United States District Court,
E.D. Missouri, Eastern Division.

Charles L. EKSTAM, et al,
Plaintiffs.
v.
C. Brad EKSTAM, et al,
Defendants.

No. 4:04CV00187 AGF

Aug. 1, 2007.

Anthony G. Simon, Simon Passanante, P.C., Kara R. Yancey, Harness and Dickey, St. Louis, MO, for Plaintiffs.

John T. Walsh, Lathrop and Gage, St. Louis, MO, James J. Kernell, Chase Law Firm, L.C., Overland Park, KS, for Defendants.

AMENDED MARKMAN ORDER

AUDREY G. FLEISSIG**, United States Magistrate Judge.**

By Order dated July 2, 2007, the Court scheduled oral argument on certain outstanding motions. In that Order the Court advised the parties that it was reconsidering its prior *Markman* Order with respect to the term "immersion" in Claim 1, and directed the parties to address that issue at the upcoming oral argument.

To provide some history, in connection with the initial *Markman* hearing, Defendants had asserted that the word "immersion" in Claim 1 should be construed to mean "submerge which in turn means immerse which means to cover completely with liquid; submerge," citing to the *American Heritage Dictionary* (1986). Contending that the language was not ambiguous, Plaintiffs asserted the following construction: "a filter media positioned within the interior chamber of the vessel so that the filter media can be immersed in the fuel received in the chamber." The Court determined that the term "immersion" required no further definition, and essentially adopted Plaintiff's proposed language.

Having reconsidered the arguments made by the parties in connection with the initial *Markman* Order and carefully considered the arguments made at the July 2007 hearing, the Court has determined that the term "immersion" in Claim 1 should have been construed by the Court, and should be construed to mean "submersion," or requiring complete coverage by fuel, as originally suggested by Defendants herein.

The courts have recognized that claims are part of a " 'fully integrated written instrument,' " consisting principally of the specification, and " 'must be read in view of the specification, of which they are a part." ' Phillips v. AWH Corp., 415 F.3d 1303, 1315 (Fed.Cir.2005) (en banc) (quoting Markman v. Westview

Instruments, Inc., 52 F.3d 967, 978, 979 (1995)). While language is normally given its ordinary meaning, the patentee may serve as his own lexicographer, and subscribe a meaning to a term in the specification that differs from or is more limited than the meaning it would otherwise have, and in such instance, "the inventor's lexicography governs." Phillips, 415 F3d at 1316.

At the July 2007 oral argument, neither party questioned that "submersion" is included among the ordinarily accepted definitions of the word "immersion." The question is whether the definition of the term should be so limited in light of the full instrument and the specification. Upon careful reconsideration of the parties' prior arguments and further review of the claims and specification, the Court is convinced that the term should be so limited. In the specification, both in defining the invention itself and the preferred embodiment, the patentee has invariably described the filter media as being "submerged" within the fuel and below the fuel level. *See* col. 1, line 65 ("A separation or filter media is located within the reservoir so as to be submerged within the fuel"); col. 4, lines 33-34 ("[t]he filter media **102** is submerged below the fuel level L"). Indeed, apart from this single use in the claim itself, the word "immersed" is never used in the instrument or the specification; only the term "submerged" is used.

Throughout the specification, both in defining the invention itself and the preferred embodiment, the patentee has also invariably described a fuel delivery system in which the filter media is submerged below the operating fuel level, such that the trapped air bubbles float upward and away from the filter media, and are then returned through the overflow tube to the fuel tank. For example, the Abstract states, "As the bubbles are trapped on the screen, they float upward to the fuel level...." The Summary of the Invention likewise describes that some of the bubbles immediately float to the surface where they enter the overflow tube, while "[o]ther bubbles may be carried with the fuel down to the filter media," whose small openings allow fuel to pass, but not the bubbles of air, and that "[a]s a result, the bubbles are separated from the fuel and float to the surface to be carried through the overflow tube to the return line." Col. 4, lines 20-31. This is also consistent with all of the drawings and with the descriptions provided throughout the specification. *See, e.g.,* Figs. 3 and 5; col. 2, lines 45-48, 50-51; col. 4, lines 26-35; col. 5, lines 26-27, 34-35, 40-41. No other configuration or concept is anywhere discussed.

Accordingly, the Court finds that the word "immersion" as used in connection with the secondary fuel filter media in Claim 1, should be defined to mean "submersion," or "fully covered by," such that the last element FN1 related to the secondary fuel filter shall mean:

FN1. To better mesh with the language of the earlier elements, the recitation of the third element, as recapped on page 19 of the Court's *Markman* Order [Doc. # 77], is also amended to substitute "A" for "The," as the first word, and to add the word "which" to the second line, such that the first sentence of the third element, as recited on page 19, should read, "A secondary fuel filter, which is located downstream from the initial fuel filter, which includes an outlet in fluidic communication with the engine and an inlet in fluidic communication with the initial fuel filter." These two changes are made for grammatical reasons only, and no substantive change to the prior construction is made or intended hereby.

The secondary fuel filter also includes a vessel defining a hollow interior chamber, which chamber is in fluidic communication with a return line, which is in fluidic communication with the fuel tank, for returning fuel and undesired gas to the fuel tank. The secondary fuel filter also includes a filter media positioned with the chamber of the vessel so that the filter can be submerged in, or fully covered by, the fuel received in the chamber. The secondary fuel filter also has a conduit located within the filter media for delivering fuel

passing through said filter media to the outlet.
At the July 2007 hearing, Plaintiffs requested an opportunity to provide further briefing in the event I amended the claim construction to define "immersed" in the manner discussed herein. Although I do not believe that any further briefing is necessary, because I have in fact changed the claim construction with regard to Claim 1, and such change occurred following the submission of the parties' summary judgment motions, I will allow Plaintiffs briefly to address any new arguments they believe, in good faith, are occasioned by this amended claim construction.

Accordingly,

IT IS HEREBY ORDERED that this Court's prior *Markman* Order [Doc. # 77] be amended as set forth herein.

IT IS FURTHER ORDERED that Plaintiffs shall have until **August 10, 2007** to file any additional arguments they believe, in good faith, are necessitated by the amended claim construction adopted herein. Plaintiffs' filing shall be limited to Claim 1 and to any new arguments necessitated by the amended claim construction, and shall not exceed 15 pages. Defendants shall have seven (7) calendar days thereafter, to and including **August 17, 2007,** to respond, which response shall also be limited to 15 pages.

E.D.Mo.,2007.
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