United States District Court,
D. Oregon.

STORMWATER MANAGEMENT, INC,
Plaintiff.
v.
CDS TECHNOLOGIES, INC,
Defendant.

No. Civ. CV 04-414-MO

March 30, 2005.

Peter E. Heuser, Kolisch Hartwell, P.C., Portland, OR, for Plaintiff.

Daniel J. Furniss, Townsend & Townsend & Crew LLP, Palo Alto, CA, Ian L. Saffer, Steven A. Gahlings, Townsend Townsend & Crew, LLP, Denver, CO, Susan D. Marmaduke, Harrang Long, P.C., Portland, OR, for Defendants.

OPINION AND ORDER

MOSMAN**, J.**

Plaintiff Stormwater Management, Inc. owns U.S. Patent No. 5,707,527 ("the '527 Patent"), which describes an apparatus and method of removing pollutants from storm water that flows over paved surfaces in urban areas. Plaintiff brought the instant action against defendant CDS Technologies, Inc., alleging that defendant's filtration system infringes the '527 patent. Before the court are the parties' proposed constructions of the '527 patent claim terms "establishing continuous fluid communication," "outlet conduit," "siphoning," and "pellets."

As stated on the record at the March 15, 2005, Markman hearing, this court adopted constructions (1) defining "establishing continuous fluid communication" as "to bring into existence or cause a stream of fluid without any interruptions breaking the stream into unconnected segments;" (2) defining "outlet conduit" as "a conduit attached to the drainage space through which treated water exits the drainage space and enters the treated water drainage conduit;" and (3) defining "pellets" as "round or cylindrical compressed forms of a substance." The court withheld ruling on the construction of the term "siphoning" for further consideration. Because this issue raises questions of both fact and law not adequately addressed in the parties' claim construction submissions, the court directs the parties to submit supplemental briefing as described below.

In considering the proper construction of "siphoning," the court begins by employing dictionaries to ascertain that term's ordinary meaning to a person of ordinary skill in the art. E-Pass Technologies, Inc. v. 3COM Corp., 343 F.3d 1364, 1367 (Fed.Cir.2003) ("In order to construe a disputed claim term .... [w]e

resort initially to relevant dictionary definitions to determine the ordinary meaning of the term."); Astrazeneca AB v. Mut. Pharmaceutical Co., Inc., 384 F.3d 1333, 1337 (Fed.Cir.2004) (the intrinsic record, other than the claims, should be consulted only after the ordinary meaning of claim terms is determined through the use of technical and general-usage dictionaries). Because defendant has presented substantial evidence from technical dictionaries indicating artisans attach special meaning to the term "siphoning," this court relies on technical dictionaries and treatises in construing that term. Vanderlande Indus. Nederland BV v. ITC, 366 F.3d 1311, 1321 (Fed.Cir.2004) (holding that where technical dictionaries demonstrate artisans attach special meaning to a claim term, "general-usage dictionaries are rendered irrelevant with respect to that term.").

The technical sources in the record appear to show that a person of ordinary skill in the art of hydraulics would understand the ordinary meaning of "siphoning" to contemplate, among other limitations, a conduit that rises above the hydraulic grade line. HYDRAULICS FOR PUBLIC HEALTH ENGINEERS, 95 (suctioning effect of siphon is obtained "by the flow downstream when a pipe rises above the level of the hydraulic grade line"); ENCYCLOPEDIA OF HYDRAULICS, SOIL AND FOUNDATION ENGINEERING 279 (1967) ("A closed conduit, a portion of which lies above the hydraulic grade line"); MARKS' STANDARD HANDBOOK FOR MECHANICAL ENGINEERS 3-53 (10^{th} ed. 1996) ("Siphons are arrangements of hose or pipe which cause liquids to flow from one level ... to a lover level [ ] over an intermediate summit"); STANDARD HANDBOOK FOR CIVIL ENGINEERS (3d ed.) ("A siphon is a closed conduit that rises above the hydraulic grade line and in which the pressure at some point is below atmospheric."). Nevertheless, neither of the parties' proposed constructions contains any reference to this limitation. Accordingly, the parties' supplemental briefing should address whether the ordinary meaning of the term "siphoning" contemplates this limitation FN1 and, if so, why the court should adopt a construction in this case that includes no such limitation. FN2

FN1. As noted above, the court finds artisans would attach special meaning to the term "siphoning," such that technical, art-specific sources provide the best evidence of that term's ordinary meaning to one of ordinary skill in the art. Accordingly, the court rejects Plaintiff's contention that general-usage dictionary definitions are persuasive evidence of the ordinary meaning of "siphoning" as used in the '527 patent. *See, e.g.,* Vanderlande, 366 F.3d at 1321 ("a general-usage dictionary cannot overcome credible art-specific evidence of the meaning ... of a claim term.").

FN2. The court recognizes that a construction of "siphoning" that requires a conduit rising above the hydraulic grade line would exclude the patent's sole disclosed embodiment, and that such an interpretation "is rarely, if ever, correct." Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582, 1583 (Fed.Cir.1996). Federal Circuit case law offers at least two possible rationales for adopting a construction of "siphoning" that is inconsistent with ordinary meaning. First, the Federal Circuit has held that the presumption in favor of a dictionary definition is overcome where the patentee has "clearly set forth an *explicit definition* of the term different from its ordinary meaning," or has used "*words or expressions of manifest exclusion or restriction,* representing a clear disavowal of claim scope." Tex. Digital Sys., Inc. v. Telegenix, Inc., 308 F.3d 1193, 1204 (Fed.Cir.2002) (emphasis added); *see also* Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed.Cir.1996) ("a patentee may choose to be his own lexicographer and use terms in a manner other than their ordinary meaning, *as long as the special definition of the term is clearly stated in the patent specification or file history*.") (emphasis added). Second, a patentee may redefine a claim term "by implication" by using a claim term "throughout the entire patent specification, in a manner consistent with only a single meaning." *See, e.g., Bell Atl. Network Servs., Inc. v. Covad Communications Group,Inc.,* 262,

F.3d 1258, 1271 (Fed.Cir.2001).

If the '527 patent *implies* a novel definition of "siphoning" that does not contemplate a conduit that rises above the hydraulic grade line, the parties should further brief the proper method by which the court should divine the remaining contours of the patent's peculiar definition. One possible approach would be to ascertain what else the intrinsic record "implies" about how the patent defines the term-i.e., deriving a constructing from the specification. However, Federal Circuit case law makes clear that reading limitations from a preferred embodiment into the claims is proper only where the intrinsic record contains "a clear indication ... that the patentee intended the claims to be so limited." Liebel-Flarsheim Co. v. Medrad, Inc., 358 F.3d 898, 913 (Fed.Cir.2004). Another possibility is to adopt the ordinary meaning of the term "siphoning," as demonstrated by the art-specific authorities, while in essence redacting those portions of the ordinary meaning impliedly rebutted by the intrinsic record.

Finally, there are numerous open questions regarding the proper approach to claim construction that bear directly on the issues currently before the court. For example, Federal Circuit case law currently provides no clear guidance regarding how the court should interpret claim language when usage in the specification is inconsistent with ordinary meaning, but the patentee has not "clearly set forth an explicit definition of the term different from its ordinary meaning." Tex. Digital Sys., 308 F.3d at 1204.FN3 Likewise, the Federal Circuit's pronouncement in *Bell Atlantic* that "a claim term may be clearly redefined without an explicit statement of redefinition" appears on its face to conflict with the court's subsequent decision that the presumption in favor of a dictionary definition is overcome only where the patentee "clearly set forth an *explicit definition* of the term different from its ordinary meaning," or uses "*words or expressions of manifest exclusion or restriction,* representing a clear disavowal of claim scope." Tex. Digital, 308 F.3d at 1204 (emphasis added). The Federal Circuit is poised to address these issues in an upcoming en banc decision. *See* Phillips v. AWH Corp., 376 F.3d 1382 (Fed.Cir.2004). At least one court has stayed consideration of claim construction pending the Federal Circuit's resolution of *Phillips*. *See* In re Intertape Polymer Corp., 121 Fed. Appx. 386 (Fed.Cir.2004). The parties' supplemental briefs should address whether it would likewise be appropriate to stay any ruling on the proper construction of "siphoning" until the Federal Circuit issues its opinion in *Phillips*.

FN3. *See also* Astrazeneca, 384 F.3d at 1336. In *Astrazeneca,* the Federal Circuit noted it is unclear "whether the intrinsic evidence [such as the specification] takes priority in our construction of the claim term ... or if instead the ordinary meaning of the term, as determined from sources such as dictionaries, controls our construction in the absence of intrinsic evidence of clear lexicography or disavowal." *Id*. at 1337-38. The *Astrazeneca* court determined it need not decide that question on the facts before it.

In sum, the parties are hereby ORDERED to submit supplemental letter briefing of no more than five pages addressing:

1. whether the ordinary meaning of "siphoning" contemplates a conduit that rises above the hydraulic grade line;

2. if the ordinary meaning of "siphoning" contemplates a conduit that rises above the hydraulic grade line, why the court should adopt a construction of "siphoning" that does not include this limitation; and

3. whether it would be appropriate to stay a ruling on the proper construction of "siphoning" pending the Federal Circuit's en banc decision in *Phillips*.

The parties' supplemental briefing shall be due April 13, 2005.

IT IS SO ORDERED.

D.Or.,2005.
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