United States District Court,
N.D. Texas, Dallas Division.

B-50.COM, LLC,
Plaintiff.
v.
XFORMITY, INC,
Defendant.

Civil Action No. 3:04-CV-0542-B

Feb. 23, 2006.

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ORDER ADOPTING THE SPECIAL MASTER'S FINAL REPORT AND RECOMMENDATION ON CLAIM CONSTRUCTION

JANE J. BOYLE**, District Judge.**

The Special Master's Final Report and Recommendation on Claim Construction ("final report") in this patent case is before the Court for *de novo* review. By way of background, on September 8, 2005, pursuant to Rule 53 of the Federal Rules of Civil Procedure, the Court appointed attorney Jerry R. Selinger as Special Master in this case for the purpose of assisting the Court in its claim construction analysis. (doc. 42) On November 17, 2005, the Special Master filed his report and recommendation construing ten disputed claim terms. (doc. 45) On December 7, 2005, Plaintiff B-50.com ("B-50") filed its objections to the Special Master's final report. (doc. 47) Defendant XFormity, Inc. ("XFormity") responded to B-50's objections on December 20, 2005. (doc. 50) The Special Master's findings of fact and conclusions of law on claim construction and the objections and responses thereto are now ripe for the Court's consideration.

Under Rule 53(g), this Court reviews the factual findings and legal conclusions objected to by the parties under a *de novo* standard. FED. R. CIV. P. 53(g)(3) & (4). The Court may, but need not, review all other findings of fact and conclusions of law *de novo*. *See* FED.R.CIV.P. 53 Advisory Committee Notes on 2003 Amendments. Here, the Court has elected to conduct a *de novo* review of the Special Master's final report in its entirety. Having done so, the Court **ADOPTS** the Special Master's report in full and **OVERRULES** B-50's objections.

I. BACKGROUND

This is a patent infringement suit involving U.S. Patent No. 6,633,851 ("the '851 patent"). The '851 patent involves point-of-sale reporting software. Specifically, the '851 patent claims a method of generating custom-formatted reports based on restaurant point-of-sale data transferred between multiple remote computing devices and a central computing device. ('851 patent, col. 24 lns. 10-13) B-50 accuses Xformity of infringing independent Claim 1 and dependent Claims 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 of the '851 patent through its product known as "QSRx." (Compl. at 3 para. 8; B-50 Cl. Constr. Br. at 1) The parties' claim construction dispute involves ten claim terms which were the subject of the *Markman* hearing and addressed in briefing filed in connection with that hearing. Before submitting his final report, the Special Master reviewed the *Markman* hearing transcript and all related briefing. He then sent a draft claim construction report to the parties to which they responded with comments and objections via letter briefs. Shortly thereafter, the Special Master filed his final report and recommendation which is the subject of this Order. Before addressing the Special Master's report and recommendation and B-50's objections, the Court will review the legal authority applicable to this claim construction analysis.

II. APPLICABLE AUTHORITY

Claim construction is the first step in the two-part analysis to determine patent infringement. Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1581-82 (5th Cir.1996). Patent claims that are asserted to be infringed are first construed in order to determine their true meaning and scope. Markman v. Westview Instruments, Inc., 52 F.3d 967, 976 (Fed.Cir.1995) (en banc). Then, the properly construed claims are compared against the device accused of infringing. *Id*.

Claim construction is simply a way of elaborating the normally terse claim language in order to understand and explain, but not to change, the scope of the claims. Embrex, Inc. v. Serv. Eng'g Corp. ., 216 F.3d 1343, 1347 (Fed.Cir.2000) (per curiam). The analysis begins with the language of the claim itself. *See* Vitronics, 90 F.3d at 1582. "[T]he language of the claim defines the scope of the protected invention," and "resort must be had in the first instance to the words of the claim." Bell Communications Research, Inc. v. Vitalink Communications Corp., 55 F.3d 615, 619-20 (Fed.Cir.1995). Absent an express intent to impart a novel meaning, terms in a claim are to be given their ordinary and accustomed meaning. Mars, Inc. v. H.J. Heinz Co., 377 F.3d 1369, 1373 (Fed.Cir.2004); *see also* Vitronics, 90 F.3d at 1582. However, 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. Vitronics, 90 F.3d at 1582.

Thus, it is always necessary to review the specification to determine whether the inventor has used any terms in a manner inconsistent with their ordinary meaning. *Id*. Furthermore, the words of the claim must be construed in light of the specification, which contains a written description of the invention that must be clear and complete enough to enable those of ordinary skill in the art to make and use it. *Id*. The specification is always highly relevant and the single best guide to the meaning of a disputed term. *Id*.

The Court may also consider the prosecution history of the patent. *Id*. The prosecution history contains the complete record of all the proceedings before the Patent and Trademark Office, including any express representations made by the applicant regarding the scope of the claims. *Id*.

When construing claims, the Court must look first to the claim language, the specification, and the prosecution history, known collectively as the "intrinsic evidence," because the intrinsic evidence constitutes the public record of the patentee's claim. *See id*. at 1583. Competitors are entitled to rely on this record and

on the established rules of claim construction to ascertain the scope of the patent and thus, design around the claimed inventions. *Id*.

Intrinsic evidence alone will resolve any ambiguity in most situations. *Id*. Extrinsic evidence, such as expert testimony regarding the meaning or scope of technical terms, is disfavored. *See id*. Extrinsic evidence should not be relied upon if the public record unambiguously describes the scope of the patented invention. *Id*. These principles of claim construction were recently reaffirmed by the Federal Circuit sitting en banc in Phillips v. AWH Corporation, 415 F.3d 1303, 1311-1324 (Fed.Cir.2005) (en banc). With that background, the Court now turns to the Special Master's construction of the terms at issue.

III. ANALYSIS

A. "A Central Computing Device"

The Special Master construed the term "a central computing device" to mean "a single server or higher-end machine at the top of the hierarchical relationship which stores, processes and transmits information to and from multiple remote computing devices." (F & R at 32) He viewed the parties' dispute over the meaning of the term "a central computing device" as two-fold and divided his analysis accordingly. First, he said the parties disputed whether or not the term can be read to mean that the central computer is at the top of the hierarchical computer network (XFormity)-or-whether there is no hierarchical relationship between the central and remote computers (B-50). Secondly, he stated the parties disagreed over whether the term "central computer" refers to one (Xformity) or multiple (B-50) computers. These arguments were raised by B-50 in its objections to the Special Master's final report. Both points are addressed below.

1. Hierarchical Relationship

With respect to the first dispute-whether or not the claim describes a hierarchy between the central and remote computers-the Special Master relied on the plain meaning of the claim language read in the context of the entire patent and found that the term should be construed to describe a hierarchical relationship between the central computer and the remote computer in which the central computer "is at the top of the hierarchical relationship." (F & R at 21-22) In its objections to the Special Master's report, B-50 opposed this construction, arguing that "[t]here is nothing in the patent claims that requires either the 'central computing device' or the multiple remote computing devices to be at the top (or, for that matter, at the middle or bottom) of the hierarchy." (B-50's Obj. at 2)

Upon *de novo* review of this issue, the Court finds the Special Master's construction to be correct and based on sound principles of claim construction. The Special Master explains in his final report that the hierarchical relationship is "required" by the claim language which recites a "central" computer. (F & R at 21) The term "central," he states, "must have some meaning different that adds to the term " 'computing device[s].' " (*Id*. at 21-22) The Special Master's conclusion is grounded in solid claim construction practice. Specifically, a court must construe claims to give meaning to all terms of the claim and avoid rendering any claim language mere surplusage. Merck & Co., Inc. v. Teva Pharm., USA, Inc., 395 F.3d 1364, 1372 (Fed.Cir.2005); Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc., 381 F.3d 1111,1119 (Fed.Cir.2004). Thus, to comport with proper claim construction practices, "central" must add some consequence to the term "computing device[s]."

To determine its meaning, the Special Master properly viewed the term "central" in light of the specification. From the specification, he gleaned that "central" connotes more than a "geographic indicator"

because the specification indicates that the "central computer" can be moved to any one of the other locations and still be "central." (F & R at 22) The fact that the specification recited that the central computer can be moved and still retain its "central" designation confirmed to the Special Master that "it is at the top of the hierarchical relationship with respect to the other computers." (*Id.*) The Court agrees with this analysis and conclusion. Claims must be interpreted in view of the specification which can supply understanding of unclear terms. Phillips, 415 F.3d at 1315. The specification "provide[s] context for understanding the meaning of the terms to one of skill in the art at the time of invention." Innovad Inc. v. Microsoft Corp., 260 F.3d 1326, 1332 (Fed.Cir.2001) Moreover, looking to the specification for guidance on claim terminology comports with long settled claim construction practice which requires that claim terms be construed from the perspective of a person of ordinary skill in the art "in the context of the entire patent" as opposed to "the context of the particular claim in which the disputed term appears." *See* Phillips, 415 F.3d at 1313.

The Special Master next addressed an argument made by B-50 that the remote and central computing devices "need not be in a hierarchical relationship" because the specification indicates that data transfers occur in a variety of ways. In dismissing this contention, the Special Master referred to the claim language and found that the phraseology "transferring point-of-sale data to a central computing device from multiple computing devices at multiple remote locations" defined "a relationship between at least the central computing device and the other computers" and indicates that "all of the data is transferred ... to a central computing device." (F & R at 22-23) This claim verbiage, in turn, reinforced his conclusion that the "central computing device" is at the top of a hierarchical relationship with the remote computers. (F & R at 22-23) The grammatical arrangement of words in a sentence-the syntax of the claim language-must be examined to properly interpret a claim term. *See* Credle v. Bond, 25 F.3d 1566, 1571 (Fed.Cir.1994). Here, the Special Master correctly relied on the foregoing choice of words describing data being transferred ***to*** a central computer ***from*** the remote computing devices-to find that the claim described a hierarchy of computers with the central computer at the top.

In summary, relying primarily on the plain wording of the claims while looking to the specification for context, the Special Master used settled claim construction principles to find that the claim described a hierarchical relationship between the central computer and the remote computers in which the central computer "is at the top of the hierarchical relationship." The Court agrees with and adopts the Special Master's conclusion on the hierarchical relationship between the computers. B-50's objections on this point are accordingly overruled.

2. "A Central Computer "

The parties' second dispute over this term involves whether the Special Master correctly construed "central computing device" to mean one, as opposed to multiple devices. When the Special Master initially apprised the parties of this construction by circulating his draft report, B-50 objected on several grounds. Two of those grounds are included B-50's objections to the Special Master's final report and will be addressed by this Court. First, B-50 complains that the construction of "one" device contradicts the plain language of the specification which expressly states that "embodiments of the invention contemplate *multiple* central computing devices if needed...." (B-50's Obj. at 2; '851 patent, col. 4 lns. 51-54) (emphasis added) Second, B-50 contends that the Special Master's singular construction contravenes the general rule that the use of the indefinite article "a" or "an" in patent parlance means "one or more" when-as in the '851 patent-used in open-ended claims containing the transitional phrase "comprising." (B-50's Obj. at 3-4 (*citing* KCJ Corp. v. Kinetic Concepts, Inc., 223 F.3d 1351, 1356 (Fed.Cir.2000)).

In addressing the foregoing arguments, the Special Master first acknowledged that the specification does conflict with the claim language by disclosing that there can be one or more central computers. But he did not find this contradictory disclosure in the specification determinative of the issue. Rather, he determined that "[o]ther parts of the specification, and inherent network theory, suggest this disclosure [in the specification] may be problematic." (F & R at 27 citing to '851 patent at Col. 5) He concluded that the conflicting language "cannot overcome the clear public notice found in the claim and the concession made by B-50 about how to construe the article 'a' in a related dispute." (Id .) The Court agrees with the Special Master's assessment of the effect of conflict between the statement in the specification and the claim language. Although the specification is a vital part of the intrinsic record, it "should never trump the clear meaning of the claim terms." Pixion, Inc. v. PlaceWare, Inc., No. C 03-02909-SI, 2004 WL 1769024, at (N.D.Cal. Aug.2, 2004) (citations omitted); *see also* RF Del., Inc., v. Pacific Keystone Techs., Inc., 326 F.3d 1255, 1265 (Fed.Cir.2003) ("courts may not use the teaching of the specification to contradict the clear language of the claims").

With respect to B-50's second argument that its use of the article "a" or "an" in conjunction with the term "central computing device" necessarily required a construction that the patent claimed multiple central computing devices, the Special Master disagreed. Instead he looked directly to the claim language which he concluded implied only one device. By examining the claims, he determined that the "general rule" regarding the use of "a" or "an," relied on by B-50, was inapplicable in this context because the claim language evinced a "clear intent" to claim only a single "central computing device." (F & R at 24-27) He reasoned that in drafting the claims, B-50 had used the article "a" in several other places in the claims to signify a singular meaning. He referred to method step (b) which addresses "defining **a** custom report format," method step (c) which recites generating "**a** custom report," and method step (d) which refers back to "**the** generated custom report." (F & R at 25) (emphasis added) He referred to B-50's briefing which contended that "**a** custom report" meant only one report. (*Id*.) (emphasis added) From this and other examples of B-50's use of "a" in both the independent and dependent claims to mean "one"-as opposed to more than one-the Special Master found that it was consistent that B-50's use of the term "a" in conjunction with central computing device likewise meant "one."

The Court agrees. His reasoning is based on solid claim construction analysis. When an identical term appears in multiple claims within a patent the term should be interpreted consistently within all claims. *See* CVI/Beta Ventures, Inc. v. Tura L.P., 112 F.3d 1146, 1159 (Fed.Cir.1997)("[W]e are obliged to construe the term 'elasticity' consistently throughout the claims"); Southwall Techs., Inc. v. Cardinal IG Co., 54 F.3d 1570, 1579 (Fed.Cir.1995). The Special Master bolstered his conclusion that "a" meant "one" by pointing out B-50's repeated use of terms that clearly signal "multiple" when referring to more than one. As examples, he referred to B-50's use of terms in the claims to describe multiple structures such as "multiple computing devices," "one or more formats," and "at least one of the report formats." (F & R at 26) In other words, B-50 knew how to specify multiples when it so chose.

Upon *de novo* review, the Court finds that the Special Master's construction of a single central computing device is sound and should be adopted. B-50 is correct that the Federal Circuit has held that the use of the indefinite article "a" in conjunction with the word "comprising" creates a presumption that the article means "one or more." But, as noted by the Special Master, the Federal Circuit has also held that this presumption can be overcome when the patentee evinces a clear intent to limit the article to the singular. Scanner Techs. Corp. v. ICOS Vision Sys. Corp., N.V., 365 F.3d 1299, 1304 (Fed.Cir.2004) (*citing* KCJ, 223 F.3d at 1356). Further, the Federal Circuit precedent on this issue specifically holds that "a" may suggest "one" but *can*

mean "more than one" *depending on the context in which it is used*. Elkay Mfg. Co. v. Ebco Mfg. Co., 192 F.3d 973, 977 (Fed.Cir.1999) (other citations omitted) (emphasis added). The Special Master examined B-50's use of the term "a" within the *context* of the other claim language, using the method described above, and found the "clear intent" to claim a single computer. The Court agrees with this construction and adopts it as the construction of the Court. B-50's objections as to this point are overruled.

In summary, the Court adopts the Special Master's construction of the term "a central computing device" and construes the term as follows: "a single server or higher-end machine at the top of the hierarchical relationship which stores, processes and transmits information to and from multiple remote computing devices."

B. "Point-of-sale data," "Multiple Computing Devices," "Defining a Custom Report Format," "Custom Report Format," "Logging Into a Web site for the Purpose of Defining," "Report Initiating Page," "Wherein the Selection Operations Include," "The Specified Remote Locations and the Specified Dates or Date Ranges," and "To View or Obtain the Generated Custom Report Using the Internet "

The Special Master construed the foregoing claim terms in his final report. Although no objections were filed by either party to the proposed construction of these term, this Court has reviewed the Special Master's analysis and construction of these claim terms *de novo*. The Court has also reviewed the entire record relating to the claim construction briefed by the parties. Having done so, the Court finds the Special Master's construction of these nine claim terms to be correct and based upon settled canons of claim construction. For these reasons, the Special Master's construction of the above nine claim terms is adopted as the construction of the Court and any previously filed objections are overruled.

IV. CONCLUSION

For the foregoing reasons, the Court **ADOPTS** the Special Master's Final Report in its entirety and **OVERRULES** B-50's Objections.

SO ORDERED.

N.D.Tex.,2006.
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