United States District Court,
E.D. Wisconsin.

**ALLOC, INC., a Delaware corporation, Berry Wood S.A., a French company,**
Plaintiffs.
v.
**PERGO, INC., a Delaware corporation, Pergo AB, a Swedish company,**
Defendants.
**Pergo, Inc., and Pergo (Europe) AB,**
Plaintiffs.
v.
**Alloc, Inc., Armstrong World Industries, Inc. and Berry Finance Nv,**
Defendants.

**May 12, 2006.**

Daniel J. O'Connor, David I. Roche, James J. Dries, Shima S. Roy, Baker & McKenzie LLP, Chicago, IL, for Plaintiffs.

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***ORDER***

STADTMUELLER**, J.P., District Judge.**

Pergo, Inc. and Pergo (Europe) AB (collectively, "Pergo") assert claims of patent infringement against Alloc, Inc., Armstrong World Industries, Inc., and Berry Finance NV. Pergo's patent infringement claims arise from Pergo's United States Patent Nos. 6,397,547 ("the '547 patent") and 6,421,970 ("the '970 patent"), patents that relate to methods of joining floor panels together without the use of glue or other fasteners such as nails or metal clips. Pergo contends that claims 1-4, 8, 10, 12-29, 31, 32, 34, 35, and 37-44 of the '547 patent and claims 1-15 and 17 of the '970 patent are infringed either literally or under the doctrine of equivalents. Alloc, Inc. and Berry Wood S.A. seek a declaratory judgment that the '547 and '970 patents are invalid, unenforceable, and were not infringed. Pergo submitted a brief on the claim construction of the two patents-in-suit, and Alloc, Inc., Berry Wood S.A., Berry Finance NV, and Armstrong World Industries, Inc. (collectively, "Alloc") submitted a separate claim construction brief. The court construes the meaning of the claim terms in dispute.

**ANALYSIS**

The two steps of a simple patent case are construing the patent and determining whether infringement occurred. Markman v. Westview Instruments, Inc., 517 U.S. 370, 384 (1996); Vitrionics Corp. v.

Conceptronic, Inc., 90 F.3d 1576, 1581-82 (Fed.Cir.1996). Claim construction is a question of law to be determined by the court. Markman, 517 U.S. at 374 ("[T]he construction of a patent ... is exclusively within the province of the court.")

Interpreting an asserted claim requires the court to examine intrinsic evidence, including the words of the claims themselves, the specification, and the prosecution history. Vitrionics, 90 F.3d at 1582. The words in the claim are given their ordinary and customary meaning that they would be given by persons experienced in the field of the invention. Texas Digital Systems, Inc. v. Telegenix, Inc., 308 F.3d 1193, 1202 (Fed.Cir.2002) ("[A] court will give a claim term the full range of its ordinary meaning as understood by persons skilled in the relevant art."). This presumption, however, is rebutted where the patentee chooses to be his own lexicographer and uses terms in a manner other than their ordinary meaning or where the inventor has disavowed or disclaimed scope of coverage. Id. at 1204.

If an analysis of the intrinsic evidence unambiguously describes the scope of the patented invention, reliance upon any extrinsic evidence, such as expert testimony, is improper. Vitrionics, 90 F.3d at 1583. Dictionaries, encyclopedias, and treatises are technically extrinsic evidence because they do not form part of the integrated patent document, but the court may use such resources at any time to determine the ordinary and customary meaning of the claim terms so long as the dictionary definition is not inconsistent with the intrinsic evidence. Id. at 1584 n. 6; *see also* Texas Digital Systems, 308 F.3d at 1202-04.

**A. "Snapped together," "snapping," "snapping web," "snapping groove," "snap action joint," "snap action groove," and "snap action projection" (collectively, the "snap terms")**

The parties do not set forth competing definitions for each of the snap terms. Instead, Alloc argues that the term "snap" should be interpreted to mean "a connection made by pushing one panel horizontally toward the other until the tongue of one 'snaps' into the groove of the other." (Alloc Br. 14.) Setting aside the circularity problem with Alloc's definition, Alloc argues that the panels must be pushed together *horizontally* as opposed to tilting one panel in relation to the other. Alloc argues that all of the snap terms should be construed accordingly.

The court does not find that "snap" or any snap term is limited to horizontal joining or that the snap terms preclude tilting the panels. Alloc has not shown that the ordinary meaning of the word snap incorporates any such limitation or that someone skilled in the art would understand the word to be so limited. The patentees of the '547 and "0 patents did not act as their own lexicographers by defining the word snap to mean only horizontal joining. Neither did the patentees clearly disavow the scope of coverage in the file histories.

Alloc argues that the snap terms should be limited to horizontal joining for two reasons: (1) the '341 Kajiwara patent that is discussed in the specifications of the patents-in-suit distinguished a "snap-together" flooring system from systems that lock by tilting one panel; and (2) patent examiners made three remarks that "snap" includes only a horizontal joining method, and the inventors acquiesced to the examiners' interpretations.

The '341 Kajiwara patent does not limit the ordinary meaning of the snap terms to include only horizontal joining. Although the Kajiwara patent discusses prior art in which panels must be overlaid and tilted to allow the tongue to fit within the groove, U.S. Patent Number 3,657,852 ('852 Worthington patent), the claims and specification of the Kajiwara patent do not limit the "snap-together" system to horizontal joining.

The Kajiwara patent does not explicitly require that the floor panels be pushed together "horizontally," and the Kajiwara patent does not define the "snap-together" system to incorporate such a limitation. The court may interpret a term based upon its usage in prior art that was cited in the patent. Kumar v. Ovonic Battery Co., Inc., 351 F.3d 1364, 1368 (Fed.Cir.2003); Arthur A. Collins, Inc. v. Northern Telecom Ltd., 216 F.3d 1042, 1045 (Fed.Cir.2000) ("When prior art that sheds light on the meaning of a term is cited by the patentee, it can have particular value as a guide to the proper construction of the term, because it may indicate not only the meaning of the term to persons skilled in the art, but also that the patentee intended to adopt that meaning."). The Kajiwara patent, however, does not show that the snap terms refer only to horizontal joining. The court will not read unstated limitations into claim language. Northern Telecom Ltd. v. Samsung Electronics Co., Ltd., 215 F.3d 1281, 1290 (Fed.Cir.2000) ("This court has repeatedly and clearly held that it will not read unstated limitations into claim language.").

The Pergo patentees did not disclaim the scope of the snap terms. The court considers the prosecution history to determine whether the applicant "clearly and unambiguously disclaimed or disavowed any interpretation during prosecution in order to obtain claim allowance." Salazar v. Proctor & Gamble Co., 414 F.3d 1342, 1344 (Fed.Cir.2005) (quoting 3M Innovative Props. Co. v. Avery Dennison Corp., 350 F.3d 1365, 1371 (Fed.Cir.2003)). The prosecution history cannot be used to limit the scope of a claim unless the applicant took a position before the Patent and Trademark Office that would lead a competitor to believe that the applicant had disavowed coverage of the relevant subject matter. Schwing GmbH v. Putzmeister Aktiengesellschaft, 305 F.3d 1318, 1324 (Fed.Cir.2002). "An applicant's silence in response to an examiner's characterization of a claim does not reflect the applicant's clear and unmistakable acquiescence to that characterization if the claim is eventually allowed on grounds unrelated to the examiner's unrebutted characterization." 3M Innovative Props., 350 F.3d at 1373-74.

Alloc argues that the Pergo inventors acquiesced to three patent examiners' remarks that indicate that "snap" includes only a horizontal joining method. The first two remarks cited by Alloc do not suggest that the snap terms are limited to horizontal joining or that the snap terms preclude tilting the panels. The first remark is "adjacent panels are snapped together by moving the same toward each other." (Alloc Br. 9.) The second remark is "the panels are assembled by pushing two similar panels towards one another and snapping the panels together." (Alloc Br. 10.) Moving or pushing panels toward each other is a broad description of the method of connecting panels that encompasses horizontal joining as well as tilting or "angling in" a panel in relation to another panel. The examiners' remarks are consistent with Pergo's interpretation of the snap terms.

Unlike the first two remarks, the third remark describes a method of connecting the panels that is consistent with Alloc's interpretation of the snap terms. The third remark describes a method of "laying panels straight down and simply snap each other straight together." (Alloc Br. 12.) The examiner made this remark after stating that claims 1 to 6 of the application that resulted in the '970 patent described the same method of joining the panels together in view of U.S. Patent Number 6,066,486 (Moriau '486 patent). Pergo argues that there was no reason to dispute the remark because its invention includes, but is not limited to, laying panels straight down and snapping them together. More importantly, Pergo points out that the examiner allowed the patent to issue after the Pergo inventors argued that the Moriau patent could not be prior art to the Pergo invention because the Pergo invention predates the Moriau patent. (Pergo Resp. 9.) In other words, the Pergo inventors did not amend its claim to avoid prior art or otherwise disavow all interpretations of the snap terms that did not involve horizontal joining. *See* 3M Innovative Props., 350 F.3d at 1373-74. Because the Pergo inventors did not take a position that disavowed coverage relating to the direction in which panels should be joined, they are not estopped from asserting that the snap terms include more than strictly

horizontal joining. *Id*.

**B. "Chipboard," "particle board" and "bonded wood particles"**

The parties essentially agree on the meaning of these terms with one exception: Alloc contends that these terms exclude fiberboard, and Pergo contends that the terms include fiberboard. FN1 According to Alloc, the determination is important because claims 1, 19, and 21 of the ' 547 patent describes the tongue or groove of the panels as "consisting of chipboard and particle board." This form of claim is known as a "Markush group," "a listing of specified alternatives of a group in a patent claim, typically expressed in the form: a member selected from the group consisting of A, B, and C." Abbott Labs. v. Baxter Pharm. Prods., Inc., 334 F.3d 1274, 1280 (Fed.Cir.2003). In this example, A, B, and C are alternatively usable, but the group is closed, so that D does not fall within the claim scope. *See* id. at 1280-81. Alloc argues that fiberboard does not fall within the scope of claims 1, 19, and 21 of the ' 547 patent.

FN1. The parties' suggested definitions are very similar. Alloc argues that "chipboard" and "particle board" should be defined as "composite materials in which chips or particles of wood (as opposed to wood fibers) are bound together by an adhesive." (Alloc Br. 19-20.) Pergo argues that "bonded wood particles," "wood chips," "wood particles," and "wood parts" should all be defined as "small pieces of wood that are bonded together by, for example, joining wood particles in the presence of a thermoplastic, glue, resin, or other bonding agent." (Pergo Br. 10-11, 23-24.)

The court determines that fiberboard is not included within the ordinary meaning of "chipboard," "particle board," or "bonded wood particles." The court finds that the ordinary and customary meaning that these terms would be given by persons skilled in the relevant art is found in the United States Department of Agriculture's *Wood Handbook*. *See* U.S. Department of Agriculture, Forest Service, Forest Products Laboratory, *Wood Handbook: Wood as an Engineering Material (1999) ("Wood Handbook"),* Website is provided as follows:

http://www.fpl.fs.fed.us/documnts/fplgtr/fplgtr113/fplgtr113.htm . FN2

FN2. "[The *Wood Handbook]* was prepared by the Forest Products Laboratory (FPL), a unit of the research organization of the Forest Service, U.S. Department of Agriculture. The Laboratory, established in 1910, is maintained at Madison, Wisconsin, in cooperation with the University of Wisconsin. It was the first institution in the world to conduct general research on wood and its utilization. The accumulation of information that has resulted from its engineering and allied investigations of wood and wood products over nine decades-along with knowledge of everyday construction practices and problems-is the chief basis for this handbook." *Wood Handbook, Preface v*. *The Wood Handbook* was first issued in 1935 and was subsequently revised in 1939, 1955, 1974, 1987, and 1999. Id.

Both "particleboard" and "fiberboard" are discussed in Chapter 10 of the *Wood Handbook* entitled, "Wood-based Composites and Panel Products," but the *Wood Handbook* clearly distinguishes particleboard from fiberboard. For example, Table 10-1, a classification of wood-based composites, lists "particleboard" and "cellulosic fiberboard" as separate items of composite material. Wood Handbook 10-2, Table 10-1. In another classification of wood composite boards, the *Wood Handbook* separates composite boards made from the raw material of fiber from boards made from the raw material of particles. *Wood Handbook* 10-3,

Figure 10-2. In other words, fibers and particles are distinct raw materials. Under the heading, "Types of Conventional Composite Materials," the *Wood Handbook* states, "Conventional wood composite materials fall into five main categories based on the physical configuration of the wood used to make the products: plywood, oriented strandboard, particleboard, hardboard, and cellulosic fiberboard." *Wood Handbook* 10-3. Figure 10-3, depicting figures of various composite products, shows that particleboard and medium-density fiberboard are different products. *Wood Handbook* 10-3, Figure 10-3. Table 10-2 shows that particleboard is governed by American National Standards Institute ("ANSI") standard A208.1, and medium-density fiberboard is governed by ANSI A208.2. *Wood Handbook* 10-5, Table 10-2. ANSI A208.1-1999 defines particleboard as "a generic term for composite panel composed of cellulosic materials (usually wood), generally in the form of discrete pieces or particles, *as distinguished from fibers,* bonded together with a bonding system, which may contain additives." *Id*. s. 2.7 (emphasis added). Although the *Wood Handbook* states that "[a]ll the products in the family of particle and fiber composite materials are processed in similar ways," *Wood Handbook* 10-13, the *Wood Handbook* discusses the manufacturing process and the property requirements of particleboard in a section separate from fiberboard. *Wood Handbook* 10-13-10-23. The *Wood Handbook* also describes basic differences between particleboard and fiberboard. For example, the *Wood Handbook* states, "All things being equal, reducing lignocellulosic materials to particles requires less energy than reducing the same materials into fibers. However, particleboard is generally not as strong as fiberboard because the fibrous nature of the lignocellulosics is not exploited as well." *Wood Handbook* 10-15. Under the section entitled, "Fiberboard," the *Wood Handbook* states, "The term fiberboard includes hardboard, medium-density fiberboard (MDF), and insulation board. Several things differentiate fiberboard from particleboard, most notably the physical configuration of the comminuted material (Fig.10-9). Because wood is fibrous by nature, fiberboard exploits the inherent strength of wood to a greater extent than does particleboard." *Wood Handbook* 10-17. One heading in the index of the *Wood Handbook* lists "Fiberboard: distinguished from particleboard, 10-17." In the glossary, fiberboard and particleboard are both defined under the broader term, "wood-based composite panel," but the terms are defined separately. *Wood Handbook,* Glossary G-13-G-14. The *Wood Handbook* and the ANSI standards make clear that fiberboard is not synonymous with, or a subset of, particleboard.

Pergo argues that the *Wood Handbook's* definition of "particles" supports its position that "fiberboard" and "particleboard" are "broad and overlapping categories of wood-based materials." (Pergo Reply 5.) The *Wood Handbook* defines "particles" as "the aggregate component of particleboard manufactured by mechanical means from wood. These include all small subdivisions of wood such as chips, curls, flakes, sawdust, shavings, slivers, strands, wafers, wood flour, and wood wool." *Wood Handbook,* Glossary G-9. As Alloc points out, wood fiber is notably absent from the list of the small subdivisions of wood that may constitute particles. Pergo, however, argues that the phrase "such as" indicates that the list of subdivisions is non-exhaustive. Given the distinction between particles and fibers discussed in Chapter 10 of the *Wood Handbook,* the court does not believe that the omission of fiber from the definition of particle is a careless error. The court considers the *Wood Handbook* to be the authoritative treatise on the matter, and considering its clear distinction between particleboard and fiberboard, a person skilled in the relevant art would not equate fiber with particle or fiberboard with particleboard, chipboard, or bonded wood particles.

The '970 patent also lists "fiber board" as an item distinct from "chipboard" or "particle board":

"It is preferred that the groove and the tongue are made of a water proof or water resistant material, such as a thermoplastic, a thermosetting laminate, aluminum or a cellulosic product *such as a wood fiber board, chipboard or particle board....* "

'970 patent col. 2 ll. 40-44 (emphasis added). In contract or statutory interpretation, one canon of construction is that "every word must be given effect." If fiberboard were synonymous with, or a subset of, particle board, its mention in the '970 patent specification would be superfluous.

**C. "Water tight," "water tight joint,"**

"Water tight" and "water tight joint" are terms defined within the patents: "A joint is water tight when standing water will not penetrate the joint for several hours." '970 patent col. 3 ll. 43-44.

**D. "Tongue" and "groove"**

Alloc contends that the terms "tongue" and "groove" must be defined as "elements that are separate formed attachments to the base of the panel." (Alloc Br. 21.) Alloc does not base its argument on any proposed ordinary meaning of tongue and groove. Rather, Alloc bases its construction upon one embodiment in the '547 patent and upon the mistaken belief that "there is no discussion anywhere in the '547 patent of an arrangement where the tongue and groove would be integrally formed with (or machined out of) the base material comprising the panel." (Alloc Br. 21-22.)

Contrary to Alloc's argument, the '547 patent discusses an "integrally formed" embodiment, stating that "the whole panel is preferably made of" one material for certain applications. '547 patent col. 3 ll. 19-20. The '970 patent refers to an embodiment in which "the integral tongue and groove portions of the panels can be formed in either the base material, the laminate material and/or both." '970 patent col. 2 ll. 56-58. Alloc urges the court to limit the definitions of tongue and groove based upon one embodiment of the invention, but the court may not do that. *See* Johnson Worldwide Assocs., Inc. v. Zebco Corp., 175 F.3d 985, 992 (Fed.Cir .1999) ("[J]ust as the preferred embodiment itself does not limit claim terms, mere inferences drawn from the description of an embodiment of the invention cannot serve to limit claim terms.") (citation omitted). The court, therefore, rejects Alloc's construction of tongue and groove and adopts Pergo's construction that a tongue is a portion of the panel that is designed to mate with a groove of an adjacent panel. ( *See* Pergo Resp. 16.)

**E. Claim 35 of the '574 patent and claim 1 of the '970 patent: method steps**

Under this subsection of its argument, Alloc does not suggest a construction for any terms within patent '547 and patent '970; instead, Alloc argues that the court should characterize statements within the patents as "installation steps" or as "manufacturing or sales steps." The court does not believe that this argument is appropriate in a claim construction brief because Alloc does not urge the court to construe any terms within the patents.

**F. Four-sided snapping**

Alloc argues that the claims of both patents-in-suit require that the panels have the ability to snap on all sides. (Alloc Br. 26-29.) Pergo does not dispute Alloc's argument.

**G. "Rear neck" and "neck portion"**

There is no important distinction between the parties' suggested definitions of "neck." The court adopts Pergo's definition that a "neck" is a "relatively narrow part" of an object. Merriam-Webster's New Collegiate Dictionary 774 (10th ed.1998). A "neck portion" is a portion relatively narrow as compared to

other portions. ( *See* Pergo Resp. 19.)

**H. "Impregnated"**

Claim 21 of the '547 patent refers to "wood particles impregnated with a plastic." '547 patent col. 6 ll. 3-4. Alloc argues that "impregnated" should be interpreted to mean not merely just to immerse an object with a substance but to saturate or fill the object throughout such that the object absorbs the substance. (Alloc Br. 30.) Impregnate means "to fill throughout or saturate." Webster's II New Riverside University Dictionary 615 (1984). The definition does not speak of absorption. Moreover, Alloc's use of the deposition testimony of Goran Martinsson, the inventor of the '547 patent and the co-inventor of the '970 patent, (Alloc Reply 5), is extrinsic evidence that the court does not consider. Vitrionics, 90 F.3d at 1583. If considered, however, Martinsson's testimony only negates Alloc's construction of impregnate. If no one has ever "impregnated" wood particles with resin on the molecular level as Martinsson testified, it is highly unlikely that persons skilled in the relevant art would construe the word "impregnated" in that manner.

The parties raise other terms in their briefs which need not be addressed by the court either because the parties indicate that the terms are undisputed, the court does not discern any meaningful difference between the parties' constructions, or any dispute is resolved by the other portions of this decision. If the court is mistaken and the parties believe that remaining terms require construction by the court, they should so indicate within thirty (30) days from the date of this order.

Although fact discovery has been completed, the parties have deferred expert discovery as it relates to patent infringement, damages, patent validity, and patent enforceability until after the court issues a ruling on the meaning of the claim terms in dispute. ( *See* July 14, 2004 Sixth Amended Scheduling Order, at p. 3-4.) This order triggers the parties' obligation to complete discovery in this action.

Accordingly,

**IT IS ORDERED** that the claim terms of the patents-in-suit shall be construed as provided for in this order.

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