United States District Court,
N.D. Iowa, Cedar Rapids Division.

PRIMOS, INC., a Mississippi Corporation,
Plaintiff.
v.
HUNTER'S SPECIALTIES, INC. an Iowa Corporation, David Forbes, Carmen Forbes, and Wayne Carlton,
Defendants.

March 15, 2004.

Brett L. Foster, L. Grant Foster, Holland & Hart, LLP, Salt Lake City, UT, Brian J. Fagan, Eric W. Lam, Larry G. Gutz, Moyer & Bergman, PLC, Cedar Rapids, IA, for Plaintiff.

David A. Hacker, Stephen J. Holtman, Simmons Perrine Albright Ellwood, Cedar Rapids, IA, Edmund J. Sease, Jeffrey D. Harty, Mark D. Hansing, McKee, Voorhees & Sease, PLC, Des Moines, IA, Gregg I. Anderson, Greenberg Traurig LLP, Denver, CO, for Defendants.

ORDER

JOHN A. JARVEY**, United States Magistrate Judge.**

This matter comes before the court pursuant to the defendants' renewed oral request for *Markman* claim construction of the term "engages" or "engaging." In his July 24, 2002 order, Judge Melloy stated that "a 'second roof-of-mouth engaging portion' is not particularly in dispute between the parties. Having denied Defendants' validity challenges with respect to this element, it is clear that this language requires that a portion of the claimed device-aside from the back flexible tape edge-come into contact with the roof of the user's mouth when in use for calling game." On June 3, 2003, the defendants filed a motion for *Markman* claim construction of "engages." Judge Reade declined to further construe the term "engages" and stated that "the court will construe the claim, if necessary, at trial." The defendants now again ask this court to construe the term "engages."

Claim 21 of the '567 patent provides:

A game call for use inside a person's mouth, comprising:

a U-shaped frame;

a yieldable reed spanning across the U-shaped frame;

a first roof-of-mouth engaging yieldable sealing portion carried by the frame;

a second roof-of-mouth engaging portion extending upwardly from the frame, the second portion being spaced away from the first portion, the first and second portions defining a predetermined orientation of the U-shaped frame inside the mouth relative to the roof of the mouth.

Claim construction is a matter of law. Markman v. Westview Instruments, Inc., 517 U.S. 370, 384-91 (1996). It is the "process of giving proper meaning to claim language." Abtox, Inc. v. Exitron Corp., 122 F.3d 1019, 1023 (Fed.Cir.1997). In construing a claim, the court considers the intrinsic evidence in the record, specifically, the language of the claims themselves, the patent specification or description, and the prosecution history. Markman v. Westview Instruments, Inc., 52 F.3d 967, 979 (Fed.Cir.1995) (citations omitted). Intrinsic evidence is "the most significant source of the legally operative meaning of disputed claim language." Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed.Cir.1996).

"Extrinsic evidence consists of all evidence external to the patent and prosecution history, including expert and inventor testimony, dictionaries, and learned treaties." Markman v. Westview Instruments, Inc., 52 F.3d at 980. A trial court may hear and rely on expert testimony on an ultimate claim construction question in cases in which the intrinsic evidence does not answer the question. *See* Vitronics Corp. v. Conceptronic, Inc., 90 F.3d at 1584. A court may only consider extrinsic evidence "if there were still some genuine ambiguity in the claims, after consideration of all available intrinsic evidence...." *Id*. "Thus, if the meaning of a disputed claim term is clear from the intrinsic evidence-the written record-that meaning, and no other, must prevail; it cannot be altered or superseded by witness testimony or other external sources simply because one of the parties wishes it were otherwise." Key Pharm. v. Hercon Labs. Corp., 161 F.3d 709, 716 (Fed.Cir.1998) (citing Vitronics Corp. v. Conceptronic, Inc., 90 F.3d at 1584).

The defendants use dictionary definitions to argue that the term "engages" should be construed as meaning "interlocking." This court, however, does not agree. Interlocking, in its standard dictionary definition, is not an appropriate word to describe something that occurs with the roof of one's mouth. There is nothing in the roof of a mouth for a device to interlock with. Further, the diagram in the patent showing the preferred embodiment does not show any interlocking because, again, there is nothing for it to interlock with in the roof of the mouth. It simply shows the plate touching the roof of a person's mouth. While it is true that the language of the patent does not neatly recognize the term "engages," the court concludes the term cannot mean interlocking when describing an interaction with the roof of one's mouth. Interlocking may be appropriate in the context of a transmission or a latch, for example, but not for an in-mouth diaphragm call. In his order, Judge Melloy stated that for the "second roof-of-mouth engaging portion," of the patent, "it is clear that this language requires that a portion of the claimed device-aside from the back flexible tape edge-come into contact with the roof of the user's mouth when in use for calling game." Therefore, this court construes the term "engages" to mean come into contact with.

Upon the foregoing,

IT IS ORDERED that the term "engages" or "engaging" is construed to mean come into contact with.

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