United States District Court,
S.D. Florida.

Waldemar VEAZIE III,
Plaintiff.
v.
The GATES RUBBER COMPANY; Trico Products Corporation; and Tridon, Inc. ACD Tridon & ACD Tridon Europe, Ltd,
Defendants.

No. 02-14084-CIV-PAINE

July 7, 2004.

Deborah J. Westervelt, Royal W. Craig, Royal Craig, Baltimore, MD, Gary Charles Rosen, Patricia Elizabeth McQueeney, Becker & Poliakoff, Fort Lauderdale, FL, John Patrick Marino, Fowler White Boggs Banker, Jacksonville, FL, for Plaintiff.

Brian A. Carpenter, Gayle L. Strong, George G. Matava, Greenberg Traurig, Denver, CO, John Patrick Marino, Fowler White Boggs Banker, Roger K. Gannam, Lindell & Farson, P.A., Jacksonville, FL, Susan Fleischner Kornspan, Greenberg Traurig, West Palm Beach, FL, for Defendants.

ORDER ADOPTING IN PART REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

JAMES C. PAINE**, District Judge.**

This matter is before the court following a Report and Recommendation entered by Magistrate Judge Frank J. Lynch, Jr. on December 29, 2003 (D.E.# 83) regarding Markman claim construction. Judge Lynch held a Markman hearing on December 17, 2003, and thoroughly analyzed the underlying pleadings in construing Independent Claim 1 and Depending Claims 2-16. Defendants objected to Judge Lynch's recommendations, and requested the court reject same. Upon review of all underlying pleadings, including the objections, responses, and replies to the Judge Lynch's report, FN1 and upon *de novo* FN2 review of the matter, the court finds Judge Lynch's recommendations to be largely supported by law, with the exception of the parenthetical reference to the description of "substantially smooth and continuous," as noted below. In conducting its review, this court was cognizant of defendants four objections, and will discuss each in turn.

FN1. The court has also reviewed Defendants' Submission of New Authority in Further Support of Defendants' Objections to Magistrate Judge's Report and Recommendation, filed on June 3, 2004.

FN2. Claim construction is a matter of law. *See* Markman v. Westview Instruments, 517 U.S. 370 (1996).

First, defendants object to the construction of "strip" in Claims 1 and 9. The R & R recommended that the word be defined as "long narrow piece or area." Defendants specifically take issue with the words "or area" in this definition, contending (1) The R & R ignored authoritative dictionaries, (2) the R & R did not construe the word "strip" in the context of the other words of the claims, and (3) The recommended construction improperly broadens the scope of the word beyond its ordinary and customary meaning.

In considering the claims of a patent, the court must first look at the words of the claims themselves. Vitrionics Corp. v. Conceptronics, Inc., 90 F.3d 1576 (Fed.Cir.1996). Normally, a particular claim term should be given "the *full range* of its ordinary meaning as understood by persons skilled in the relevant art." Texas Digital Systems, Inc. V. Telegenix, Inc., 308 F.3d 1193 (Fed.Cir.2002)(emphasis supplied). Where multiple definitions are consistent with the use of the words, "the claims terms may be construed to encompass *all* such consistent meanings." *Id*. (emphasis supplied).

In this instance, the R & R cited two dictionary definitions FN3 for the word "strip." *See* R & R at p. 7. The resulting claim construction encompassed the consistent meanings of the word. Thus, upon *de novo* review, the court finds the term "strip" to be adequately defined as "long narrow piece or area."

FN3. While defendants object to the Magistrate Judge's use of a "five dollar paperback dictionary," the definitions defendants suggest are remarkably similar to those set forth in the "five dollar paperback dictionary." *Compare* R & R at p. 7 with Defendant's Objections at p. 4.

Second, defendants object to the construction of the phrase "substantially smooth, continuous." The R & R recommended that the phrase be defined as "the strip has a largely but not wholly smooth surface without irregularities (as compared to Cavenago's bristles), not rough, and which continues without a break." Defendants' objections focuses on the parenthetical description contained within this definition, namely "as compared to Cavenago's bristles." Upon review, the court finds this parenthetical description to be beyond the ordinary and customary meaning of the claim language. Therefore, the court will amend the definition of "substantially smooth, continuous" to be "the strip has a largely but not wholly smooth surface without irregularities, not rough, and which continues without a break."

Third, defendants object to the construction of the functional language "in order to gradually come in contact with the windshield surface being wiped upon deflection of said body in said wiping operation." This objection further relates to the analysis of Independent Claim 1. *See* R & R at p. 9-11. Upon review, this court finds no legal error in the construction recommended by the Magistrate Judge.

Fourth, defendants contend that the Magistrate Judge erroneously construed the "whereby" clause as an additional limitation. In order for the "whereby" clause to become a limitation, the clause must have become an essential feature of the invention during the prosecution of the patent. Eltech Sys. v. P.P.G. Indus., Inc., 710 F.Supp. 622, 633 (W.D. La 1998), *aff'd, in part,* 903 F.2d 805 (Fed.Cir.1990). The court has reviewed the Magistrate Judge's recommendation on this point, and is in agreement with the R & R. The whereby clause was considered by the Examiner in granting an allowance, and, thus, became an essential feature of the invention and a necessary limitation. Accordingly, it is

ORDERED AND ADJUDGED that the Report and Recommendation issued by the Magistrate Judge is ADOPTED IN PART. All recommendations regarding claim construction are adopted, with the exception of the claim construction for "substantially smooth, continuous," which shall now be defined as "the strip has a

largely but not wholly smooth surface without irregularities, not rough, and which continues without a break."

DONE and ORDERED.

S.D.Fla.,2004.
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