United States District Court,
D. Massachusetts.

THE GILLETTE COMPANY,
Plaintiff.
v.
ENERGIZER HOLDINGS, INC., Schick Manufacturing, Inc., Eveready Battery Company, Inc., and Energizer Battery, Inc,
Defendants.

No. Civ.A. 03-11514-PBS

Dec. 19, 2005.

Catherine Nyarady, Chelley E. Talbert, Daniel J. Leffell, Erez Liebermann, Jeh Charles Johnson, John E. Nathan, Kerry Quinn, Larry A. Coury, Lewis R. Clayton, Marc Falcone, Michael Beck, Paul D. Lall, Steven C. Herzog, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY, Dalila A. Wendlandt, Jane E. Willis, Ropes & Gray LLP, Boston, MA, for Plaintiff.

Ginta D. McNally, Kevin T. Grzelak, Matthew J. Gipson, Randall G. Litton, Eugene J. Rath, III, Price, Heneveld, Cooper, Dewitt & Litton, Grand Rapids, MI, Jason C. Kravitz, Richard D. Rochford, Maia H. Harris, Nixon Peabody, LLP, Boston, MA, for Defendants.

William L. Patton, Ropes & Gray, LLP, Boston, MA.

MEMORANDUM AND ORDER

SARIS**, J.**

Plaintiff The Gillette Company ("Gillette") brings this action against defendants Energizer Holdings, Inc., Schick Manufacturing, Inc., Eveready Battery Company, Inc., and Energizer Battery, Inc. (collectively "Schick") for patent infringement. Plaintiff alleges that Schick's four-bladed Quattro razor infringes claim 1 of U.S. Patent No. 6,212,777 B1 (filed May 17, 1996) (issued Apr. 10, 2001) ("the '777 Patent"), for which Gillette is the assignee. Both parties seek claim construction. Defendants move for summary judgment of non-infringement. After hearing and review of the briefs, the motion is *DENIED*.

I. BACKGROUND

A. *Facts and Procedural History*

Both Gillette and Schick manufacture and sell shaving products. Gillette introduced the Mach3(R) in 1998. The Mach3(R), Mach3(R) Turbo and Venus(R) razors and shaving cartridges use three blades and constitute Gillette's current flagship shaving products. In September 2003, Schick launched its Quattro razor, which uses four blades.

In August 2003, Gillette filed this patent infringement action and a motion for a preliminary injunction against Schick. In January 2004, the Court construed claim 1 of Gillette's '777 Patent to exclude from its literal scope razors having more than three blades and thus, denied Gillette's motion for a preliminary injunction. (Mem. & Order, Jan. 15, 2004.) On appeal, in a split opinion, the Federal Circuit Court of Appeals vacated and remanded this Court's denial of a preliminary injunction, finding that Gillette's '777 Patent was not limited to razors with solely three blades based on the preliminary record. Gillette Co. v. Energizer Holdings, Inc., 405 F.3d 1367 (Fed.Cir.2005).

By stipulation of the parties and endorsement of the Court, Gillette refined its case and now asserts only claim 1 of its '777 Patent against Schick's Quattro product. Both parties seek construction of several terms of claim 1 of the '777 Patent, and Schick moves for summary judgment of non-infringement.

B. *Claim 1 of* the '777 Patent ***("Claim 1")***

The '777 Patent, entitled "Safety Razors," is directed to multiple blade safety razors that provide "an enhanced overall shaving performance." '777 Patent col.2 ll.50-53. Specifically, the '777 Patent uses a "particular geometrical disposition" so that "the frictional drag forces can be kept at an acceptable level while allowing an improved shaving efficiency," id. col.1 11.32-37, "especially in terms of closeness," id. col.1 11.14-17.

Claim 1, the independent claim and the only claim at issue, of the '777 Patent recites:

A safety razor blade unit comprising a guard, a cap, and a group of first, second, and third blades with parallel sharpened edges located between the guard and cap, the first blade defining a blade edge nearest the guard having a negative exposure not less than -0.2 mm, and the third blade defining a blade edge nearest the cap having a positive exposure of not greater than +0.2 mm, said second blade defining a blade edge having an exposure not less than the exposure of the first blade and not greater than the exposure of the third blade.

Id. col.4 11.5-14. The parties have asked the Court to construe eight terms of Claim 1:(1) "comprising," (2) "guard," (3) "cap," (4) "group of," (5) "first, second, and third," (6) "blades," (7) "blade edge," and (8) "exposure."

II. DISCUSSION

"Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." ' Barbour v. Dynamics Research Corp., 63 F.3d 32, 36 (1st Cir.1995) (quoting Fed.R.Civ.P. 56(c)). "To succeed [in a motion for summary judgment], the moving party must show that there is an absence of evidence to support the nonmoving party's position." Rogers v. Fair, 902 F.2d 140, 143 (1st Cir.1990); *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

"Once the moving party has properly supported its motion for summary judgment, the burden shifts to the non-moving party, who 'may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial." ' Barbour, 63 F.3d at 37 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). "There must be 'sufficient

evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." ' Rogers, 902 F.2d at 143 (quoting Anderson, 477 U.S. at 249-50) (citations and footnote in *Anderson* omitted). The Court must "view the facts in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor." Barbour, 63 F.3d at 36.

"Determining whether a patent has been infringed involves two steps: (1) claim construction to determine the scope of the claims, followed by (2) determination whether the properly construed claim encompasses the accused structure." Bai v. L & L Wings, Inc., 160 F.3d 1350, 1353 (Fed.Cir.1998).

A. *Claim Construction*

The Court begins by construing Claim 1 of the '777 Patent. Claim construction is a "pure issue of law." Cybor Corp. v. FAS Techs., Inc., 138 F.3d 1448, 1454-56 (Fed.Cir.1998) (en banc) (interpreting Markman v. Westview Instruments, Inc., 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996)); Phillips v. AWH Corp., 415 F.3d 1303, 1328 (Fed.Cir.2005) (en banc) (leaving *Cybor* undisturbed for the time).

The Federal Circuit recently addressed the basic tenets of claim construction in *Phillips*. "It is a 'bedrock principle' of patent law that 'the claims of a patent define the invention to which the patentee is entitled the right to exclude." ' Phillips, 415 F.3d at 1312 (quoting Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc., 381 F.3d 1111, 1115 (Fed.Cir.2004)). The "words of a claim 'are generally given their ordinary and customary meaning," ' which is "the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application." Id. at 1312-13 (quoting Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576 (Fed.Cir.1996)) (citations omitted).

"In some cases, the ordinary meaning of claim language as understood by a person of skill in the art may be readily apparent even to lay judges, and claim construction in such cases involves little more than the application of the widely accepted meaning of commonly understood words." Id. at 1314. When the "ordinary and customary meaning" is not readily apparent, the Federal Circuit directs courts to examine two categories of evidence-intrinsic and extrinsic. *See* id. at 1314-19. "The sequence of steps used by the judge in consulting various sources is not important; what matters is for the court to attach the appropriate weight to be assigned to those sources in light of the statutes and policies that inform patent law." Id. at 1324 (citing Vitronics, 90 F.3d at 1582).

There are three, and no more than three, types of intrinsic evidence. First, "the claims themselves provide substantial guidance as to the meaning of particular claim terms." *Id*. at 1314 (citations omitted). The "context in which a term is used in the asserted claim can be highly instructive," and "[o]ther claims of the patent in question, both asserted and unasserted, can also be valuable sources of enlightenment as to the meaning of a claim term." *Id*. (citations omitted).

Second, "the specification 'is always highly relevant to the claim construction analysis. Usually, it is dispositive; it is the single best guide to the meaning of a disputed term." ' *Id*. at 1315 (quoting Vitronics, 90 F.3d at 1582). The specification may also "reveal a special definition given to a claim term by the patentee that differs from the meaning it would otherwise possess" or "reveal an intentional disclaimer, or disavowal, of claim scope by the inventor." *Id*. at 1316. In using the specification to interpret the meaning of a claim term, however, courts must avoid importing limitations from the specification into the claim or limiting the

claims to particular embodiments described in the specification. *See id*. at 1323.

Third, the patent's prosecution history, which "consists of the complete record of the proceedings before the PTO and includes the prior art cited during the examination of the patent," should also be considered by courts if in evidence. *Id*. at 1317 (citations omitted). The prosecution history "provides evidence of how the PTO and the inventor understood the patent" and "can often inform the meaning of the claim language by demonstrating how the inventor understood the invention and whether the inventor limited the invention in the course of prosecution, making the claim scope narrower than it would otherwise be." *Id*. (citations omitted). "Yet because the prosecution history represents an ongoing negotiation between the PTO and the applicant, rather than the final product of that negotiation, it often lacks the clarity of the specification and thus is less useful for claim construction purposes" in comparison to the specification. *Id*. (citations omitted).

Extrinsic evidence "consists of all evidence external to the patent and prosecution history, including expert and inventor testimony, dictionaries, and learned treatises." *Id*. at 1317 (internal quotations and citations omitted). Courts should consider extrinsic evidence "less significant than the intrinsic record in determining the legally operative meaning of claim language" because "it is unlikely to result in a reliable interpretation of patent claim scope unless considered in the context of the intrinsic evidence." *Id*. at 1317, 1319 (internal quotations and citations omitted). The Federal Circuit has thus directed:

Nonetheless, because extrinsic evidence can help educate the court regarding the field of the invention and can help the court determine what a person of ordinary skill in the art would understand claim terms to mean, it is permissible for the district court in its sound discretion to admit and use such evidence. In exercising that discretion, and in weighing all the evidence bearing on claim construction, the court should keep in mind the flaws inherent in each type of evidence and assess that evidence accordingly.

Id. at 1319. Accordingly, *Phillips* rejects the methodology suggested by Texas Digital Sys., Inc. v. Telegenix, Inc., 308 F.3d 1193 (Fed.Cir.2002), where "the specification should be consulted only after a determination is made, whether based on a dictionary, treatise, or other source, as to the ordinary meaning or meanings of the claim term in dispute." *See* Phillips, 415 F.3d at 1319-24.

The Court applies these principles to the terms of claim 1 of the '777 Patent.

1. ***Terms Not Construed by the Federal Circuit***

a. "Guard" and "cap"

Claim 1 requires a "safety razor blade unit comprising a *guard,* a *cap,* and a group of first, second, and third blades." '777 Patent col.4 ll.5-6 (emphasis added).

Schick asserts that the term "guard" as used in the '777 Patent means "a blade unit element positioned in front of the blade edges." (Defs.' Opp'n to Pl.'s Markman Br. 9.) Gillette agrees with this construction. (Pl.'s Reply to Pl.'s Markman Br. 6.)

Schick asserts that the term "cap" as used in the '777 Patent means "a blade unit element positioned behind the blade edges" and includes "any lubricating strip incorporated in such element." (Defs.' Markman Br. 12.) While initially disagreeing, Gillette now concedes this construction. (*See* Pl.'s Reply to Pl.'s Markman Br. 6; Markman & Summ. J. Hr'g Tr. 19:11-18, Oct. 20, 2005.)

The Court adopts these constructions of the terms "guard" and "cap" as well. While the "ordinary and customary meaning" is not readily apparent from the terms or the claims, the specification as noted by Schick:

refers to "guard and cap surfaces positioned in front of and behind the blade edges." '777 Patent at 1:35-36. Both Figures in the patent show the blade unit element denominated "cap" positioned behind the blade unit elements denominated "blades having parallel sharpened edges." '777 Patent at 3:4; 3 :7-8; and Figs. 1 & 2.... Both Figures in the patent show the blade unit element denominated "guard" positioned in front of the blade unit elements denominated "blades having parallel sharpened edges." '777 Patent at 3:4; 3 :7-8; and Figs. 1 & 2.

(Defs.' Opp'n to Pl.'s Markman Br. 9.) Also noted by Schick, "the specification states that '[a]s shown the cap comprises lubricating strip 4 mounted on a frame.' (Id. (quoting '777 Patent col.3 ll.4-5).) Therefore, as used in the '777 Patent, the term "cap" means "a blade unit element positioned behind the blade edges" and includes "any lubricating strip incorporated in such element," and the term "guard" means "a blade unit element positioned in front of the blade edges."

b. "Blades" and "blade edge"

Claim 1 recites "a group of first, second, and third *blades* with parallel sharpened *edges* located between the guard and cap." '777 Patent col.4 ll.6-7 (emphasis added). Claim 1 identifies each of the "first, second, and third blades" as "defining a *blade edge*." Id. col.4 ll.7-14 (emphasis added).

Gillette asserts, and Schick does not dispute, that the term "blades" is well-known in the wet shaving art and that its plain meaning is clear. (Pls.' Markman Br. 6.) The Court agrees. From the language of Claim 1, it is readily apparent that the ordinary meaning of term "blades" as understood by a person of skill in the art refers to "safety razor blades."

The parties disagree, however, over the term "blade edge." Schick asserts that the term means "the entire sharpened side of a blade lying between the sidewalls of the cartridge housing." (Defs.' Markman Br. 10.) Gillette responds that the term means "that portion of a blade that has a sharpened surface which engages the skin and cuts hair." (Pls.' Opp'n to Defs.' Markman Br. 12.)

The ordinary and customary meaning of the term "blade edge" appears to the Court to include any sharpened edge of the blade. Claim 1 recites "blades with parallel sharpened edges," and there is no language in Claim 1 or in any of the other claims that indicates that the term "blade edge" excludes any sharpened edges in whole or in part. *See* '777 Patent col.4 ll.5-50. Similarly, the specification recites "blades defining parallel sharpened edges arranged to pass in turn over a skin surface being shaved." '777 Patent col.1 ll.3-6. As such, at the outset, the term "blade edge" means "any sharpened edge of the blade." This definition is supported by the extrinsic evidence as well. (*See* Defs.' Markman Br. 10 (quoting the *American Heritage College Dictionary* (2d ed.1982) definition of "edge" as the "usually thin, sharpened side of the blade of a cutting instrument").)

In light of this apparent ordinary and customary meaning, both parties' proposed definitions contain unjustified limitations. Gillette attempts to shave away portions of the blade that do not engage the skin and cut hair from the term "blade edge" by pointing to the term "skin contacting surface" in the specification. (

See Pls.' Opp'n to Defs.' Markman Br. 11-13; Markman & Summ. J. Hr'g Tr. 10-12, Oct. 20, 2005.) However, none of the claims contain the term "skin contacting surface." And the specification uses the terms "skin contacting surface" and "skin engaging surface" only in defining the term "exposure" but not in defining the terms "blade edge" or "edge." *See, e.g.,* '777 Patent col.1 ll.50-53, col.2 ll.2-5. Similarly, Schick's attempt to limit the term "blade edge" to the "sharpened side of a blade *lying between the sidewalls of the cartridge housing*" is not supported by either the claims or the specification. (Defs.' Markman Br. 10 (emphasis added).)

Therefore, as used in the '777 patent, the term "blade edge" means "any sharpened edge of the blade."

c. "Exposure"

Claim 1 recites:

the first blade defining a blade edge nearest the guard having a negative *exposure* not less than -0.2 mm, and the third blade defining a blade edge nearest the cap having a positive *exposure* of not greater than +0.2 mm, said second blade defining a blade edge having an *exposure* not less than the exposure of the first blade and not greater than the *exposure* of the third blade.

'777 Patent col.4 ll.7-14 (emphasis added). Claim 1 thus defines each of the "first, second, and third blades" in part by the term "exposure."

The specification contains an explicit definition of the term "exposure":

The blade exposure is defined to be the perpendicular distance or height of the blade edge measured with respect to a plane tangential to the skin contacting surfaces of the blade unit elements next in front of and next behind the edge. Therefore, for the three-bladed blade unit of the invention, the exposure of the first or primary blade is measured with reference to a plane tangential to the guard and the edge of the second blade, and the exposure of the third or tertiary blade is measured with reference to a plane tangential to the edge of the second blade and the cap.

'777 Patent col.1 ll.50-59 [hereinafter "the Specification Exposure Definition"]. In addition, the specification illustrates the progressive increase in blade exposure in Fig. 2 to the '777 Patent:

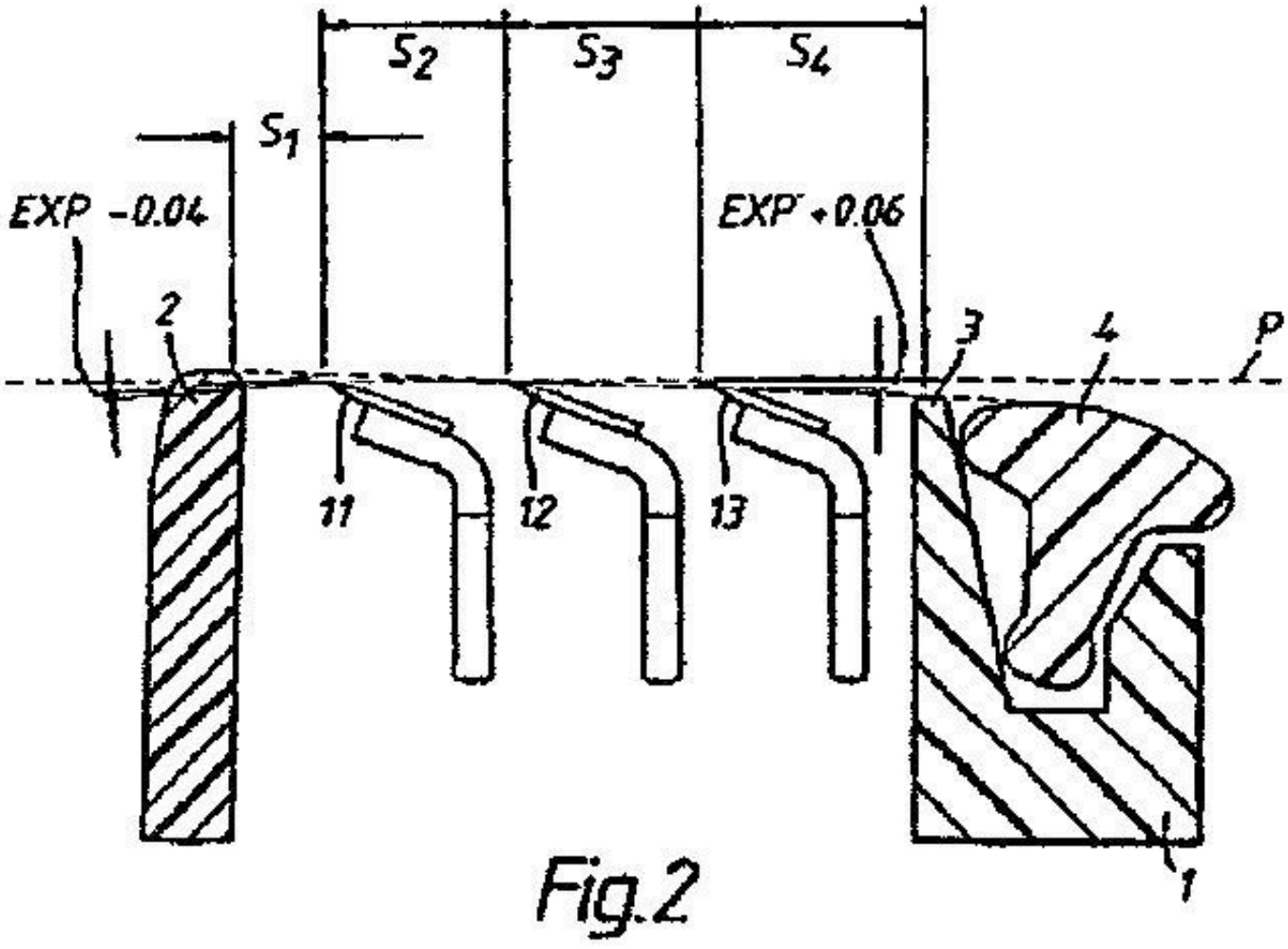


Fig.2

"FIG. 2 shows a schematic representation of a transverse cross-section through the preferred embodiment." '777 Patent col.2 ll.60-62. As illustrated, the blade unit "has a frame 1 defining a guard 2 and a cap 3. As shown the cap comprises a lubricating strip 4 mounted on the frame. Carried by the frame are primary, secondary and tertiary blades 11,12,13 having parallel sharpened edges." Id. col.3 ll.3-8. In the Fig. 2 embodiment, the primary (11), secondary (12) and tertiary (13) blades have exposures of-0.04 mm, zero, and +0.06 mm, respectively. *See* id. col.3 ll.42-50.

The parties disagree on how the Court should construe the term "exposure." At issue is how "the exposure of the third or tertiary blade is measured with reference to a plane tangential to the edge of the second blade and the cap." Id. col.1 ll.57-59. The Court addresses the intrinsic evidence first and refers to Fig. 2 and its labels in its analysis.

Gillette contends that the "exposure" of the third blade (13) is measured by drawing a plane tangential to the edge of the second blade (12) and the skin contacting surface of the cap lip, which is the skin contacting surface both closest to the third blade (13) and part of the cap (3). Gillette bases this construction on the phrase "plane tangential to *the skin contacting surfaces* of the blade unit elements *next in front of and next behind* the edge." Id. col. 1 ll.52-53 (emphasis added).

Schick asserts, however, that the "exposure" of the third blade (13) is measured by drawing a plane

tangential to the edge of the second blade (12) and the "topmost boundary" of the cap (3), which Gillette concedes could include the lubricating strip (4). Therefore, under Schick's proposed construction, if in Fig. 2 the lubricating strip (4) were constructed so that it extended vertically above plane P and the cap (3) remained unchanged, the "exposure" of the third blade (13) would be measured by drawing a plane tangential to the edge of the second blade (12) and the "topmost boundary" of the lubricating strip (4). FN1 Schick bases this construction on a different interpretation of the same phrase used by Gillette: "plane tangential to the skin contacting surfaces of the blade unit elements next in front of and next behind the edge." Id. col.1 ll.52-53. But under Schick's interpretation, "next in front of and next behind" refers to "the blade unit element," and "the skin contacting surface" means the entire portion of "the blade unit element."

FN1. This issue of construction relates directly to infringement. (*Compare* Pls.' Ex. 39 (illustrating Gillette's proposed construction on Schick's Quattro razor) *with* Defs.' Mem. Summ. J. 6 (illustrating Schick's proposed construction on Schick's Quattro razor).)

Based on the intrinsic evidence, the Court finds that the term "exposure" is ambiguous. The phrase "next in front of and next behind" of the Specification Exposure Definition could modify "the skin contacting surfaces" (as Gillette contends), "the blade unit elements" (as Schick contends), or both "the skin contacting surfaces" and "the blade unit elements" (which would essentially be the same as Gillette's proposed construction). The dashed line that measures the "exposure" of the third blade (13) in Fig. 2 of the '777 Patent supports both proposed constructions because the plane touching the cap lip also touches the lubricating strip. Aside from the specification, none of the claims defines the term "exposure," and the parties have pointed to nothing in the prosecution history of the '777 Patent pointing in either direction. Therefore, the extrinsic evidence becomes critical for the Court to construe the term "exposure."

Pointing to dictionary definitions, Schick contends that the term "the skin contacting surface" means the entire portion of a blade unit element's skin contacting surface. (*See* Defs.' Markman Br. 12.) This definition would support Schick's proposed construction of the term "exposure" even if, as asserted by Gillette, the phrase "next in front of and next behind" of the Specification Exposure Definition modifies "the skin contacting surfaces." If the "exposure" of the third blade (13) were measured by drawing a plane tangential to the edge of the second blade (12) and the entire portion of the cap's (3) skin contacting surface, the dictionary definitions of the words "tangential" and "surface" would direct the plane to be drawn to the "topmost boundary" of the cap (3). *See American Heritage College Dictionary* (2d ed.1982) (defining the word "tangential" as "[o]f ... or moving along or in the direction of a tangent," the word "tangent" as "[m]aking contact at a single point or along a line; touching but not intersecting," and the word "surface" as "[t]he outer or the topmost boundary of an object").

The extrinsic dictionary definitions, however, do not resolve the ambiguity of the term "exposure." The crux of Schick's argument is that the use of a definite article in the term "the skin contacting surfaces" signifies that each blade unit element has one and only one skin contacting surface: " 'the' signifies that the phrase refers to the entirety of the blade unit element's skin contacting surface." (Defs.' Markman Br. 12.) The pertinent excerpt of the Specification Exposure Definition states, however, "plane tangential to the *skin contacting surfaces of the blade unit elements* next in front of and next behind the edge." '777 Patent col.1 11.52-53 (emphasis added). This language is ambiguous because it is unclear whether the plural word "surfaces" refers (a) to multiple surfaces on the same blade unit element or (b) to the combination of the singular "surface" on the blade unit element "next in front of" the edge and the singular "surface" on the blade unit element "next behind the edge." Therefore, Schick's argument based on extrinsic dictionary

definitions is not conclusive.

More persuasively, Gillette points to extrinsic evidence in the form of another patent, deposition testimony from Schick's own expert, and Schick's own Quattro production specification as demonstrating that persons of ordinary skill in the art understand the term "exposure" under Gillette's proposed construction. Specifically, U.S. Patent No. 3,660,893 (filed Mar. 24, 1970) (issued May 9, 1972) ("the Welsh Patent"), which the '777 Patent cites as a reference, defines the term "exposure" as "the perpendicular distance from the cutting edge to the plane tangent to the skin-engaging surfaces disposed in front of and behind the cutting edge." Welsh Patent col.4 11.53-55. While Schick's briefs attempt to distinguish the Welsh Patent as defining a different "protocol" for measuring "exposure" based on the different language used, Schick's own technical witness, William Vreeland, testified that he understood that the Welsh method of measuring "exposure" was the same method disclosed in the '777 Patent. (Pls.' Surreply to Defs.' Markman Br. Ex. 1.) In addition, Schick's own production specification for the Quattro razor illustrates that in measuring the "exposure" of the blade closest to the cap, a plane is drawn tangent to the cap lip, which is the skin engaging surface next behind the blade as Gillette contends. The plane is not drawn tangent to the cap or the entirety of the cap's skin engaging surface as Schick contends. (*See* Pls.' Ex. 39.) This extrinsic evidence thus reveals that persons of ordinary skill in the art understand the term "exposure" under Gillette's proposed construction.

Therefore, the Court construes the term "exposure" according to the explicit definition of the specification, where the phrase "next in front of and next behind the edge" modifies "the skin engaging surfaces." With regard to the "exposure" of the third blade (13), the Court adopts Gillette's proposed construction, where the plane is tangential to the edge of the second blade (12) and the skin contacting surface that is both closest to the third blade (13) and part of the cap (3).

2. *Terms Construed by the Federal Circuit*

In vacating this Court's denial of a preliminary injunction, the Federal Circuit emphasized that "because the claim construction set forth in [its] opinion is preliminary and based upon an incomplete record, the district court will have every opportunity to review and revisit this claim construction during development of a full record." Gillette, 405 F.3d at 1375. As such, the parties supplemented the record by briefs and hearing regarding the terms "comprising," "group of," and "first, second, and third" after the Federal Circuit's decision.

In *Gillette,* the Federal Circuit first construed the terms "comprising" and "group of" to be "presumptively open-ended" and thus, to indicate that the "addition of elements not recited in the claim cannot defeat infringement." Gillette, 405 F.3d at 1371-72 (citations omitted). Based on the language of Claim 1 and caselaw construing the terms in other patents, the Federal Circuit found the construction "clear" and "not ambiguous." *See* id. at 1371-73 (citing, inter alia, Crystal Semiconductor Corp. v. TriTech Microelectronics Int'l, Inc., 246 F.3d 1336, 1347 (Fed.Cir.2001) and Abbott Labs. v. Baxter Pharm. Prods., Inc., 334 F.3d 1274, 1280 (Fed.Cir.2003)). *Gillette* found that the "language of the claims depending from claim 1 also support reading 'comprising' and 'group of' as open terms." *Id*. at 1373 (discussing the difference between "the span" and "a span" in claim 2 of the '777 Patent).

Next, the Federal Circuit construed the terms "first, second, and third" to be "terms to distinguish different elements of the claim, not terms supplying a numerical limit." Gillette, 405 F.3d at 1373. This construction was based on the Federal Circuit finding that the language of Claim 1(a) provided different definitions in

terms of location and exposure for the "first, second, and third" blades, (b) did not follow a consecutive order, and (c) used the open-ended terms "comprising" and "group of." Id. at 1372-74. "The specification provides further support for interpreting claim 1 to encompass razors with more than three blades" by the use of the phrase "plurality of blades" and the absence of disavowals of claim scope. Id. at 1373-74. In addition, the admissions of Schick in the "prosecution of patents related to the '777 patent also support reading claim 1 as an open claim." Id. at 1373.

Schick contends that new evidence and the intervening en banc decision of *Phillips* require reinstatement of this Court's original claim construction.

a. New Evidence

i. Gillette's statements in prosecuting counterparts to the '777 Patent **in Australia and Malaysia**

Schick submits that Gillette made multiple admissions that its invention is limited to three-bladed razors in the prosecution of Australian and Malaysian counterparts to the '777 Patent. (Defs.' Markman Br. 3-5.) Specifically, in prosecuting the Australian counterpart, Gillette submitted on October 2, 1997 that:

With respect the essence of the present invention, as recited in claim 1 (the sole independent claim), is not any multiple (more than 2) -bladed razor but only a 3-bladed razor with a specific relation of blade geometry (exposure and span).... Referring now to paragraph 4 of the Action, in the first place the cited U.S. Patent 3,786,563 is not relevant because it is concerned with a two-bladed razor whereas the present invention is limited to a three-bladed razor.

(Id. Ex. 2 10-11.) In prosecuting the Malaysian counterpart, Gillette submitted in almost identical language on June 24, 1999 that:

It should be respectfully pointed out to the Examiner that the essence of the present invention, as recited in claim 1 (the sole independent claim), is not any multiple (more than 2) -bladed razor but *only a 3-bladed razor with a specific relation of blade geometry (exposure and span)*. ... Cited references US-A-3786563 and US-A-4146958 are not relevant because they each concern a two-bladed razor, whereas the present invention is limited, to a three-bladed razor.

(Harris Summ. J. & Markman Decl. Ex. 1 GIL-Q 43492-93.)

Schick contends that these also blatant admissions are critical to construing the terms "first, second, and third" in this case because the Federal Circuit expressly relied on Schick's admission, regarding a related patent in front of the European Patent Office ("the EPO"), that an open interpretation of "comprising" would not exclude an arrangement with four or more blades. (Id.) Gillette agrees that it made the statements cited by Schick but disputes their relevance based on the different procedural and patent contexts in which they were made. (*See* Pls.' Opp'n to Defs.' Markman Br. 4-10.)

While Gillette's statements are admissions and relevant to what a person of ordinary skill in the art would understand the terms "first, second, and third" to mean, this new evidence does not necessarily alter the Federal Circuit's construction. Schick's admission to the EPO was not integral to the Federal Circuit's reasoning in *Gillette*. Two members of the Federal Circuit construed the terms "first, second, and third" based on their view of the language of Claim 1. The reference to Schick's admission in a three-sentence paragraph in the opinion merely provided the cherry on the top. Therefore, Gillette's admissions have only

tangential significance.

Extrinsic evidence is "less significant than the intrinsic record in determining the legally operative meaning of claim language," Phillips, 415 F.3d at 1317-19 (discussing the reasons as well for treating extrinsic evidence with less weight), and has "no bearing" on claim construction if it "conflicts with the intrinsic record," Cross Med. Prods., Inc. v. Medtronic Sofamor Danek, Inc., 424 F.3d 1293, 1304 (Fed.Cir.2005) (citing Phillips, 415 F.3d at 1318). While the Federal Circuit has occasionally used statements made in front of foreign patent offices regarding related patents to determine what a person of ordinary skill in the art understands terms to mean, it has never made them a part of the intrinsic record for claim construction purposes. *See* Phillips, 415 F.3d at 1317 (defining intrinsic prosecution history to include "the complete record of the proceedings before the PTO and ... the prior art cited during the examination of the patent" and extrinsic evidence to include "all evidence external to the patent and prosecution history" (quotations and citations omitted)); Gillette, 405 F.3d at 1374 (referencing statements made regarding related patent in front of foreign patent offices but not characterizing them as intrinsic prosecution history of patent at issue); C.R. Bard, Inc. v. U.S. Surgical Corp., 388 F.3d 858, 870 n. 6 (Fed.Cir.2004) (leaving the question unresolved of whether statements applicants made during the prosecution of foreign patent applications may limit claims when intrinsic record suffices to support the claim construction); Tanabe Seiyaku Co., Ltd. v. U.S. Int'l Trade Comm'n, 109 F.3d 726, 733 (Fed.Cir.1997) ("In evaluating infringement under the doctrine of equivalents, 'representation[s] to foreign patent offices should be considered ... when [they] comprise relevant evidence." ' (citation omitted)). Indeed, the rationales underlying according extrinsic evidence with less weight in comparison to intrinsic evidence seem to apply to such statements not only because the patent language may differ, as is the case here, but also because the patent regimes differ. Phillips, 415 F.3d at 1319 (noting that extrinsic evidence "is unlikely to result in a reliable interpretation of patent claim scope unless considered in the context of the intrinsic evidence").

Therefore, Gillette's admissions, while relevant, do not necessarily alter the Federal Circuit's construction of the terms "first, second, and third" in *Gillette*.

ii. Clerical error of the Patent & Trademark Office ("the PTO")

Schick also submits that the Federal Circuit analyzed sua sponte the difference between the use of "the span" and "a span" in a dependent claim "evidently without considering a critical aspect of the record." (Defs.' Opp'n to Pls.' Markman Br. 10.)

Claim 2 of the '777 Patent ("Claim 2"), which depends on Claim 1, recites:

A safety razor blade unit according to claim 1, wherein *the span between the first blade edge and the guard* is substantially smaller than *a span between the edges of the first and second blades* and the span between the edges of the second and third blades.

'777 Patent col.4 11.16-20 (emphasis added). The Federal Circuit found that this language "also support[s] reading 'comprising' and 'group of' as open terms" because:

The patent drafter's use of "a span" between the first and second blades recognizes that more than one such span may exist. On the other hand, the drafter's use of "the span" to identify the span between the guard and first blade recognizes that only one such span is possible.

Gillette, 405 F.3d at 1373. FN2 The dissenting opinion pointed out that the patent drafter would have used "spans" instead of "a span" to indicate plurality. *See* Gillette, 405 F.3d at 1376-77 (Archer, J., dissenting).

FN2. The *Gillette* decision made no mention of the drafter's use of "the span" between the second and third blades in the same sentence.

Schick contends that the difference between "a" and "the" in the '777 Patent is due only to the failure of the PTO clerk to properly enter an amendment to the patent application. (Defs.' Opp'n to Pls.' Markman Br. 10-11.) Indeed, the amendment cited by Schick requests that "the span" be changed to "a span" in four different claims. (*See* Harris Summ. J. Decl. Ex. 16 at G 0000101-06.) Gillette responds that the Federal Circuit's reasoning has continued vitality because "the span" remains in Claim 2. (Pls.' Reply to Defs.' Opp'n to Pls.' Markman Br. 6-7.)

Again, similar to Gillette's admissions, the Federal Circuit's misplaced reliance on a typographical error does cut support away from its conclusion that the terms "comprising" and "group of" are presumptively open-ended, but it does not eviscerate the core rationale of the two-member majority. *Gillette* found the "clear language" of Claim 1 to be "not ambiguous." *Id*. at 1371-73 (citing, inter alia, Crystal Semiconductor, 246 F.3d at 1347, and Abbott Labs., 334 F.3d at 1280). The discussion of definite and indefinite articles in claims depending on Claim 1 merely added support. *Id*. (noting that the language "also support[s] reading 'comprising' and 'group of' as open terms").

b. New Law

Schick submits that the Federal Circuit's subsequent en banc *Phillips* decision supersedes the reasoning in *Gillette*. Specifically, Schick contends that "the linchpin of the panel's majority decision was its observation that the '777 Patent contains no 'explicit disclaimer' or 'disavowal' of razors with more than three blades, and that this "approach to claim construction-the view that a claim term encompasses any meaning not expressly defined away or disavowed in the patent-plainly does not survive *Phillips*." (Defs. Opp'n to Pls.' Markman Br. 4.) Schick's argument fails.

Schick misinterprets *Phillips* in applying it to *Gillette*. *Gillette* stated that " 'words or expressions of manifest exclusion' or 'explicit' disclaimers in the specification are necessary to disavow claim scope." *Id*. at 1374 (citations omitted). The Federal Circuit did not reject this approach in *Phillips*. Indeed, as noted by Gillette, both *Phillips* and subsequent Federal Circuit decisions affirmed the doctrine. *See* Phillips, 415 F.3d at 1316 ("[T]he specification may reveal an *intentional* disclaimer, or disavowal, of claim scope by the inventor." (citation omitted) (emphasis added)); *see, e.g.,* NTP, Inc. v. Research In Motion, Ltd., 418 F.3d 1282 (Fed.Cir.2005) (finding that the "required words or expressions of manifest exclusion or restriction representing a clear disavowal of claim scope are not present in these passages from the prosecution history" after *Phillips*), *reh'g and reh'g en banc denied* (Oct. 7, 2005). Rather, *Phillips* overturned the approach of *Texas Digital,* where claim terms are construed to encompass all dictionary definitions consistent with the intrinsic record unless the specification contains a sufficiently specific alternative definition or disavowal. Phillips, 415 F.3d at 1319-20; Nystrom v. Trex Co., Inc., 424 F.3d 1136, 1144-45 (Fed.Cir.2005).

Schick is correct, however, in emphasizing that *Phillips* reaffirmed the primacy of the specification in construing claim terms: "claims 'must be read in view of the specification, of which they are a part," ' and "the specification 'is always highly relevant to the claim construction analysis. Usually it is dispositive; it is

the single best guide to the meaning of a disputed term." ' 415 F.3d at 1315 (citations omitted). In all of the post- *Phillips* cases cited by Schick, the Federal Circuit used the specification to interpret the meaning of a term where the meaning could not be conclusively discerned from the claim language. *See* Nystrom, 424 F.3d at 1143-44 (examining the specification and prosecution history to construe the term "board" when the claims established only a presumption that the term was not limited to wood); Network Commerce, Inc. v. Microsoft Corp., 422 F.3d 1353, 1359-61 (Fed.Cir.2005) (examining the specification to construe the term "download component" when "the claim language is not clear as to what other programs are to be used with the 'download component" ' and when the parties agreed that the term "does not have a specialized meaning in the relevant art"); AquaTex Indus., Inc. v. Techniche Solutions, 419 F.3d 1374, 1380-82 (Fed.Cir.2005) (examining the written description, prosecution history, and extrinsic evidence of record when the claims "offer little guidance as to the underlying composition of 'fiberfill batting material' apart from the functions it must be capable of performing").

Schick is also correct in emphasizing that the broad constructions of the terms at issue in those post- *Phillips* cases were rejected because the Federal Circuit panels unanimously found that the narrower meanings were contained consistently throughout the specifications. *See* Nystrom, 424 F.3d at 1143-44 (Fed.Cir.2005) (construing the term "board" to be limited to wood material where "[t]hroughout the written description, Nystrom consistently used the term 'board' to describe wood decking material cut from a log"); Network Commerce, 422 F.3d at 1360-61 (construing the term "download program" to include a boot program that interacts with the computer operating system directly where "[t]he specification repeatedly states that the download file contains the boot program" and "describes no programs mediating between the boot program and the operating system"); AquaTex, 419 F.3d at 1381 (Fed.Cir.2005) (construing the term "fiberfill batting material" to be limited to purely synthetic fiber where the written description provides guidance only to materials "entirely of synthetic materials").

These latter arguments are persuasive, but Schick is preaching to the choir. While I respectfully disagree with the two-member majority in *Gillette,* I am bound by the construction of its opinion that the plain meaning of the claim language encompasses more than three blades. Perhaps based on a fuller record with the new evidence cutting away the support of the *Gillette* opinion, Schick's arguments will prevail on appeal.

B. *Infringement*

The "determination of infringement, whether literal or under the doctrine of equivalents, is a question of fact." Bai, 160 F.3d at 1353.

Schick submits two arguments in its motion for summary judgment of non-infringement. First, Schick argues that its Quattro razor does not infringe, either literally or under the doctrine of equivalents, because Claim 1 of the '777 Patent is limited to three-bladed razors. Second, in the alternative, Schick argues that the Quattro blade that is nearest to the cap has a negative exposure, placing Schick's Quattro razor outside the scope of Gillette's patent.

The Court's construction of the terms "first, second, and third" and "exposure" is critical to these issues of infringement. Schick's motion for summary judgment is premised on its proposed construction of the terms "first, second, and third" as limited to three-bladed razors and of the term "exposure" as measured by drawing a plane tangential to the topmost boundaries of the blade unit elements next in front and behind. (*See* Defs.' Mem. Summ. J. 2-7; Defs.' Reply to Defs.' Summ. J. 1-11.) As discussed above, however, the Court does not adopt Schick's proposed constructions of the terms "first, second, and third" and "exposure."

Accordingly, Schick's motion for summary judgment of non-infringement fails. Gillette did not move for summary judgment of infringement.

ORDER

Schick's motion for summary judgment of non-infringement is *DENIED*. (Docket No. 270.)

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