United States District Court,
S.D. California.

HENRY-GRIFFITTS, INC., a Delaware corporation,
Plaintiff.
v.
ACHUSHNET COMPANY dba Titleist Golf, Roger Cleveland Golf Company, Inc.; Taylor Made Golf Company,
Defendants.

No. 04CV2182-LAB(RBB)

Jan. 4, 2006.

Christopher S. Walton, Gregory Donahue, Raymond M. Galasso, Simon Galasso and Frantz, Austin, TX, David Sean Dufek, Law Offices of David Sean Dufek, San Diego, CA, for Plaintiff.

Kevin Cooper Mayer, Steptoe and Johnson, Los Angeles, CA, Roger W. Parkhurst, Steptoe and Johnson, Washington, DC, for Roger Cleveland Golf Company, Inc.

Jonathan Hangartner, La Jolla, CA, for Taylor Made Golf Company.

ORDER CONSTRUING PATENT CLAIM

LARRY ALAN BURNS**, District Judge.**

On November 15, 2005, the Court conducted a hearing pursuant to Markman v. Westview Instruments, Inc., 52 F.3d 967 (Fed.Cir.1995) to construe the meaning of disputed patent terms involving a "Golf Club Lie Angle Evaluation Device." Plaintiff Henry-Griffitts, Inc. ("Henry-Griffitts") alleges the remaining defendants in this case, Taylor Made Golf Company ("Taylor Made") and Cleveland Golf Company, Inc. ("Cleveland Golf"), are infringing its patent. Claim 1 of plaintiff's '662 Patent (provided as Exhibit A to the Joint Appendix Of Exhibits For Claim Construction Hearing) describes the device, as pertinent here (disputed terms highlighted):

1. Apparatus for determining a golfer's proper golf club lie angle comprising:

a golf club including a head having a ground contacting surface to be evaluated by a golfer;

a removable **abradable coating** applied to said ground contacting surface of said head of said golf club and extending continuously from a first end located generally below the toe of said club head to a second end located generally below the heel of said club head; and

a **translucent surface** for supporting a golf ball and for abrading said abradable coating when a golfer

swings said golf club at a golf ball supported on said surface further including **means for imparting a tactually soft appearance thereto.**

The parties provided a Joint Claim Construction Chart, with each party proposing its own construction of the disputed terms. Dkt No. 37. After entertaining oral argument and in consideration of the parties' briefs and exhibits, the court tentatively construed on the record two of the three terms at issue, and requested additional briefing with respect to the third term. This Order memorializes the court's construction of all the disputed patent terms.

The court construes the term "a removable abradable coating" in the manner proposed by Taylor Made in the Joint Claim Construction Chart, with the addition of the word "removable." That is: " 'removable abradable coating' means: 'a coating that is scraped off or obviously worn away by moving contact with the supporting surface .' "

The court construes the term a "translucent surface" in the manner proposed by Taylor Made in the Joint Claim Construction Chart. That is: " 'translucent surface' means: 'a surface that diffuses light so that objects beneath it cannot be seen distinctly.' " "Translucent surface" does not include a clear (transparent) surface or an opaque surface.

Finally, the court finds "means for imparting a tactually soft appearance" is not a fatally indefinite term, as charged by defendants. There appears to be no dispute the actual surface on which the golf ball sits must be hard in order to abrade the removable coating on the golf club head. However, the awkwardly compressed syntax of that claim term requires paraphrase to untangle the confusion inherent in invoking two senses (visual and touch) to describe a single impression, Although a paraphrase does not resolve the claim construction issue, it provides a starting point. The court accordingly first defines the term "means for imparting a tactually soft appearance" to be: a "means for imparting a visual impression of tactile softness," that is, a "means to give the visual sense impression the surface would be soft to the touch."

The court has considered the parties' supplemental briefing for construction of the term "means for imparting a tactually soft appearance." Henry-Griffitts contends the "imparting means" of the claim are "associated with three corresponding structures in the patent's specification: (1) the translucent material of the surface, (2) the material of the surface being fabricated in light blue, and (3) the material of the surface being fabricated in an off white." FN1 Plaintiff's Suppl. Brief. 1:9-15. Plaintiff quotes the '662 patent's Summary of the Invention: "Such a tactually soft appearance is imparted to the surface when the surface is **fabricated of a translucent material, for example, plastic**" (Henry-Griffitts Suppl. Brief 4:11-12, *citing* ' 662 patent, col. 1. //66-68), and argues the "blue" and "off-white" references are simply possible (but not required) "enhancements" to the visual impression of softness. Henry-Griffitts' Suppl. Brief 4:1-12. Henry-Griffitts' construction thus treats the translucent material itself as the "imparting' means." Plaintiff's Suppl. Brief 4:4.

FN1. Henry-Griffitts argues: "Here, the '662 patent specification clearly associates at least three alternative structures with the 'imparting' function. The specification discloses that the appearance of being 'tactually soft' is established in the mind of the golfer '[b]y fabricating surface 25 of a translucent material ...' '662 patent, col. 3, //53-54. **In other words, the translucent material itself is the 'imparting' means.** The specification also teaches that the appearance of tactual softness may be but is not required to be *enhanced* in two ways: first, enhancement may be 'achieved by making the material of which surface 25 is fabricated of light blue' (*ie*. /62); and, second, enhancement may be 'achieved by making the material of which surface

25 is fabricated of ... [an] off white cast.' *Id*. Accordingly, the additional structures of a 'surface fabricated of light blue material' and a 'surface fabricated of off white material' may also be included in 'imparting' means." Henry-Griffitts' Suppl. Brief 4:10-12 (emphasis added).

However, both defendants argue that plaintiff's proposed construction would "read out" of the claim the "**further**" requirement of a "means for imparting" *to the translucent surface* "a tactually soft appearance," because "the use of a translucent surface is already separately required." Taylor Made Reply 2:6-9. "Henry-Griffitts again fails to acknowledge that the required 'means' is a *further* structure or material *in addition to* the previously-claimed translucency of the 'translucent surface.' " Cleveland Golf's Reply 2:20-21. The court is persuaded that defendants' proposed construction, rather than plaintiff's, preserves all the elements identified in the claim: "(1) a *translucent* surface, which translucent surface (2) ' *further include[es*],' (3) ' *means for imparting* [to that translucent surface] a *tactually soft appearance*.' " Cleveland Golf's Reply 2:15-18.

With Henry-Griffitts' concession that "translucent" excludes "clear" and "opaque," the language "said surface **further including means**" to achieve the described visual impression of softness supports defendants' construction that a requirement separate from translucence exists in the articulation of Claim 1. Accordingly, the court adopts the defendants' perspective. The court construes the language the translucent "surface further including means for imparting a tactually soft appearance thereto" as follows: "translucent" relates to the material used; the "further included means" are the use of light blue or off-white additives combined at surface 25 with the material fabricated; and, as proposed by Taylor Made, the "only supportable claimed means are: 'a surface that is either light blue or an off-white cast.' " Joint Claim Const. Chart p. 3.

IT IS SO ORDERED.

S.D.Cal.,2006.
Henry-Griffitts, Inc. v. Achusnet Co.

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