United States District Court,
W.D. Texas, Austin Division.

SPINAL CONCEPTS, INC,
Plaintiff.
v.
EBI, L.P., EBI Medical Systems, Inc., Electro-Biology, Inc., Biomet, Inc. And Biomet Orthopedics, Inc,
Defendants.

No. A-02-CA-636-LY

Aug. 19, 2004.

Daniel E. Reidy, Jones Day, Chicago, IL, Dwayne K. Goetzel, Eric B. Meyertons, Ryan Tyler Beard, Meyertons Hood Kivlin Kowert & Goetzel, PC, Austin, TX, Patrick J. Norton, Jones Day, Cleveland, OH, Thomas R. Jackson, Jones Day, Dallas, TX, for Plaintiff.

Charles H. De La Garza, Chaz De La Garza & Associates, LLC, Michael C. Barrett, Michael R. Krawzsenek, Fulbright & Jaworski, L.L .P., Austin, TX, for Defendants.

ORDER

LEE YEAKEL**, District Judge.**

Before the Court is the above styled cause of action in which Plaintiff Spinal Concepts, Inc. ("Spinal Concepts") alleges that Defendants EBI, L.P., EBI Medical Systems, Inc., Electro-Biology, Inc., Biomet, Inc., and Biomet Orthopedics, Inc., are infringing on two patents, U.S. Patent Nos. 6,331,179 ("the '179 Patent") and 6,454,769 ("the '769 Patent") assigned to Spinal Concepts. Spinal Concepts alleges patent infringement claims, including willful infringement, and a breach of contract claim. Spinal Concepts seeks, among other relief, monetary damages, which could include reasonable royalties and lost profits. Defendants in turn assert several affirmative defenses, including patent invalidity and non-infringement, and a counterclaim for declaratory judgment as to the invalidity of Spinal Concepts' patents. At this stage of the litigation, the parties seek construction of disputed terms in the patents at issue. Specifically, the parties seek construction of Claims 1, 2, 9, 17 and 21 in the '769 Patent and Claims 1, 2, 4, 32, 40, 41, 42, and 50 in the '179 Patent.

On July 29, 2003, this Court, with the Honorable James R. Nowlin presiding, referred all future nondispositive and dispositive motions to United States Magistrate Judge Andrew W. Austin for report and recommendation pursuant to 28 U.S.C. s. 636(b), Federal Rule of Civil Procedure 72, and Rule 1 of Appendix C of the Local Rules of the United States District Court for the Western District of Texas (Clerk's Document No. 14).

On April 13, 2004, Magistrate Judge Austin filed his Report and Recommendation on Claim Construction (Clerk's Document No. 75) after considering Spinal Concepts' Claim Construction Brief filed February 20, 2004 (Clerk's Document No. 66); Defendants' Claim Construction Brief filed February 20, 2004 (Clerk's Document No. 63); Spinal Concepts' Reply Brief filed March 5, 2004 (Clerk's Document No. 68); and Defendants' Reply Brief filed March 5, 2004 (Clerk's Document No. 69). Magistrate Judge Austin held a *Markman* (Claim Construction) hearing on March 29, 2004. By his Report and Recommendation, Magistrate Judge Austin recommends that this Court construe the disputed claim terms as set forth in his Report and Recommendation.

The Defendants filed Objections To *Markman* Report And Recommendation of the United States Magistrate Judge on April 28, 2004 (Clerk's Document No. 85) and Spinal Concepts filed Objections To The *Markman* Report and Recommendation of the Magistrate Judge on August 9, 2004 (Clerk's Document No. 86) and Spinal Concepts filed a Response to Defendants' Objections To Markman Report And Recommendation of the United States Magistrate Judge on May 12, 2004 (Clerk's Document No. 92). In light of the parties' objections, the Court has undertaken a *de novo* review of the parties' Claim Construction Briefs and filings in this action and finds that the Report and Recommendation filed by Magistrate Judge Austin is correct and should be approved and accepted by the Court for the reasons stated therein.

IT IS ORDERED that the United States Magistrate Judge's Report and Recommendation (Clerk's Document No. 75) filed in this cause is hereby **APPROVED** and **ACCEPTED** by this Court.

W.D.Tex.,2004.
Spinal Concepts, Inc. v. EBI, L.P.

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