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

David NICHOLS and Nichols Lures,
Inc. Plaintiffs.
v.
STRIKE KING LURE CO., Wal-Mart Stores, Inc., Bliss-Murski Sales, Inc., and Ray A. Murski Sales Co,
Defendants.

No. CIV.A.3:99-CV-1950-B

Oct. 25, 2000.

MEMORANDUM OPINION AND ORDER

BOYLE**, Magistrate J.**

Plaintiffs David Nichols and Nichols Lures, Inc. (hereinafter referred to as "Nichols") are the owners of a patent for fishing lures covered with a glitter-containing coating and on a method for applying the glitter-containing coating to fishing lures (U.S. Patent No. Re. 35,160 [the " '160 patent"]). FN1 Nichols alleges that the Defendants have, among other things, infringed this patent.

FN1. The '160 patent was granted February 27, 1996 as a reissue of U .S. patent No. 5,146,707.

The case is currently before the Court on the issue of claim construction. The Court heard oral argument at a *Markman* hearing on August 22, 2000 and has also considered the briefs submitted prior to the hearing as well as the post-hearing briefs submitted by the parties. Before addressing the merits, the Court first reviews the legal standards governing interpretation of patent claims.

I. LEGAL STANDARDS

Claim construction is a question of law for the Court. *See Markman v. Westview Instruments, Inc.,* 517 U.S. 376, 372 (1996). The analysis begins with the language of the claim itself. *See* Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed.Cir.1996). Absent an express intent to impart a novel meaning, terms in a claim are to be given their ordinary and accustomed meaning, which is typically the dictionary definition. *See* Optical Disc Corp. v. Del Mar Avionics, 208 F.3d 1324, 1334-35 (Fed.Cir.2000).

The words of the claim must also be construed in light of the specification, the prosecution history, and the prior art. *See* Embrex, Inc. v. Service Eng'g Corp., 216 F.3d 1343, 1347 (Fed.Cir.2000) ("[T]he construction of claims is simply a way of elaborating the normally terse claim language in order to understand and explain, but not to change, the scope of the claims.") The Court must look first to the intrinsic evidence. *See*

Vitronics, 90 F.3d at 1582. The intrinsic evidence- *i.e.*, the patent itself, including the claims, the specification, and the prosecution history-constitutes the public record of the patentee's claim. *See* Vitronics, 90 F.3d at 1583. Competitors are entitled to rely on this record and on the established rules of claim construction to ascertain the scope of the patent and thus, design around the claimed inventions. *See* Vitronics, 90 F.3d at 1583.

Intrinsic evidence alone will resolve any ambiguity in most situations. *See* Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1583 (Fed.Cir.1996). Furthermore, because of the public notice function performed by intrinsic evidence, extrinsic evidence, such as expert testimony regarding the meaning or scope of technical terms, is disfavored. *See* Vitronics, 90 F.3d at 1583. Thus, extrinsic evidence should not be relied upon if the public record unambiguously describes the scope of the patented invention. *See* Vitronics, 90 F.3d at 1583. In this case, the parties agree that the claim at issue may be interpreted relying only on the intrinsic evidence.

With these standards in mind, the Court now turns to interpret the disputed language.

II. ANALYSIS

The '160 patent contains nine claims; only claim 1 is at issue.

Claim 1 reads as follows:

A light dispersing and reflecting fishing lure comprising a body securable to a fishing line;

said body having a solid, light dispersing, transparent resin coating over the entire outer surface of said body;

said transparent resin coating containing a large plurality of pieces of brightly colored, light reflecting glitter particles of a size not exceedingly [sic] 0.01 inches in any direction; and

said glitter particles being substantially uniformly dispersed throughout said coating, whereby substantially all light incident on said body is reflected and dispersed in all directions from said transparent resin coating.

The parties dispute the meaning of a number of phrases and words of this claim, each of which the Court addresses below.

A. "a body"

It is not entirely clear from the record whether there is any dispute over the meaning of the term "a body." The specification provides the following definition:

The term "body" of the lure as used hereinafter refers either to the tear drop shaped body applied to a lure having a leader connected to the shank portion projecting out of one end of the body and a hook or hooks projecting out of the other end of the body, or to any form of blade, spoon or other vibrating element swivelly attached to the lure to further attract the attention of the fish. Thus, the term body includes, without limitation, spinner baits, popping lures, jig-type lures, "buzz baits", crank baits, blades and spoons of any size or shape.

Nichols argues that, according to this definition, the body includes "any solid part of the lure except leader connecting wire or shank and/or the hooks." (Pl.'s Post *Markman* Br. at 3.) Defendants do not disagree. Instead, they raise an issue that Nichols has not addressed; namely, that the definition of "a body" in the specification is ambiguous because it is unclear whether the term refers collectively to any number of elements that together comprise a single body, or whether each of the elements enumerated in the definition individually comprises a body. Stated another way, the question is whether a patented lure has only a single body comprised of one or more elements, for example one tear drop-shaped element to which two blade elements are swivelly attached, or whether each element is a separate body so that a patented lure may have several bodies. Under the "several body" construction, a patented lure configured according to this example would have three bodies-one tear drop-shaped body plus two blade bodies.

The Court concludes that the proper construction of the term "body" is that each patented lure has only a single body, which may consist of one or more elements. The Court finds this the most reasonable interpretation based on the predominate use of the term in the patent, despite one or two arguably ambiguous references in the specification.

First, the Court finds particularly convincing that claim 1, as well as other claims that are not at issue here, refers to "a body securable to a fishing line." The implication of this language is that a fishing lure has only one body. Second, throughout the specification, the term "body" is consistently used in the singular. For example, the Abstract refers to the application of a glitter containing coating to the external surfaces of "the lure body." ('160 Patent, Abstract.) There are numerous other similar examples. ('160 Patent, col. 2, line 1; col. 2, line 9; col. 2, line 12; col. 2, line 32; col. 3, line 3; col. 4, line 43.)

There is at least one place in the specification where the term "body" is used in the plural form. ('160 Patent at col. 4, line 55 .) This reference describes the method by which the lure bodies are allowed to dry after the coating has been applied to their surfaces. The use of the plural in this context is easily construed as referring to the method for drying on a single rack the bodies for several lures and is not inconsistent with the Court's conclusion that each lure has only one body.

In one place in the specification, "body" is used to refer to the "head" of the lure-commonly tear drop-shaped-which is the part of the lure molded around the shank. ('160 Patent, col. 1, lines 27-34.) This language arguably implies that only the tear drop-shaped head of the lure is the body and therefore, elements other than the head are not part of the body. However, the definition of "body" in the specification expressly includes other swivelly attached elements; thus, these elements may not be excluded from the term.

In sum, claim 1 is construed to mean that each fishing lure has one body; said body consisting of a tear drop shaped head element and any form of blade, spoon or other vibrating or swivelling elements attached to the lure to further attract the attention of the fish.

B. "resin coating"

Two aspects of this term are in dispute. The disputes require the Court to resolve the following issues: (1) whether claim 1, read in light of the specification and prosecution history, should be construed as requiring the coating to be any particular thickness and; (2) whether the resin coating must be a two-part mixture.

1. Coating Thickness

Defendants argue that this term should be construed to include a limitation requiring the thickness of the

coating to be at least three times the maximum glitter particle dimension (the "3x thickness"). They acknowledge that no such limitation is included in the language of the claim. However, they contend that Nichols surrendered coatings less than the 3x thickness during prosecution and, therefore, Nichols should not now be allowed to reclaim those smaller thicknesses in order to pursue infringement claims.

Nichols presents three arguments in response. First, it argues that it is improper for the Court to read limitations from the specification and prosecution history into the claims. Second, it argues that the doctrine of claim differentiation creates a presumption against reading claim 1 so as to render it identical to claim 2. Third, it argues that the Defendants have taken the prosecution history out of context and that any thickness limitation derived from the prosecution history does not apply to claim 1.

Before addressing Nichols' arguments, the Court will first review the specification and the prosecution history. The purpose of the invention is to produce a fishing lure whose surface has a three-dimensional appearance, which is believed to make the lure more attractive to fish. ('160 Patent, col. 2, lines 14-20.) As conceded in the patent, the application of glitter to fishing lures is not a new idea. ('160 Patent, col. 1, lines 46-55.) Previous patents taught that glitter could be applied by dusting, sprinkling, or spraying the glitter onto the surface of a lure which had been covered with wet glue. ('160 Patent, col. 1, lines 46-55.) According to the '160 patent, the problem with previously known methods of applying glitter is that the glitter particles all lay on the surface and were easily scratched off. ('160 Patent, col. 1, lines 56-59.) Furthermore, most of the glitter applied by this method lay flat on the surface thereby reflecting light only outwardly from the surface of the lure. ('160 Patent, col. 1, lines 59-64.)

The '160 patent purports an improvement over the prior art with its method for dispersing small glitter particles throughout a resin coating which is then applied to the lure. This method is claimed to be superior to the prior art for many reasons, but primarily because it creates the three-dimensional appearance that was lacking in previous lures.

The three-dimensional appearance is achieved by applying to the surface of the lure a resin coating that contains glitter particles which face-and thus reflect light-in many different directions. This feature is what distinguishes the '160 patent from the prior art. In other words, a lure with a coating applied in accordance with the '160 patent will not have its glitter particles facing-and thus reflecting light-primarily outward; instead, the glitter particles will face-and thus reflect light-"in a very large plurality of directions" thus imparting a three-dimensional appearance to the surface. ('160 Patent, col. 2, line 13.)

The specification further states, in the preferred embodiment, that the coating should be applied to a thickness that is at least three times the size of the glitter particles. ('160 Patent, col. 4, lines 44-46.) The specification explains why the coating must be three times the size of the glitter particles:

By the thickness of the coating being three times the maximum size of the glitter particles, the glitter particles can be oriented in all directions within the coating. Since the glitter particles are literally flat flakes, *if the thickness is not three times the size of the glitter particles, the glitter particles will tend to lay flat*. If the glitter particles lay flat, then the reflective effect would be two dimensional rather than three dimensional and, again, it would not give the appearance of live bait. ('160 Patent, col. 4, lines 46-54.)

What is clear from this language is that the 3x thickness is not merely an optional feature of the preferred embodiment, but a requirement crucial to achieving the object of the invention-a three-dimensional appearance. Therefore, in order to be consistent with the specification and the preferred embodiment, the

term "resin coating" must be construed to mean that the coating thickness has to be at least three times the maximum glitter particle dimension. As the specification states, if the thickness is less than the 3x thickness, then the primary innovation of the invention will not be achieved.

That this construction is the correct one is also clear from the prosecution history. The language of claims 1-4 as presented in Nichols' original application is identical in all relevant aspects to the language in the final patent, including dependent claims 2 and 4 which specify that the coating thickness must be at least three times the glitter size. However, claims 1-4 were initially rejected in their entirety by the patent examiner who determined that any innovation as to coating thickness and glitter particle size was obvious from the prior art. (Examiner's Action, Jan. 17, 1992, at Strike King's Br. filed July 17, 2000 App. p. 60.) In response to the patent examiner's objection, Nichols inserted into the specification the passage quoted above to explain why the 3x thickness is not merely an obvious design choice, but is instead a patentable improvement upon the prior art:

With the [above] amendment to the specification...the particular problem being solved and the stated purpose is now clearly spelled out in the specification. If the metallic flakes are too large, they will migrate to one end of the lure body upon rotation of the lure body. *Further, the thickness of the coating must be approximately three times the size of the reflective particles or otherwise the particles, which are basically flat flakes of material will have a tendency to lay flat*. If the reflective particles lay flat, they do not have the three dimensional effect and will not appear as live bait. (First Amendment, Mar. 23, 1992, at Strike King's Br. filed July 17, 2000 App. p. 68.)

Nichols points out that this response to the patent examiner's objection addresses two elements; glitter particle size and coating thickness. It argues that the glitter particle size discussion is directed at the allowance of claim 1 and the thickness discussion is directed at allowance of claim 2; therefore, the 3x thickness is applicable *only* to claim 2 and should not be construed as a limitation on claim 1.

The Court finds this an unconvincing attempt to parse the language of the amendment. Nichols' characterization of the prosecution history avoids the very construction that was offered in order to overcome the examiner's objections. The word "further" linking the two elements is used in the conjunctive sense and not, as Nichols suggests, in the disjunctive sense. Thus, the language of the amendment makes clear that the 3x thickness, *in combination with glitter size,* is necessary to achieve a three-dimensional appearance. This point is emphasized again later in the amendment:

[Because the proposed small size of the glitter particles] solves a particular problem that exists in present lures that do not reflect and disperse light in all directions, it is submitted that claims 1-6 now patentably distinguish over [the prior art]. Further, none of the [prior art] references suggest the thickness of the coating would be three times the maximum dimension of the glitter particles. Again, a thickness of three times is necessary so that the glitter particles will be oriented in all directions to give a three dimensional effect. (First Amendment, Mar. 23, 1992, at Strike King's Br. filed July 17, 2000 App. p. 69.)

The Court concludes that the specification and prosecution history indicate that Nichols relinquished coverage of thicknesses less than the 3x thickness in response to the patent examiner's objections. The patent cannot now be construed to recapture this subject matter.

Nichols argues that imposing the 3x thickness limitation improperly reads limitations from the specifications and prosecution into the claim. This argument conflicts with established case law and the basic principles of

claim construction which indicate that the specification is "always highly relevant" and that the court must reject interpretations that were disclaimed during prosecution. *See, e.g.,* Vitronics, 90 F.3d at 1582-83; Southwall Technologies, Inc. v. Cardinal IG Co., 54 F.3d 1570, 1576 (Fed.Cir.1995). The cases cited by Nichols do not support its position. None of them stand for the proposition, as Nichols' argument implies, that the Court should ignore the clear meaning of the specification. Indeed, they all indicate that proper analysis of a disputed term includes a review of the specification. For example, in both *Burke, Inc. v. Bruno Indep. Living Aids, Inc.* and *Johnson Worldwide Associates, Inc. v. Zebco Corp.,* the court did not limit the claim language because it determined, *after thorough review of the specification,* that the specification did not support a limited construction. *See* Burke, Inc. v. Bruno Indep. Living Aids, Inc., 183 F.3d 1334, 1340-41 (Fed.Cir.1999); Johnson Worldwide Associates, Inc. v. Zebco Corp., 175 F.3d 985, 990-91 (Fed.Cir.1999). In this case, the Court is not reading an extraneous limitation from the specification into the language of the claim; to the contrary, the Court is construing claim 1 consistently with the essential purpose of the invention and with what the patentee has unambiguously represented to the public is the proper scope of the patent.

Finally, Nichols argues that under the doctrine of claim differentiation, it is improper to read into a broader claim limitations that are present in a narrower claim. In this case, dependent claim 2 expressly includes the 3x thickness limitation, and as such, is narrower than claim 1. Thus, Nichols argues, the doctrine of claim differentiation prevents the Court from reading the same limitation into claim 1.

However, "the doctrine of claim differentiation cannot broaden claims beyond their correct scope, determined in light of the specification and the prosecution history." Multiform Desiccants, Inc. v. Medzam, Ltd., 133 F.3d 1473, 1480 (Fed.Cir.1998). Accepting Nichols' argument would require the Court to ignore the unambiguous implication of the specification and prosecution history: that coating thicknesses less than the 3x thickness are not covered by the patent. Nothing in the cases cited by Nichols supporting the doctrine of claim differentiation permits any other conclusion. In *Modine Mfg. Co. v. United States Int'l Trade Comm'n,* cited by Nichols, the court in fact read into a broader claim a numerical limitation from a narrower claim, the doctrine of claim differentiation notwithstanding, because any other construction would have been inconsistent with the specification and prosecution history. *See* Modine Mfg. Co. v. United States Int'l Trade Comm'n, 75 F.3d 1545, 1551-54 (Fed.Cir.1996). And in *D.M .I., Inc. v. Deer & Co.,* the court, while acknowledging the importance of claim differentiation nevertheless confirmed that a patentee may not recapture ground relinquished during prosecution. *See* D.M.I., Inc. v. Deer & Co., 755 F.2d 1570, 1574 (Fed.Cir.1985).

In sum, the term "resin coating" is construed to mean that the coating thickness must be at least three times the maximum glitter particle dimension.

2. Two-Part Mixture

Defendants argue that "resin coating" should include the additional limitation that the resin consists of a "two-part mixture." In support of their argument, Defendants point to several places in the specification where the resin coating is described as a two-part mixture of a liquid resin and a hardener. Plaintiffs do not address this argument except to summarily state that the limitation is not permissible because it is not present in the claim language.

The Court concludes that the resin coating claimed by the patent must be a two-part mixture. The Abstract, which is a succinct description introducing the invention, states that the glitter particles are inserted in a

liquid mixture of 1) a resin and 2) a hardener. The Summary of the Invention also indicates that the resin coating is "produced by mixing a liquid resin with a hardener." ('160 Patent, col. 2, line 33.) Furthermore, the mixture apparently serves a distinct purpose important to achieving the object of the invention: the combination of the two ingredients initially produces a highly viscous liquid which facilitates the uniform distribution of the glitter particles. ('160 Patent, col. 2, lines 50-53.) After the resin coating containing the glitter particles is applied to the surface of the lure, by brushing or dipping, it eventually hardens into a solid. ('160 Patent, col. 2, lines 53-61.) The lure must be rotated during the drying period so that the glitter particles maintain their even distribution and do not migrate to one side of the lure under the force of gravity. ('160 Patent, col. 2, lines 61-65.)

The preferred embodiment describes how the coating is produced:

To produce such coating, a liquid epoxy resin and a hardener for such resin are mixed to produce a chemical reaction resulting in converting the liquid mixture into a solid by passing through a highly viscous liquid stage. ('160 Patent, col. 4, lines 5-10.)

The preferred embodiment goes so far as to suggest specific commercially-available liquid resins and hardeners.

The Court recognizes that a patent is not necessarily limited to the preferred embodiment. However, "[w]hether an invention is fairly claimed more broadly than the 'preferred embodiment' in the specification is a question specific to the content of the specification [and] the context in which the embodiment is described ." Wang Laboratories, Inc. v. America Online, Inc., 197 F.3d 1377, 1383 (Fed.Cir.1999). In this case, the preferred embodiment describes the invention itself, at least with respect to the composition of the coating. Accordingly, Nichols is not entitled to a broader interpretation than is described in the preferred embodiment. The Court concludes that the term "resin coating" is properly interpreted as meaning a two-part mixture.

C. "entire outer surface"

Nichols asserts that the term "entire outer surface" should be construed to mean "the greater part of the surface which is exposed to light." In offering this construction, Nichols seeks to modify the term in two ways: first, by altering "entire" to mean something less than the whole and second, by defining "outer surface" of the lure body to mean only that part of the lure body that is exposed to light. The Court addresses each element separately below.

1. "entire"

In its pre-hearing *Markman* brief, Nichols explained that accessories such as plastic eyes, skirts, hooks, and shanks are often attached directly to the bodies of fishing lures. These accessories create small areas on the lure body that may not be covered by the glitter-containing coating. Thus, Nichols argues that "entire" cannot mean that every bit of surface area is covered by the coating; instead, it must mean that only the "greater part" of the surface of the body is covered by the coating.

Unlike the term "resin coating" construed above, the term "entire" is not ambiguous, nor does it appear from the specification that the patentee has qualified the term in any way. To the contrary, a plain reading of the specification shows that the word "entire" is intended in its ordinary sense. "Entire" means "having no element or part left out" or "complete in degree." Webster's Ninth New Collegiate Dictionary 415 (1987).

FN2 According to the summary, the "resin coating is applied to *all* external surfaces of the body of the lure." ('160 Patent, col. 2, lines 32-33.) Accordingly, claim 1 must be construed to mean that the outer surface of the body of the lure must be completely covered by the coating. In other words, no part of the external surface may be left uncovered by the resin coating.

FN2. Although dictionaries constitute extrinsic evidence, they are worthy of special note and judges may rely on them when construing claim terms so long as the dictionary definition does not contradict any definition found in or ascertained by a reading of the patent documents. *See* Optical Disc Corp. v. Del Mar Avionics, 208 F.3d 1324, 1335 (Fed.Cir.2000) (citing Vitronics, 90 F.3d at 1584 n .6).

Nichols argues that such an interpretation creates a situation wherein a lure manufacturer may avoid infringement by simply leaving a small portion of the lure uncovered by coating material. However, the Court may not consider the fact that the patentee in retrospect would have inserted qualifying terms had he considered the implications of employing absolute language. No matter how great the temptations of fairness or policy making, courts are limited to interpreting claims, and are not permitted to redraft them. *See* Quantum Corp. v. Rodime, PLC, 65 F.3d 1577, 1584 (Fed.Cir.1995) (citing Autogiro Co. of America v. United States, 384 F.2d 391, 396-96 (Ct.Cl.1967)).

2. "outer surface"

Nichols argues that the term "outer surface" means only that part of the surface of the lure that is exposed to light. In support of this argument, Nichols explains that the object of the invention is to produce a light-reflecting coating that reflects substantially all of the light incident on the body of the lure. Thus, Nichols argues, portions of the body of the lure that may not receive light because they are covered, for example, by a skirt of trailing plastic streamers, are not the "outer" surface of the body. In other words, only the portions of the lure body that are exposed to light constitute the "outer" surface.

Although this argument has superficial appeal, close examination reveals that it is nor consistent with either the claim or the specification. First, even assuming that parts of the lure that are covered by a loose skirt of streamers are not exposed to light, which is by no means obvious, Nichols' interpretation is not supported by the language of the claim. The purpose of the term at issue is to indicate where the resin coating is to be applied-over the "entire outer surface"; it does not address the light-reflecting properties of the coaring. ('160 Patent, col. 5, line 25.) By contrast, it is the following clause that explains how the coating reflects light-by glitter particles. It states: "said *glitter particles* being substantially uniformly dispersed throughout said coating, *whereby substantially all light incident on said body is reflected*." ('160 Patent, col. 5, lines 31-33.) This language demonstrates that the light-reflecting ability of the lure is a function of the amount of glitter in the resin coating and not a function of where the coating is applied.

When the claim is viewed in this way it is clear that Nichols' argument collapses two distinct elements of the claim: one, that the body is covered by the coating, and two, that the glitter in the coating reflects light. Thus, Nichols attempts to modify the first element by inferring a limitation applicable to the second, or in other words, to redefine "outer" surface by reference to the light-reflecting characteristic of the glitter. However, the Court is restricted to interpreting the words of the claim and to accept Nichols' construction would be to expand the claim beyond what the language supports.

Second, Nichols' construction is inconsistent with the specification. Figures 1 and 2, and the drawing on the

first page of the patent all depict a lure having a skirt comprised of "a plurality of plastic streamers." ('160 Patent, figs. 1, 2; '160 Patent, col. 3, lines 48-49.) The drawings show a skirt placed over portions of the body that have been covered by the glitter-containing coating (indeed, the skirt covers the entire head of the lure). Thus, it cannot be the case that coating is only applied to those areas of the lure that are not covered by a skirt.

In sum, the Court concludes that no modification of the term "outer surface" is warranted.

D. "a large plurality"

"A large plurality" is the term used to describe the quantity of glitter the coating contains. The parties offer differing constructions. Nichols asserts that the term is not ambiguous and proposes the dictionary definition: "a large number or quantity." Defendants on the other hand contend that the term "a large plurality" is inherently ambiguous and propose the following construction which they argue flows from the language of the claim and the specification: "there must be sufficient glitter to cover essentially the entire light receiving surface of the lure body so that substantially all light incident on the lure body is reflected."

The Court agrees that the term "a large plurality" is ambiguous. Nichols' proposed construction, essentially a synonym, is equally vague. Defendants' proposed construction is more reasonable in view of the specification.

The specification identifies a perceived problem with the prior art; namely, that the lures did not reflect enough light because the number and spacing of glitter particles was insufficient. ('160 Patent, col. 1, lines 64-67, col. 2, lines 1-3.) The patentee's solution to this problem is to include enough glitter in the coating so that the coating reflects "substantially all of the light incident on the body." ('160 Patent, col. 2, lines 10-12.) Thus, the amount of light reflected is a function of the number of glitter particles in the coating. Nichols' assertion that light is also reflected by the resin, and therefore reflection is not a function of the number of glitter particles, is contradicted by the language of the claim. The claim clearly states that the resin coating itself is transparent. ('160 Patent, col. 5, lines 24-25.) Therefore, all light that is reflected must be reflected by glitter particles embedded in the coating.

Accordingly, the term "a large plurality" is properly construed to mean that the coating must contain a sufficient number of glitter particles to reflect substantially all light incident on the portions of the body that are covered by the coating. FN3

FN3. The Court has modified Defendants' proposed construction to remove extraneous limitations on elements which are not the subject of dispute in this litigation.

E. "a size not exceeding 0.01 inches in any direction"

This term describes the maximum size of the glitter particles. Defendants' position is that the term is ambiguous and they urge the Court to adopt the following construction: "the distance between the two most widely separated points on the periphery of the glitter particles must not exceed 0.01 inches." Nichols asserts that the term is not ambiguous and does not offer a proposed construction.

The Court finds that there is some ambiguity in the term. As Defendants point out, it is not clear whether "direction" refers to diagonal dimension, or whether it refers to side dimension. The Court concludes that

Defendants' proposed construction comports with the language of the claim and is the appropriate interpretation. FN4

FN4. Nichols did not dispute Defendants' proposed construction either at the hearing or in its briefs, and has offered no alternative.

F. "substantially uniformly dispersed throughout said coating"

This term describes how the glitter is distributed within the coating. Defendants urge the Court to adopt a construction that specifies that the glitter particles must be distributed throughout the "thickness and entirety" of the coating.

However, the term "throughout" is unambiguous and thus, the ordinary meaning must prevail. The ordinary meaning of "throughout" is "in or through every part" or "everywhere." Webster's Ninth New Collegiate Dictionary 1230 (1987). Thus, the patent requires the glitter to be dispersed through every part of the coating. The specification neither contradicts nor adds to the understanding of this term; therefore, the Court declines to impose any limitation. Although the term is not as precise as it might be, Defendants' proposal to clarify it is beyond the scope of claim construction. *See* PPG Indus. v. Guardian Indus. Corp., 156 F.3d 1351, 1355 (Fed.Cir.1998) (holding that court may not, under rubric of claim construction, add clarification beyond that supported by the specification merely to facilitate claim construction).

G. "substantially all light"

This term describes how much of the light that hits the coating is reflected. The parties offer differing constructions. The Defendants propose to substitute the phrase "essentially all light"; Nichols proposes to substitute "a large portion of but not all of the light which falls on the body of the lure."

The Court concludes that the term is not ambiguous, thus the ordinary meaning should prevail. The ordinary meaning of the term is "all but an insignificant amount." Atmel Corp. v. Information Storage Devices, Inc., 997 F.Supp. 1210, 1229 (N.D.Cal.1998), *rev'd on other grounds by* 198 F.3d 1375 (Fed.Cir.1999).

H. "dispersed in all directions"

This term describes in which directions light hitting the coating is reflected. Defendants propose that the word "all" be given its ordinary meaning because there is no basis to depart from the standard presumption in favor of the ordinary meaning. The Court disagrees. In this case, the inventor has not used the word "all" in its ordinary sense, but instead has imparted a special meaning. This special meaning is apparent in the specification, as well as in the words of the claim at issue.

First, from the claim itself it can be seen that the term "dispersed in all directions" does not stand alone, but is part of a clause that works as a unit to describe where and how the glitter particles are positioned within the coating. The first part of the clause-"whereby substantially all light incident on said body is reflected"-indicates that the glitter particles are evenly distributed throughout the coating and in such close proximity to each other that all but an insignificant amount of light is reflected. The second part of the clause-the one at issue-describes how the flat glitter particles are oriented within the coating. The term states that the glitter is oriented so that light incident on the coating is reflected in "all directions."

There is an infinite number of directions. If light is to be reflected in "all" of them, then the ordinary meaning of the word "all" would require a finite number of glitter particles to be oriented upon an infinite number of planes. This peculiar implication of the ordinary meaning renders unclear the meaning of the term "in all directions" in the context of an invention defined as having only a finite number of glitter particles. Thus, it is appropriate to refer to the specification to ascertain its meaning. *See* Johnson Worldwide Assoc., Inc. v. Zebco Corp., 175 F.3d 985, 990 (Fed.Cir.1999) (disputed term invites reference to the specification when term chosen by patentee deprives claim of meaning).

Furthermore, it appears that the patentee did not use the term "all" in its ordinary sense, requiring light to be dispersed in an infinite number of directions, but rather has set forth a different definition. The specification states that light is reflected "in a very large plurality of directions." ('160 Patent, col. 2, line 12.) Although this term itself is somewhat ambiguous, fortunately the patentee defines exactly what is meant by "a very large plurality of directions" later in the specification: light is reflected from the coating at "as many different angles... as there are [glitter] particles." ('160 Parent, col. 3, line 5.) The Court is convinced that this interpretation is the one mandated by in view of the claim language and the specification.

III. CONCLUSION

The Court concludes that the disputed claim terms are properly construed as follows:

Disputed Term	Proper Construction
body	each fishing lure has one body; said body consisting of a teardrop-shaped head element and any form of blade, spoon or other vibrating elements attached to the lure to further attraction the attention of fish
resin coating	the resin coating must be at least three times the maximum glitter particle dimension
	the resin coating must be a two part mixture consisting of a liquid resin and a hardener
entire outer surface	the outer surface of the body of the lure must be completely covered by the coating; no part of the external surface may be left uncovered by the resin coating
a large plurality	there must be sufficient glitter to cover essentially the entire light receiving surface of the lure body so that substantially all light incident on the lure body is reflected
a size not exceeding 0.01 inches in any direction	the distance between the two most widely separated points on the periphery of the glitter particles must not exceed 0.01 inches
substantially uniformly dispersed throughout said coating	substantially uniformly dispersed throughout said coating

substantially all light incident on said body is reflected	all but an insignificant amount of light incident on the coating is reflected
dispersed in all directions	light is dispersed in as many directions as there are glitter particles

N.D.Tex.,2000.
Nichols v. Strike King Lure Co.

Produced by Sans Paper, LLC.