United States District Court,
N.D. California, San Jose Division.

FRESH EXPRESS, INC,
Plaintiff.
v.
BRAVO PACKAGING, INC., et al,
Defendants.

No. C 01-20743 RMW

May 13, 2002.

Robert Scott Wales, Korula T. Cherian, Howrey Simon Arnold & White, Kevin T. Lemond, Igor Shoiket, Townsend and Townsend and Crew LLP, San Francisco, CA, for Plaintiff.

CLAIM CONSTRUCTION ORDER

RONALD M. WHYTE**, District Judge.**

I. INTRODUCTION

This is a patent infringement action. Plaintiff Fresh Express, Inc. alleges that defendants Bravo Packing, Inc. and Elioco Produce, Inc. infringe United States Patent No. 6,196,237 B1 (the '237 Patent"). The '237 Patent generally relates to methods for washing cores of cored lettuce heads. Only two claims are asserted: independent claim 1 and dependent claim 3.

Following briefing by the parties, the court conducted a claim construction hearing on April 25, 2002 at which each party presented its arguments. This order shall interpret the disputed terms of the asserted claims. Having considered the initial and supplemental papers submitted by the parties and the arguments of counsel during the claim construction hearing, the court interprets the disputed claim terms as set forth below.

II. CLAIM CONSTRUCTION

In the following chart, the first column recites the asserted claims and identifies the disputed claim terms in bold. The second column contains the court's claim construction of the disputed claim terms.

CLAIM LANGUAGE	CONSTRUCTION
'237 Patent	
1. A method of washing a cored head of lettuce comprising the steps of: placing said cored lettuce head in a position such that the cored hole faces	1. **Downwardly with respect to an upwardlydirected spray:** No construction is needed. A vertical orientation is not necessary.

downwardly with respect to an upwardly-directed spray of an aqueous solution;	
directing said spray of an aqueous solution upwardly into said cored hole for a time and at a pressure sufficient to wash said cored hold; and	2 **Directing said spray of an aqueous solution upwardly:** No construction is needed. A vertical orientation is not necessary.
pushing said cored lettuce head from said position and onto a conveyor for said cored Lettuce head.	3. **Pushing said cored lettuce head from said position:** Pushing means propelling, exerting force against something to induce movement. The term is not limited to force exerted by an apparatus, but does exclude striking.
3. The method of claim 1 further comprising providing a **chamber** for said aqueous solution and providing a **pressurizing medium** to said chamber to pressurize said aqueous solution in said chamber and to **propel [sic, direct]** said aqueous solution into said cored hole.	1. **Chamber:** No construction needed. 2. **Pressurizing medium:** No construction needed. The claim is not limited to pressurized gas. 3. **Propel:** The word "propel" was changed to "direct" by an Examiner's amendment that is not reflected in the claim language as issued. "Direct said aqueous solution" needs no construction.

III. DISCUSSION

The primary disputed claim terms are: "downwardly" and "upwardly" (and limitations including those terms), "pushing," "chamber," "pressurized medium," and "propel." Each of the disputed claim terms will be addressed in turn.

A. *Downwardly and Upwardly*

The parties dispute the meanings of the terms "downwardly" and "upwardly" as they appear in the claims. The principal dispute arises out of defendants' contention that the terms require a vertical orientation, i.e., straight up and straight down. Defendants argue that such a construction is necessary because the vertical orientation is the only embodiment disclosed in the patent, and in order to save the patent from invalidity, the patent must be construed with the vertical orientation implied from the disclosed embodiment. Defendants' argument is not persuasive and defendants have not established that the patent would be invalid if the claims were not limited to the method practiced by the disclosed preferred embodiment. The terms are clear and were given no special definition in the specification or prosecution history. "Downwardly" and "upwardly" need no construction.

B. *Pushing*

The parties dispute the meaning of the term "pushing" as used in claim 1's "pushing said cored lettuce head from said position and onto a conveyor for said cored lettuce head." Plaintiff contends that the ordinary meaning of the term is "pressing against [the lettuce head] with force in order to move" the cored lettuce head away from its position. Defendants contend that the term should be construed to mean "moving the lettuce head upwardly from a horizontal position using steady mechanical force or pressure" and that the term "excludes striking." Defendants' proposed construction, however, is too restrictive and would improperly limit the scope of the claim to the method as performed on the disclosed embodiment. Ultimately, the primary disputes are whether the term should be limited to a steady mechanical force that moves the cored lettuce, *i.e.,* whether the claim encompasses movement of the lettuce head by a human being, and whether the term excludes inducing movement by striking.

Turning first to the claim language, the claim recites "pushing said cored lettuce head from said position and onto a conveyor for said cored Lettuce head." The word "pushing" has an ordinary and common meaning, and is not a term of art in any relevant industry. Both parties have submitted dictionary definitions to support their proposed claim constructions, all of which define "push" as the exertion of force to cause movement. The dictionaries each offer several definitions of the term, all of them including the exertion of force or pressure, and some of them including the concept of exerting "steady pressure in contact." *See* Webster's Third New International Dictionary at 1848, Lorenz Decl. Exh. 10. Two of the dictionaries include a definition of "push" which includes exerting pressure "without striking." *See* Webster's Collegiate Dictionary, 10th ed. at 950 ("to press against with force in order to drive or impel, to move or endeavor to move away or ahead by steady pressure without striking, to thrust forward, downward, or outward"), Lorenz Decl. Exh 14 and Wales Decl. Ex. 19, *and* The New International Dictionary of the English Language, 2d ed., Lorenz Decl. Exh. 15.

The dictionaries demonstrate that "push" has many similar meanings, with various subtle nuances. Webster's New World Dictionary of the American Language, for example, lists synonyms for "push" and their distinctions:

push implies the exertion of force or pressure by a person or thing in contact with the object to be moved ahead, aside, etc. [to *push* a baby carriage]; **shove** implies a pushing of something so as to force it to slide along a surface, or it suggests roughness in pushing [*shove* the box into the corner]; to **thrust** is to push with sudden, often violent force, sometimes so as to penetrate something [he *thrust* his hand into the water]; **propel** implies a driving forward by a force that imparts motion [the wind *propelled* the sailboat].

Id. at 1155, Lorenz Decl. Ex. 11. The term "push" has many possible meanings differing generally in the degree of force used, but common throughout is the concept of exerting force against something to induce movement. Thus, the ordinary meaning of the word "push," as confirmed by the dictionaries, is to exert force against an object to induce movement.

None of the dictionaries, however, define pushing to include "striking," a term which carries a different connotation than does "pushing." "Striking" connotes the exertion of sudden, strong or violent force against an object and is not a synonym for "pushing." In addition, nothing within the definitions of "push" or "pushing" requires the use of mechanical apparatus. Accordingly, the ordinary meaning of the word "pushing" is the exertion of force against something to induce movement, but does not include striking and is not limited to inducing movement by mechanical force.

The court next turns to the specification to determine if the applicant used or defined the term in a way to

give the term a particular meaning. The specification contains four references to the movement of the cored lettuce head from the washing apparatus to the conveyor and uses three different words to describe the movement: "pushing," "propelling" and "delivering." First, the Abstract describes the washing method, ending with "then pushing the heads from that position onto a conveyor." '237 Patent, Abstract. Second, the specification also describes the washing apparatus, including a "holder" which is movable upwardly to a position 45 (deg.) to 75 (deg.) from horizontal, the movement of which "unseats the cored area of the lettuce head from the guide and propels the lettuce head onto a conveyor that carries the cored, washed lettuce head from the washing apparatus." '237 Patent, 1:36-40. Third, again in the course of describing the apparatus, the specification states that air pressure is delivered to a cylinder to "to move the platform **104,** propelling a cored lettuce head onto a conveyor (not shown)." '237 Patent, 3:16-18. Finally, the specification describes the sequence of operations in the washing of a cored lettuce head by the disclosed apparatus, ending with "platform **104** moves upwardly as the rod clevis **110** connected to piston **109** moves upwardly to deliver lettuce head **300** onto a suitable lettuce head conveyor belt." '237 Patent, 4:1-3. From these references in the specification, "pushing" is used somewhat interchangeably with "propelling" and "delivering." No special or limiting definition of the term is used in the specification.

Finally, the court considers the prosecution history to determine whether the applicant limited the meaning of "pushing" in any material manner. Here, the prosecution history reveals that during the course of prosecution, the applicant limited the term "pushing" to mean "propelling." The term was specifically added during the course of prosecution to overcome a rejection of the claim as initially proposed. Originally, the claim recited a method that included the final step of "displacing said cored lettuce head from said position." The claim was rejected in part for lack of enablement on the basis that the only method enabled and supported by the specification involved "propelling" the cored lettuce head. Wales Dec. Ex. 11, March 29, 2000 Office Action at 3-4. The applicant overcame the rejection by amending the claim language to recite "pushing said cored lettuce head" instead of "displacing said cored lettuce head" and by successfully arguing that "pushing" and "propelling" are synonymous terms. Wales Decl. Exh. 13, April 21, 2000 Amendment at 2, 4-5. The Examiner agreed and eventually allowed the claim.

Subsequently, the prosecution history demonstrates that "pushing" was used more than merely synonymously with propelling, but that the two terms had identical meanings. Specifically, in addition to the "pushing the cored lettuce head" claim, the applicant also proposed an additional substantially identical claim which used "propelling the cored lettuce head." The Examiner rejected the "pushing" claim under 37 C.F.R. 1.75 as a substantial duplicate of the "propelling" claim, stating that the two claims "are the same and represent duplicative claims since the term 'pushing' is equivalent and has the same meaning as that of 'propelling.' " Wales Decl. Exh. 14, July 17, 2000 Office Action at 3. In response, the applicant did not traverse the rejection, canceled the "propelling" claim and proceeded with the "pushing" claim. Accordingly, based on the prosecution history, "pushing" as used in claim 1 means "propelling."

The remaining issue is whether the pushing step of the claimed method includes inducing movement of the cored lettuce head by hand or is instead limited to pushing by mechanical means. Nothing within the specification or prosecution history suggests that the claimed method could be performed by hand. To the contrary, the original application and the prosecution history are all directed at the washing apparatus and the corresponding method. Nevertheless, it is the claim language that defines the scope of a claim, and while the claims must be read in view of the disclosures in the specification, it is improper to import limitations from the specification into the claims. Moreover, a method claim is not limited to the particular mode disclosed in the specification. Cochrane v. Deener, 94 U.S. 780, 786-88, 24 L.Ed. 139 (1877); Smith v. Snow, 294 U.S. 1, 11, 55 S.Ct. 279, 79 L.Ed. 721 (1935). In this case, the language of the claim is broad and

is not, by its terms, restricted to being practiced by a mechanical device. There is nothing express or implied in either the claim language, the specification, or the prosecution history to suggest that the inventor limited the scope of the claimed method to one which could be performed only by mechanical apparatus. While nothing in the specification suggests that the claimed method can be performed by hand, there is also nothing in the specification or prosecution to suggest that the only manner in which the claimed method could be performed was by mechanical means. Thus, the court concludes that the pushing step of the claimed does not implicitly require pushing by mechanical means.

C. *Chamber*

The term "chamber" does not require construction. The ordinary meaning of "chamber" is an enclosed space or cavity. Defendant proposes that the term should be construed to mean "an enclosed space or compartment in a piece of mechanism." The latter phrase, while finding support in the definition provided by the Oxford English Dictionary, is not necessary to defining a chamber. The term is not necessarily limited to an enclosed space or compartment "in a piece of mechanism."

D. *Pressurizing medium*

The term "pressurizing medium" also does not require construction. A person of ordinary skill in the art would understand the term to mean a means through which pressure is applied. The term is not limited to pressurized gas.

E. *Propel*

Finally, the term "propel" as recited in Claim 3 requires some discussion. Both parties' proposed claim constructions address the term "propel," with plaintiff contending that propel is synonymous with push and defendant contending that propel must be construed to mean "moving the aqueous solution upwardly via pressurized gas." The claim, however, was modified by an Examiner's amendment following a telephone interview with applicant's counsel, changing "propel said aqueous solution into said cored hole" to "direct said aqueous solution into said cored hole." Wales Dec. Exh. 18, November 16, 2000 Notice of Allowability at 2. In their supplemental letter briefs submitted in response to the court's inquiry on the effect of the Examiner's amendment, both parties conceded that the as-issued language is erroneous and that the claim was amended to recite "direct said aqueous solution." Accordingly, Claim 3's final limitation is "to direct said aqueous solution into said cored hole." The language is clear and requires no construction.

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