90 F.3d at 1582. To that end, plaintiff has submitted the declaration of William K. Hull, one of the inventors of the "7 Patent. Hull explains that persons of ordinary skill in the art would understand that the subject inserts should be installed:

"by rotating the leg around the rail head and pressing the inserts into position between the rail and the gauge panel ... A person of ordinary skill in the art would understand that the inserts do not need to be, and should not be, beaten down with powerful swings of a spike maul or forced down with a heavy piece of railroad track equipment such as a back hoe bucket or a ballast regulator, as such actions may result in 'overdriving' the inserts into an improper position. Therefore, a person of ordinary skill in the art would understand that the terms 'pressing' and 'pushed,' as used and described in the subject patents, would be to press or push, or their equivalent ... with hand tools such as the lining bar, spike maul, or their equivalent."

(Hull Decl. para. 10). This testimony is consistent with the particular niche plaintiff's product was designed to fill. *See* CVI/Beta Ventures, 112 F.3d at 1160. Other than defendants' insert, plaintiff's invention is the only elastomeric flangeway filler that can be retrofit without moving the gauge panel from its center position. (Hull Decl. para.para. 3 & 8). The unique ability to "press" this insert into position without disturbing the surrounding materials supports a definition of the term that excludes force fitting. Accordingly, the Court finds that the term "pressing" means "to push into position without the need to force fit."

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RFR Industries, Inc. v. Century Steps, Inc.

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