United States District Court,
C.D. California.

Gillet OUTILLAGE,
Plaintiff.
v.
PENN TOOL COMPANY, INC., et al,
Defendants.

No. CV 03-6299 ABC (SHx)

March 22, 2004.

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ORDER RE: CLAIM CONSTRUCTION

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

On December 1, 2003, the Court scheduled a *Markman* Hearing in this case for March 22, 2004. The parties timely filed their claim construction briefs. Having considered the materials submitted by the parties, argument of counsel and the case file, the Court rules as indicated herein.

I. BACKGROUND

This case arises from Gillet Outillage's ("Plaintiff's") allegations of patent infringement against Fisher Tool Company, Inc. d/b/a/ Astro Pneumatic Tool Company ("Defendant"). Specifically, Plaintiff has alleged that Defendant sold and offered to sell products which infringe upon Plaintiff's patent, U.S. Patent No. 6,189,190 (the '190 Patent) entitled "System for the Remote Handling of Equipment Particularly Adapted to Elastic Rings." The '190 Patent was issued on February 20, 2001 to Plaintiff based on a patent application filed on December 16, 1997. The '190 Patent contains a total of ten claims. The parties' dispute over patent infringement stems, in part, from differing interpretations of certain language in Claim 7, which reads as follows:

Apparatus for remote handling of equipment, comprising:

a fixed jaw and a mobile jaw;

actuating means for linearly displacing the mobile jaw relative to the fixed jaw; said actuating means comprising a first arm integral with a first handle, and a second arm integral with a second handle; said handles being articulated on a same articulation axis; each arm having a free end;

a cable having two ends and coupling said actuating means to said equipment; a first end of said cable being connected to the mobile jaw, said cable sliding inside a flexible sheath having a first end and an opposite second end; the first end of the sheath abutting the fixed jaw, and the free end of said first arm structured and arranged to serve as a stop for the second end of the sheath, while allowing the cable passing therethrough to slide freely; the free end of said second arm being connected to a second end of said cable;

a ratchet mechanism mounted on one of the handles cooperating with a stub provided on the other handle for holding said handles one against the other and therefore keeping the mobile jaw in a position close to the fixed jaw, except when the stub of the ratchet is released by the action of an unlocking mechanism;

wherein the two handles are brought towards one another in a plane of movement perpendicular to the articulation axis, the arms to which they are respectively connected are angled in the same plane, on the same side of a median axis passing through the articulation axis and between the handles, the second arm being angled more than the first arm, such that when the two handles are one against the other, the distance between the free ends of the two arms is at least equal to the maximum linear displacement of the mobile jaw.

The allegedly infringing device is referred to as "9409-Hose Clamp Pliers," Patent No. 6,370,985 (the '985 Patent) which Plaintiff alleges that Defendant has advertised, marketed, sold and offered to sell. (Compl.para.para. 9, 11-13.)

On January 7, 2003, Plaintiff filed a complaint against Defendant, Penn Tool Company, Inc. and Larry Semegran d/b/a/ Semegran & Associates in United States District Court for the District of New Jersey. In the complaint, Plaintiff seeks declaratory and injunctive relief, as well as damages. The case was transferred to this Court on September 4, 2003. On November 3, 2003, the Court granted a motion to sever and transfer and accordingly severed and transferred the claims against defendants Penn Tool Company, Inc., Larry Semegran d/b/a/ Semegran & Associates, Weiss Tool Distributors Company, Inc., Medco Tool, The Tool Warehouse and Handsontools. The Court retained jurisdiction over Plaintiff's claims against Defendant.

On February 13, 2004, Defendant filed its brief in support of its proposed claim construction of Claim 7 of the patent-in-suit. Plaintiff filed its initial brief on claim construction issues on February 17, 2004. Responses were filed to the initial briefs on February 27, 2004, and on March 8, 2004, the parties filed their replies.

II. LEGAL STANDARD

In Markman v. Westview Instruments, Inc., 52 F.3d 967, 976 (Fed.Cir.1995) (en banc), *aff'd,* 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (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; Carroll Touch, Inc. v. Electro Mechanical Sys., 15 F.3d 1573, 1576 (Fed.Cir.1993).

In determining the proper construction of a claim, the court first looks to intrinsic evidence (*e.g.,* the claims, the specification, and the prosecution history if in evidence). Karlin Technology Inc., v. Surgical Dynamics, Inc., 177 F.3d 968, 971 (Fed.Cir.1999). 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. Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1583 (Fed.Cir.1996) ("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. Karlin, 177 F.3d at 972. ("[T]he court may not use extrinsic evidence to arrive at a claim construction that is clearly at odds with the construction mandated by the intrinsic evidence").

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 different meaning to the terms. Johnson Worldwide Assoc., Inc. v. Zebco Corp., 175 F.3d 985, 989 (Fed.Cir.1999). "[A] court must presume that the terms in the claim mean what they say, and, unless otherwise compelled, give full effect to the ordinary and accustomed meaning of claim items." *Id.; accord* K-2 Corp. v. Salomon S.A., 191 F.3d 1356, 1362-63 (Fed.Cir.1999).

The next step in claim construction is a review of the specification to determine if the patentee has used the disputed terms in a manner inconsistent with their ordinary meaning. Vitronics, 90 F.3d at 1582. "Claims must be read in view of the specification, of which they are a part." FN1 Markman, 52 F.3d at 979. The specification is a written description of the invention and the manner and process of making and using it. 35 U.S .C. s. 112 (1988). The specification concludes with the claim or claims. 35 U.S.C. s. 112 (1988). "For claim construction purposes, the description may act as a sort of dictionary, which explains the invention and may define terms used in the claims." Markman, 52 F.3d at 979-980.

FN1. The specification is useful in interpreting claim language because words must be used in the same way in both the claims and the specification. Autogiro Co. v. United States, 181 Ct.Cl. 55, 384 F.2d 391, 397 (Ct.Cl.1967); Minnesota Mining and Mfg. Co. v. Johnson & Johnson Orthopaedics, Inc., 976 F.2d 1559, 1567 (Fed.Cir.1992).

The final step is a review of the prosecution history of the patent, if in evidence. Vitronics, 90 F.3d at 1582. The prosecution history should be used to understand disputed terms of a claim and claims should be construed in light of the prosecution history. Markman, 52 F.3d at 979. However, prosecution history "cannot 'enlarge, diminish, or vary' the limitations in the claims." Id. at 979.

Occasionally, after considering the intrinsic evidence and any applicable extrinsic evidence, the evidence will support more than one contradictory interpretation of a claim. In such a case,

[w]here there is an equal choice between a broader and a narrower meaning of a claim, and there is an enabling disclosure that indicates that the applicant is at least entitled to a claim having the narrower meaning, we consider the notice function of the claim to be best served by adopting the narrower meaning.

Athletic Alternatives, Inc. v. Prince Manuf., Inc., 73 F.3d 1573, 1581 (Fed.Cir.1996). Thus, after considering the appropriate evidence, "to the extent that the claim is ambiguous, a narrow reading which excludes the ambiguously covered subject matter must be adopted." Ethicon Endo-Surgery, Inc. v. United States Surgical Corp., 93 F.3d 1572, 1581 (Fed.Cir.1996).

III. CLAIM CONSTRUCTION

The parties' dispute about the claim language is limited to parts of Claim 7. The relevant portion of Claim 7 reads as follows: FN2

FN2. The disputed terms are numbered and italicized.

a(1) *ratchet mechanism* (2) *mounted on* one of the (3) *handles* cooperating with a(4) *stub* (5) *provided* on the other (3) *handle* for holding said (3) *handles* (6) *one against the other* and therefore keeping the mobile jaw in a position close to the fixed jaw, except when the (4) stub of the ratchet is released by the action of an unlocking mechanism[.]

Both parties seek construction of the terms "handle" and "stub ." In addition, Defendant asks to Court to construe the terms "ratchet mechanism," "mounted on," "provided on" and "one against the other."

A. Ratchet Mechanism.

Defendant asks the Court to construe the term "ratchet mechanism" to mean the latch FN3 mechanism described in the specification and depicted in the figures, i.e., mounted on a pivot bar attached to the inner handle. According to Defendant, the structure designated by Plaintiff as a ratchet mechanism does not fall within the term's ordinary meaning,FN4 and the Court must therefore consider intrinsic evidence in construing the term. Defendant asserts that each of the figures in the specification shows that the ratchet mechanism is a latch mechanism mounted on a pivot bar attached to the inner handle.

FN3. At oral argument, Plaintiff asserted that the word "latch" did not appear anywhere in the patent and that its use in the construction of the term is therefore improper. Having reviewed the patent and the papers submitted by the parties, the Court is inclined to agree.

FN4. Defendant cites the following definitions of ratchet:
1. A mechanism consisting of a pawl, or hinged catch, that engages the sloping teeth of a wheel or bar, permitting motion in one direction only.
2. The pawl, wheel or box of a ratchet.
See American Heritage Dictionary, 2nd College Edition (1991).

In its response brief, Plaintiff contends that the Court should construe ratchet mechanism to mean "a system to allow motion in only one direction," based on the specification, the ordinary meaning of "ratchet," FN5 and the deposition of Plaintiff's expert. Plaintiff posits that the ordinary meaning of ratchet and the specification are not in conflict. Plaintiff also argues against a construction that would require the term to have a specific form.

FN5. Plaintiff cites the following definition of the term:
Ratchet: Such a wheel (or bar) and pawl as a unit: used in certain wrenches, hand drills, etc. to allow motion in one direction only. *See* Webster's New World Dictionary, 3rd College Edition (1999). The Court is unpersuaded that this definition is appropriate, given its reference to another, undisclosed definition of the term.
The Court finds that the proper construction of the term "ratchet mechanism" for purposes of the patent-in-suit is a "mechanism consisting of a pivoted bar or device permitting motion in one direction only." This construction incorporates the agreed upon "motion in one direction only," elements of the specification and definitions of "ratchet" and "pawl" from Webster's II New Riverside University Edition. The Court disagrees with Plaintiff's contention that "ratchet mechanism" must mean something more than "ratchet." The use of "mechanism" is redundant in these circumstances, especially given (1) the prevalence of definitions of ratchet which refer to it as a "mechanism" and (2) the interchangeable use of "ratchet" and "ratchet mechanism" in Claim 7.

B. Mounted on.

Defendant seeks to construe the term "mounted on" to mean fixed securely to a support, and to impose a requirement of direct physical contact. Plaintiff asks to Court to construe "mounted on" to mean "affixed on." FN6

FN6. The relevant definitions of "mount" provided by the parties are as follows:
1. Mounted, mounting, mounts: to fix securely to a support[.] *See* American Heritage Dictionary, 2nd College Edition (1991).

2. to put in a fixed position. *See* Webster's New World Dictionary, 3rd College Edition (1999).

While the Court finds little difference between the parties proposed constructions of the term, the Court adopts Defendant's construction, which fully incorporates the meanings of both mounted and on,FN7 and therefore construes the term "mounted on" to mean "fixed securely to, and in direct physical contact with, a support."

FN7. "On" is defined as "used in a function word to indicate position over and in contact with that which supports from beneath." Inverness Med. Switzerland GmbH v. Warner Lambert Co., 309 F.3d 1373, 1378 (Fed.Cir.2002), citing Webster's Third Int'l Dictionary (1968).

C. Handle.

The primary issue to be resolved in the construction of the term "handle" is how far the handle extends towards the top of the pliers. Plaintiff urges the Court to adopt a construction that the handle extends "from the bottom of the gripping portion into the area of articulation and surrounding it, so as to connect and to be integral with the arm." Defendant argues that the term "handle" means a part that is designed to be held or operated with the hand and which is separate and distinct from the area of articulation.

1. ***Plaintiff's Proposed Construction***

For support of its construction of "handle," Plaintiff cites, among other things, (1) the language of Claim 7, (2) the underlying patent to the allegedly infringing device and (3) prior art. In response, Defendant argues, among other things, that (1) areas need not be physically adjacent or connected in order to be integral; (2) being on the same articulation axis does not mean that the handles must extend into the area of articulation, but instead suggests that the handles are distinct from the area of articulation; (3) the fact that the arm is an extension of the handle does not mean that they are adjacent, as the two are offset by the area of joinder; (4) Plaintiff's prior art argument must fail because the handles at issue here are structurally dissimilar from and bear no relationship to the handles in the patent discussed by Plaintiff and (5) the Court need not consider the extrinsic evidence introduced by Plaintiff, as the intrinsic evidence sufficiently demonstrates the proper construction of the term "handle."

a. ***The Claim Language.***

Plaintiff asserts that in order to be integral with its corresponding arm, the handle must extend from the bottom of the gripping portion into the area of articulation, citing the following claim language:

Actuating means for linearly displacing the mobile jaw relative to the fixed jaw; said actuating means comprising a first arm integral with a first handle, and a second arm integral with a second handle. *See* Claim 7, Col. 7:1-4.

In addition, Plaintiff argues that the phrase "said handles being articulated on a same articulation axis" (Claim 7, Col, 7:4-5) supports its construction because the handles could not be articulated on the axis of articulation unless each of the handles extended into the articulation axis. Next, Plaintiff contends that the handles must extend into the area of articulation based on the following:

"Wherein the two handles are brought towards one another in a plane of movement perpendicular to the articulation axis, the arms to which they are respectively connected are angled in the same plane[.]" *See* Claim 7, Col. 7:23-8:2.

In Plaintiff's view, in order for the handles and arms to be connected, they must "meet, touch and come together," which can be done only in the area of articulation. (Plaintiff's Initial Brief at 12:26-27.)

According to Defendant, Plaintiff is incorrect in inferring that the arm being integral with the handle requires that the handle extend to the area of articulation. Defendant asserts that the term "integral" covers more than a unitary construction and does not mean "of one-piece construction," citing In re Morriss, 127 F.3d 1048, 1055 (Fed.Cir.1997) and Advanced Cardiovascular Systems v. Scimed Life Systems, Inc., 887 F.2d 1070, 1074 (Fed.Cir.1989). In Defendant's view, regions need not be physically adjacent in order to be integral.

Moreover, Defendant contends that even if the term "integral" were construed in the manner proposed by Plaintiff, Claim 10 clearly indicates that the area of articulation does not coincide with the area where said second arm joins the second handle.FN8 In Defendant's view, the fact that the arm and handle are integral does not mandate, or even suggest, that the handle encompasses some portion of the area of articulation.FN9 Defendant also argues that the phrase "articulated on a same articulation axis" does not mean that the handles must extend to the axis of articulation. Instead, Defendant contends that the articulation axis must be positioned between the handles, resulting in the handles being distinct from the articulation axis.

FN8. Claim 10 provides as follows:
The apparatus according to claim 7, wherein the area of articulation of the second arm does not coincide with the area where said second arm joins the second handle, which is offset by an appendage that unites the two areas.

FN9. In its reply brief, Plaintiff contends that each claim of the patent defines a separate invention and Claim 7, an independent claim, may not be limited by what is claimed in Claim 10, a dependent claim.

b. *The* '985 Patent.

Plaintiff argues that the underlying patent to the allegedly infringing device supports its construction of the term "handle." For support, it cites Kumar v. Ovonic Battery Co. Inc., 351 F.3d 1364 (Fed.Cir.2003), in which the Federal Circuit applied the definition of a claim term used by the defendant in its patent to the same claim term used in the plaintiff's patent. Plaintiff refers the Court to the '985 Patent, in which the handle includes a "first gripping portion at one end, a first attachment portion at the other end and a first disk member between the first gripping portion and the first attachment portion." *See* '985 Patent, Claim 1, Col. 5:10-13. In Plaintiff's view, the first disk member of the '985 Patent is the same element which is described as the area of articulation in the '190 Patent, and thus, whether the area is referred to as the first disk member or the area of articulation, it forms part of the handle.

Defendant argues that *Kumar* does not support Plaintiff's position, because the Federal Circuit referred to defendant's later-issued patent only to confirm its reliance on prior art. According to Defendant, Plaintiff cannot incorporate a portion of the definition of handle from the '985 patent because it is not relevant evidence of the ordinary meaning of the term handle. Instead, where the definition of handle in the '985 Patent is in open conflict with the plain meaning of the term handle and the specification of the patent-in-suit.

In its reply brief, Plaintiff criticizes Defendant's interpretation of *Kumar,* arguing that if the Court were to determine that handle does not have a special meaning in the '190 patent, under *Kumar,* the '985 patent is directly relevant to show that the plain meaning of a handle may encompass the area of articulation.

c. *Prior Art.*

Finally, Plaintiff contends that prior art supports its construction of handle. "Prior art cited in a patent or cited in the history of a patent constitutes intrinsic evidence." *Kumar,* 1351 F.3d at 1368. According to Plaintiff, the '190 Patent references Patent No. 5,096,170 (the '170 Patent), which shows that a hand grip is only a small portion of the handle. Plaintiff also directs the Court's attention to the 1995 Oxford-Duden Pictorial English Dictionary definition of "handle," which shows that it extends beyond the handgrip.FN10

FN10. Plaintiff asserts that the construction of handle provided by Defendant's expert, Dr. Karl Ulrich, is inconsistent with Claim 7's requirement that the handle and arm be connected. Dr. Ulrich has opined that the handle goes up to, but does not extend into the circular, outer disk area. According to Plaintiff, the gap created by the circular outer disk is inconsistent with Claim 7's requirement that each handle be integral to each arm.

In response, Defendant argues that Plaintiff's citation to the Ulrich deposition is inappropriate, as Dr. Ulrich's testimony concerns the outer arm and outer handle, which are not at issue here. The Court agrees with Defendant that Plaintiff's argument with respect to the Ulrich deposition has no bearing on the issue to be decided.
In its response, Defendant argues that the '170 Patent is not relevant or persuasive evidence of the ordinary meaning of the term handle, because (1) the arms of the '170 Patent bear no relationship to the arms of the '190 Patent and (2) the '170 Patent makes no reference to any axis of articulation, area of articulation, appendage, or other significant structures in the '190 Patent. Based on the above, Defendant concludes that Plaintiff's reliance on the '170 Patent is misplaced, given the extensive intrinsic evidence which supports Defendant's construction of handle and the tenuous relationship between the two devices.

2. ***Defendant's Proposed Construction***

Defendant argues that the term "handle" should be given its ordinary meaning, i.e., a part that is designed to be held or operated with the hand. FN11 In Defendant's view, this construction is supported by the claim language, which indicates that (1) the handles may be brought towards one another and moved apart, (2) the median axis passes between the handles rather than through them and (3) the handles may be held one against the other, while disks that form the area of articulation cannot be brought towards one another, only rotated relative to one another. Defendant asserts that its construction of the handle as being distinct from the area of articulation is supported by the specification and by Claim 10, which provides that the area of articulation structure is separate and distinct from the handle structure. Based on the ordinary meaning of handle, the language of Claims 7 and 10 and the specification, Defendant concludes that the meaning of the term is clear and that it is unnecessary to consider extrinsic evidence in construing the term.

FN11. *See* The American Heritage Dictionary, 2nd College Edition (1991).

In opposing Defendant's proposed construction, Plaintiff makes the same arguments set forth in its initial brief in support of its construction of the term, contending that the term may not be given its ordinary meaning, but must instead be construed using intrinsic evidence, the '985 Patent and prior art.

In its reply brief, Defendant asserts that Plaintiff's attempt to ascribe a special meaning to the claim term handle is inappropriate. Defendant argues that its reliance on Claim 10 is appropriate because the term "handle" must have the same meaning in both Claim 10 and Claim 7. Because Claim 10 describes an embodiment of the invention in which the area of articulation "does not coincide" with the area where the arm joins the handle, Defendant contends that if the handle is defined to include a portion of the area of articulation, the embodiment described in Claim 10 cannot coexist.FN12

FN12. In addition, Defendant argues that Plaintiff's construction is not supported by the following language found in the detailed description of the invention:
According to an essential characteristic of the invention, each arm 13 or 14 is associated with a handle, respectively 16 or 17, in accordance with a particular arrangement that causes each arm to correspond with the handle situated on the same side of a line XX' that coincides with the median line of handles 16, 17 and arms 13, 14 passing through their centre or *their articulation axis* 15[.] *See* '190 Patent, Col. 4:3-9 (emphasis added).

According to Defendant, "their articulation axis" may refer to (1) the arms only or (2) both the arms and handles, but may not refer exclusively to the handles, exposing a flaw in Plaintiff's position that the handles extend into the articulation axis. The Court agrees with this analysis.

c. *Construction of the Claim Term Handle.*

The Court finds that Defendant's construction of the term "handle" is in keeping with its ordinary meaning and the intrinsic evidence. First, the Court disagrees with Plaintiff's construction of "integral" as meaning physically connected to or adjacent with. No definition of integral found by the Court or cited by Plaintiff requires direct physical contact. Accordingly, the Court does not find that the handles must extend into the area of articulation in order to be integral to the arms. Second, the fact that each arm is "associated with" a handle similarly does not require the handle to extend into the area of articulation in order to be associated with the arm. Third, Claim 10 specifically provides that the area of articulation does not coincide with the area where the arm and handle join. Although Defendant may not use Claim 10 to limit Claim 7, the construction of "handle" in Claim 10 may not be in conflict with the construction of the term in Claim 7, a point which Plaintiff concedes in its response to Defendant's initial brief. Finally, In re Morriss, 127 F.3d 1048, 1055 (Fed.Cir.1997) and Advanced Cardiovascular Systems v. Scimed Life Systems, Inc., 887 F.2d 1070, 1074 (Fed.Cir.1989) do not define integral as being of one piece construction. Instead, these cases provide that the term "integral" does not exclude, and may encompass more than, one piece or unitary, construction.

Based on the foregoing, the Court construes the term "handle" to mean a part that is designed to be held or operated with the hand and which does not extend into the area of articulation/articulation axis.

D. Stub.

Both parties seek a construction of the term "stub." Plaintiff asks the Court to construe the term "stub" to mean "a short or blunt object that works with a ratchet mechanism to prevent the handles from moving." Defendant seeks to construe the term "stub" to mean a "short and blunt (typically cylindrical) protrusion that cooperates with a ratchet mechanism for holding handles one against the other and is released by the action of an unlocking mechanism."

1. *Plaintiff's Proposed Construction*

Plaintiff bases its construction on the language of Claim 7, which provides as follows:

A ratchet mechanism mounted on one of the handles cooperating with a *stub* provided on the other handle for holding said handles one against the other and therefore keeping the mobile jaw in a position close to the fixed jaw, except when the *stub* of the ratchet is released by the action of an unlocking mechanism. (Emphasis added). *See* Claim 7, Col. 7:17-22.

Plaintiff asserts that as defined in Claim 7, the stub is located on one handle and is used for cooperating with the ratchet mechanism in order to hold one handle against the other. Based on the foregoing, Plaintiff asks the Court to construe "stub" as a "short or blunt object working in cooperation with a ratchet mechanism to prevent the handles from moving."

In Defendant's response brief, it argues that Plaintiff's proposed construction disregards the requirement that the stub project directly from the handle and ignores the functional requirements of Claim 7. According to

Defendant, the claim limitation that the stub be "provided on" the handle relates to its role as a static, rather than a dynamic, structure that is released by the unlocking mechanism.

2. *Defendant's Proposed Construction*

In its initial brief, Defendant asks the Court to construe stub as a short, blunt, cylindrical protrusion, based on a synthesis of definitions provided by the Oxford English Dictionary, the parties' experts FN13 and Figure 1 of the specification. In Plaintiff's response, it contends that Defendant has neglected the claim language in favor of dictionary definitions, and that the construction of the term must also be guided by the claim language, which indicates that the stub's purpose is to act as a protrusion for the ratchet mechanism to hold onto and prevent movement of the handles. Plaintiff posits that the specification similarly supports this construction. In its reply brief, Defendant asserts that the functional requirement that the stub be a passive, static member acted upon by an unlocking mechanism may not be omitted from the term's construction.

FN13. Defendant's expert, Dr. Karl Ulrich, testified that a stub is a "substantially prismatic or cylindrical protrusion whose height is not large with respect to its diameter." *See* Expert Rebuttal Report of Karl Ulrich at 5. Plaintiff's expert, Dr. Stephen J. Tricamo, asserted that a stub is "something made or worn to a short or blunt shape." *See* Expert Report of Dr. Stephen J. Tricamo in rebuttal to the 9/30/03 report of Karl Ulrich at 1.

Having considered the arguments set forth in support of both parties' constructions, the Court construes the term "stub" to mean a short, blunt protrusion that cooperates with a ratchet mechanism for holding handles one against the other. This construction is in keeping with the language of Claim 7 and the ordinary meaning of stub. The Court declines to impose a requirement that the stub be static, finding that this is supported neither by the ordinary meaning of the term or the intrinsic evidence.

E. Provided On.

Defendant seeks to construe the term "provided on" to mean "supplied on" or "furnished on," based on the ordinary meaning of the term. Accordingly, Defendant asserts that the claim language "a stub provided on the other handle" should be construed as "a stub furnished on the other handle" or "a stub supplied on the other handle." In its response brief, Plaintiff asserts that there is no need to construe the term, which should be given its ordinary meaning, but that if the Court elects to do so, it should construe "provided on" to mean "positioned on" or "located on," based on the specification and without reference to the plain and ordinary meaning of the term.

Although the Court finds little distinction between the constructions proposed by the parties, the Court must first consider the plain and ordinary meaning of a term, generally derived from the dictionary rather than intrinsic evidence. The Court therefore adopts Defendant's construction of the term "provided on" as meaning "supplied on" or "furnished on."

F. One Against the Other.

Defendant asks the Court to construe the term "one against the other" to require physical contact between the handles, based on the ordinary meaning of "against." FN14 Defendant contends that in order to satisfy Claim 7, a tool must possess a locking device which fixes the handles in a conformation such that they physically contact one another.

FN14. Defendant cites the following definitions of "against":
2. So as to come into forcible contact with;

3. In contact with so as to rest or press on.

See The American Heritage Dictionary, 2nd College Edition.

In its opposing brief, Plaintiff argues that "one against the other" should be construed as "directly opposite: facing one another and close together." For support, Plaintiff relies on (1) the claim specification, (2) the ordinary meaning of "against" and (3) examination of Figure 1 of the '190 patent. According to Plaintiff, the following language found in the specification supports an interpretation of "one against the other" as close but not in physical contact:

In the same way, advantageously a ratchet mechanism 21 is mounted for example on the handle support 19 in such a way that its end hook 22 cooperates with a stub 23 provided on the other handle support 18 to keep one handle against the other when they are close together. *See* '190 Patent, Col. 5:19-23.

According to Plaintiff, the use of "close together" in the above language confirms that "one against the other" means near but does not require physical contact.

Finally, Plaintiff argues that Figure 1 of the '190 Patent makes clear that the handles are not in physical contact, citing *Vitronics* for the position that it is highly unlikely that an inventor would define an invention in such a way as to exclude the preferred embodiment. Plaintiff contends that the visual image provided in Figure 1 supports its claim construction, and that a claim construction that would exclude this preferred embodiment is rarely, if ever, correct and would require highly persuasive evidentiary support. *See* Rexnord Corporation v. The Laitram Corporation, 274 F.3d 1336, 1342 (Fed.Cir.2001). In Plaintiff's view, Defendant has produced no evidence that Plaintiff's preferred embodiment is inconsistent with the correct interpretation of the construed claim, and that physical contact therefore cannot be required.

The Court finds that the term "one against the other" should not be construed in such a way as to exclude the inventor's preferred embodiment of the term, absent persuasive evidentiary support to the contrary. Accordingly, the Court declines to construe the term to require direct physical contact. Although Defendant has presented persuasive *argument* that Plaintiff could have drafted Claim 7 differently had it intended the handles to be close together rather than in direct physical contact, it has not presented any evidentiary support of the nature required to construe the term in a manner inconsistent with its preferred embodiment. The Court therefore construes the term "one against the other" to mean "directly opposite: facing one another" without a requirement of physical contact, based on the ordinary meaning of the term, the language of the specification and Figure 1 of the '190 Patent.

IV. CONCLUSION

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

1. Ratchet mechanism means a mechanism consisting of a pivoted bar or device permitting motion in one direction only;

2. Mounted on means fixed securely to, and in direct physical contact with, a support;

3. Handle means a part that is designed to be held or operated with the hand and which does not extend into the area of articulation/articulation axis;

4. Stub means short, blunt protrusion that cooperates with a ratchet mechanism for holding handles one against the other;

5. Provided on means "supplied on" or "furnished on;" and

6. "One against the other" means "directly opposite: facing one another" and without a requirement of physical contact.

SO ORDERED.

C.D.Cal.,2004.
Outillage v. Penn Tool Co., Inc.

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