United States District Court,
S.D. Ohio, Western Division.

Louis M. KOHUS,
Plaintiff.
v.
TOYS "R" US, INC., et al,
Defendants.

No. 1:05-CV-517

Oct. 1, 2007.

Donald John Rafferty, Cohen Todd Kite & Stanford, Cincinnati, OH, for Plaintiff.

Richard Leo Creighton, Jr., Cincinnati, OH, Abigail Butler, R. Trevor Carter, Baker & Daniels, LLP, Fort Wayne, IN, Kristiana M. Brugger, Baker & Daniels, LLP, Indianapolis, IN, for Defendants.

ORDER ON CLAIM CONSTRUCTION

SUSAN J. DLOTT**, United States District Judge.**

This is a patent infringement case in which Plaintiff Louis M. Kohus alleges that Defendants Toys "R" Us, Inc. and Baby Trend, Inc. have infringed U.S. Patent No. 4,822,033. This case was consolidated with *Kohus v. Fisher Price, Inc.,* Case No. 1:05-CV-671 (S.D.Ohio) (Beckwith, C.J.) for purposes of discovery and claim construction. Doc. No. 21. This matter is now before the Court for claim construction as required by Markman v. Westview Investments, 52 F.3d 967 (1995), *aff'd,* 517 U.S. 370 (1996). The parties filed a stipulation concerning the meaning of four of the claim terms at issue on August 2, 2006. Doc. No. 25. In addition, the parties filed with the Court a pleading designating the claims which remain in dispute. Doc. No. 26. The parties then filed claim construction briefs. Doc. Nos. 27, 28, 30 & 31. The Court held a *Markman* hearing on October 4, 2006 during which counsel for the parties presented arguments in support of their respective construction of the claims at issue.

I. ***The Patent at Issue***

U.S. Patent No. 4,822,033, entitled "Baby Swing Support Assembly" ("the ' 033 Patent"), is dated April 18, 1989. According to the abstract of the ' 033 Patent, the claimed invention is:

A baby swing support structure having a front post construction which, in side elevation, defines a scoop or concave shape to provide ready access to the baby from the sides or front. A stabilizing step at the bottom front of the posts provides a stabilizing means for preventing tipping of the support frame when a baby is to be removed, an important safety feature.

'033 Patent, Abstract. The purpose of the invention is to provide enhanced stability to a baby swing support structure while allowing access to the baby from both the front and sides of the swing. '033 Patent, col. 1, ll. 5-9; 38-44.

II. *The Claims at Issue*

The complaint alleges that the Defendants have infringed claims 1, 2, 4, 5, 6, 7, 9, 10 and 13 of the '033 Patent. Claims 1 and 10 are independent claims. Claims 2-9 are dependent claims of Claim 1. Claim 13 is a dependent claim of Claim 10. For purposes of claim construction, however, only Claims 1, 2, and 10 contain terms which require interpretation.

A. *Claim 1*

Claim 1 of the '033 Patent claims the following:

1. A baby swing support structure for providing enhanced stability and improved access to a baby seat comprising:

a pair of spaced apart upper hubs,

a pair of spaced apart support legs, each having an upper end, and each said leg extending downwardly and rearwardly from one of said hubs and having a lowermost end which is spaced rearwardly of the hub, a pair of spaced apart support posts, each having an upper end, each said post secured to and extending downwardly from its upper end from one of said hubs, each said post having a lowermost end which is spaced substantially forwardly of the hub to provide, with said support legs, a stable support for the hubs, and wherein one of said posts is generally aligned in front elevation with one of said legs and the other of said posts is generally aligned in front elevation with the other said legs, a baby seat suspended from said hubs, wherein said posts are concave in side elevation to provide ready access to said seat without interference by said posts, and wherein said structure has a top and is open at the top, and between said hubs, to provide ready access to said seat by a person reaching forwardly to place a baby into said seat or to remove a baby from said seat.

'033 Patent, col. 4, ll. 4-31.

With respect to Claim 1 and Claim 10, the parties agree on the construction of the following terms:

1. "support legs" means "the components that work in combination with the support posts to provide a stable support for the upper hubs."

2. "support posts" means "the components that work in combination with the support legs to provide a stable support for the upper hubs."

3. "each of said posts having a lowermost end which is spaced substantially forwardly of the hub" means "the lowermost end of each support post is positioned well in front of the hub."

See Doc. No. 25, at 1.

The parties disagree on the meaning of the terms "upper hubs," "each said leg extending downwardly and

rearwardly from one of said hubs," "each said post secured to and extending downwardly from its upper end from one of said hubs," and "wherein said structure has a top and is open at the top, and between said hubs." Doc. No. 26, at 1.

B. *Claim 2*

Claim 2 claims the following:

2. The baby swing support structure of claim 1, and further comprising a stabilizing means joining said post lowermost ends adjacent said post lowermost ends.

'033 Patent, col. 4, ll.32-34. With respect to Claim 2, the parties disagree on the meaning of the term "stabilizing means joining said post lowermost ends adjacent said post lowermost ends." Doc. No. 26, at 1.

C. *Claim 10*

Claim 10 claims the following:

A baby swing support structure for providing enhanced stability and access to a baby seat suspended therefrom comprising:

a pair of spaced apart upper hubs,

a pair of spaced apart support legs, each secured to and extending downwardly and rearwardly from one of said hubs and having a lowermost end which is spaced rearwardly of the hub,

a pair of generally spaced apart support posts, each secured to and extending downwardly from one of said hubs, each said post having a lowermost end which is spaced substantially forwardly of the hub to provide, with said support legs, a stable support for the hubs,

said posts defining a forwardly open scoop configuration in side elevation to provide ready access to a baby seat suspended from said hubs from the front of said seat and from the sides of said seat without interference by said posts,

said structure having a top and being open at the top, and between said hubs, to provide ready access to said seat by a person reaching forward to place a baby into said seat or to remove a baby from said seat.

'033 Patent, col. 4, ll. 65-68, col. 5, ll.1-19, col. 6, ll.1-2.

With respect to Claim 10, the parties agree that the term "each said post having a lowermost end which is spaced substantially forwardly of the hub" means "the lowermost end of each support post is positioned well in front of the hub." Doc. No. 25, at 1. The parties, however, disagree as to the proper construction of the terms "upper hubs," "support legs, each secured to and extending downwardly and rearwardly from one of said hubs," "support posts each secured to and extending downwardly from one of said hubs," and "said structure having a top and being open at the top, and between said hubs." Doc. No. 26, at 1-2.

III. *Claim Construction Principles*

In Phillips v. AWH Corp., 415 F.3d 1303 (Fed.Cir.2005), the Federal Circuit Court of Appeals reiterated for the district courts the proper procedure and standards that guide patent claim construction. The main points of *Phillips* may be summarized as follows:

1. the words of a claim are generally given their ordinary and customary meaning, as understood by a person of ordinary skill in the art as of the filing date of the patent application. *Id*. at 1312-13.

2. the claims themselves provide substantial guidance as to the meaning of particular claim terms. *Id*. at 1314.

3. the claims must be read in view of the specification; however, the court must not import limitations from the specification into the claims. *Id*. at 1315, 1320, 1323.

4. if part of the record, the court may consider the patent's prosecution history to ascertain how the inventor understood the invention and whether he narrowed the scope of the invention during prosecution. *Id*. at 1317.

5. the court may consider extrinsic evidence, such as treatises and dictionaries, but extrinsic evidence is less significant than the intrinsic record in determining the meaning of the claim language. *Id*.

IV. *The Court's Construction of the Claims*

A. *Claim 1*

1. *Upper Hubs*

The first term in dispute is "upper hubs." Plaintiff proposes that "upper hubs" means "the components from which the baby seat assembly is suspended." Doc. No. 27, at 8. Defendants propose that "upper hubs" means "hubs, at the top of the swing, from which the baby seat, the support posts, and the support legs all descend." Doc. No. 28, at 8. The principal distinction between the parties' definitions is Defendants' inclusion of a limitation that the support posts and support legs "descend" from the upper hubs.

Plaintiff argues that Defendants' definition burdens the meaning of "upper hubs" by including unnecessary explanations of how the hubs are supported and how they interact with other components. Plaintiff contends that these matters are dealt with in other aspects Claim 1 and Claim 10. Defendants, however, contend that the plain language of Claim 1 mandates its definition of "upper hubs." Both parties rely on the specification in support of their respective definitions. The Court agrees with Plaintiff that Defendants' definition of "upper hubs" unnecessarily attempts to define subject matter covered in other areas of Claim 1.

A claim should be interpreted so as to give effect to all terms in the claim, so that none are rendered superfluous or meaningless. Bicon, Inc. v. Straumann Co., 441 F.3d 945, 950-51 (Fed.Cir.2006). In this case, Defendants propose to include in the definition of "upper hubs" a limitation which states that the support posts and support legs descend from the hubs. As Plaintiff correctly argues, however, other parts of Claim 1 describe the relationship between the upper hubs and the support legs and support posts. The term "upper hubs" appears in the very first element of Claim 1: "a pair of spaced apart upper hubs." '033 Patent, col. 4, l. 7. The next two elements of Claim 1 then describe the relationship between the hubs and the

support legs and support posts. Id. ll. 8-12, ll.13-22. The support legs extend downwardly and rearwardly from the hubs; the support posts are secured to and extend downwardly from their upper ends from the hubs. *See* id. Defendants' definition of "upper hubs," which states that the support legs and support posts descend from the hubs, covers subject matter described in the second and third elements. Therefore, Defendants' definition of "upper hubs" renders superfluous or meaningless the second and third elements of Claim 1. Consequently, Defendants' definition of "upper hubs" cannot be correct.

Although Defendants' definition of "upper hubs" contains limitations covered by other elements in Claim 1, the parties find common ground with respect to the baby seat's relationship to the "upper hubs." Plaintiff proposes that the baby seat is "suspended" from the "upper hubs"; Defendants propose that the baby seat "descends" from the upper hubs. After eliminating Defendants' references to the support posts and support legs, these definitions are essentially the same. However, because Claim 1 states that the baby seat is "suspended from the upper hubs," '033 Patent, col. 4, l. 23, Plaintiff's proposed definition of "upper hubs" is more accurate.

Accordingly, the Court concludes that "upper hubs" means "the components from which the baby seat assembly is suspended."

2. *Each said leg extending downwardly and rearwardly from one of said hubs*

The parties next dispute the meaning of the term "each said leg extending downwardly and rearwardly from one of said hubs." This term concerns the relationship between the "support legs" and the "upper hubs." As indicated, the parties agree that the "support legs" and "support posts" work together to provide a stable support for the "upper hubs." The parties, however, disagree as to the manner in which the patent explains the interaction between the "support legs" and the "upper hubs." Plaintiff contends that this term means "the 'support legs' extend below and to the back of the hubs." Defendants, on the other hand, propose that this term means "the upper end of each leg starts at the hub and extends downwardly and rearwardly therefrom." The basic difference between the parties' definitions is that Defendants' interpretation of the term has the upper end of each leg starting at the hubs, whereas according to Plaintiff, the support leg simply "extends below and to the back" of the upper hub.

Stated another way, Defendants' definition requires that the "support legs" be directly physically connected to the "upper hubs." Plaintiff, however, contends that no such limitation is contained in this term. Plaintiff points out that during the prosecution history of the '033 Patent, the Examiner became concerned that the patent failed to state that the hubs were supported by any means. JMA-36 (Doc. No. 29-2, at 36). Therefore, the Examiner suggested that Plaintiff add limitations to Claim 1 that both the "support legs" and "support posts" are "secured to" the "upper hubs." Plaintiff, however, amended Claim 1 so that only the "support posts" are "securedto" the "upper hubs." The Examiner then accepted Claim 1 as amended. *Compare* JMA-22 (Doc. No. 29-2, at 22) (claims of original patent application) *with* '033 Patent, col. 4, ll. 13-17. Thus, according to Plaintiff's explanation of the prosecution history of Claim 1, the only direct physical connection required in Claim 1 is between the "upper hubs" and the "support posts." Defendants' definition, argues Plaintiff, ignores this prosecution history. The Court agrees.

Defendants' proposed definition-"the upper end of each leg starts at the hub and extends downwardly and rearwardly therefrom"-implies the necessity of a physical connection between the "upper hub" and the "support leg." The plain language of Claim 1, and the prosecution history, however, clearly show that the only physical connection that is required is between the "support posts" and "upper hubs." The role of the

"support legs" is to work with the "support posts" to provide a stable support for the "upper hubs." But, as Plaintiff's hearing exhibits show, this role can be fulfilled without a direct physical connection between the "upper hubs" and the "support legs." The "support legs" and "support posts" can be clamped together, with the "support legs" extending downwardly from the general vicinity of the "upper hubs" without otherwise having a physical connection between the legs and the hubs. The Court, therefore, rejects Defendants' proposed definition.

Accordingly, the Court concludes that "each said leg extending downwardly and rearwardly from one of said hubs" means "the components that work in combination with the support posts to provide a stable support for the upper hubs are affixed to the hubs and extend below and to the back of the hubs."

3. *Support posts, each secured to and extending downwardly from one of said hubs*

This element of Claim 1 describes the relationship between the "support posts" and the "upper hubs." The parties agree that this term should be construed similarly to the "support legs" limitation just construed by the Court. The arguments for and against the parties' respective definitions of this claim are the same. The Court, therefore, essentially adopts the definition just rendered for "support posts."

Accordingly, the Court concludes that "support posts, each secured to and extending downwardly from one of said hubs" means "the components that work in combination with the support legs to provide stable support for the upper hubs are affixed to the hubs and extend below the hub so that the end of each 'support post' farthest from the hub is positioned well in front of the hub."

4. *Wherein said structure has a top and is open at the top, and between said hubs*

This element of Claim 1 concerns providing ready access to the baby seat for the purpose of placing the baby in and removing the baby from the baby seat. Plaintiff proposes that this term means "the swing support structure has an uppermost point, which is the upper most point of the hubs, and the space directly at that point, between the hubs, is not closed." Defendants suggest that this term means "there is no structure, such as a crossbar, located at the top and between the hubs." The basic dispute between the parties with respect to this term is whether the space between the upper hubs must be completely unobstructed-essentially open upwardly to infinity-or whether the space between the hubs need only be open enough to provide "ready access" to the baby seat. Defendants take the former position, which is why their definition includes a limitation that there can be no crossbar between the hubs. Plaintiff takes the latter position, arguing that a cross piece between the hubs is permissible so long as "ready access" is provided.

In arguing against Defendants' definition, Plaintiff relies on claim differentiation, pointing out that Claim 9 claims "The baby swing support structure in accordance with claim 1, and wherein the seat is suspended directly from the hubs, and wherein *there is no cross piece connecting the hubs*." '033 Patent, col. 4, ll. 61-64 (emphasis added). According to Plaintiff, Claim 1 cannot include Defendants' "no crossbar" limitation because that limitation is contained in Claim 9. Defendants, however, argue that the prosecution history refutes Plaintiff's claim differentiation argument because the "no cross piece" limitation of Claim 9 predates the "open at the top" limitation of Claim 1. Defendants argue that Plaintiff amended Claim 1 in order to further distinguish the claimed invention from the Doyle and Netherlands prior art references and yet still have Claim1 conform to the specification. The Court agrees.

Under the doctrine of claim differentiation, limitations from a dependent claim should not be read into the independent claim on which it depends. Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc., 381

F.3d 1111, 1123 (Fed.Cir.2004). In this case, because dependent Claim 9 has a limitation that independent Claim 1 does not-the "no cross piece" limitation-ordinarily claim differentiation would compel a conclusion that this limitation is not in Claim 1. However, the presumption that claim differentiation applies can be overcome by other evidence, such as the patent's specification and prosecution history. Kraft Foods, Inc. v. International Trading Co., 203 F.3d 1362, 1368 (Fed.Cir.2000). Here, the '033 Patent's prosecution history defeats Plaintiff's claim differentiation argument.

As is relevant here, as originally drafted, Claim 1 claimed "a baby seat suspended from said hubs" "wherein said posts are concave in side elevation, whereby there is ready access to said seat without interference by said posts." JMA at 22. Claim 1 originally ended here, however. There was no further limitation concerning the structure being open at the top. The Patent Examiner rejected Claim 1 as being anticipated by both the Doyle and Netherlands prior art references because Doyle and Netherlands both teach swings with "a pair spaced apart hubs", "spaced apart support posts and support legs", "and a seat suspended from the hubs." The Examiner also noted that Doyle teaches a swing with a stabilizing means and that Netherlands teaches a swing with support posts that extend "downwardly and outwardly of the hubs and are concave in side elevation[.]" The Patent Examiner also stated that the term " 'baby' does not add life or breath to the claim." JMA at 37.

In response to the Patent Examiner's action, Plaintiff amended Claim 1 in pertinent part by adding the following limitation: "and wherein said structure has a top and is open at the top, and between said hubs, to provide ready access to said seat by a person reaching forwardly to place a baby into said seat or to remove a baby from said seat." JMA at 43. In his remarks concerning this amendment, Plaintiff stated the following:

By these amendments, applicants have cancelled claims 10 through 13 and *have amended claims 1 and 14 to call for a feature illustrated in the drawings and described in the specification on page 6, lines 7 through 14*. Moreover, applicants have inserted a paragraph summarizing the feature into the specification, so that the summary will conform to the claims, as amended.

Thus, claim 1, upon which claims 2 through 9 depend, and claim 14 upon which claims 15 through 17 depend, have been amended to call for the claimed structure being open at the top, and between the hubs, to provide ready access to the seat by a person reaching forwardly to place a baby into the seat or to remove a baby from the seat.

It may be here noted that the feature noted above was claimed originally, in somewhat different terms, in claim 9, which continues to call for there being no cross piece connecting the hubs.

JMA at 44-45 (emphasis added). The last italicized section quoted refutes Plaintiff's claim differentiation argument. Here, Plaintiff clearly states that, although worded differently, the amendment to claim 1 is intended to incorporate the limitation from claim 9 that "there is no cross piece connecting the hubs."

If there were any doubt about this conclusion, the first paragraph quoted above seals the fate of Plaintiff's claim differentiation argument. As Plaintiff stated there to the Patent Examiner, the amendment to Claim 1 is intended to incorporate the feature described on page 6, lines 7 through 14, of the draft specification. In turn, the portion of the specification cited by Plaintiff states:

It is also to be noted that the swing structure 10 of the present invention is open at the top between the hubs

12, so that as a person is placing a baby in the swing seat 15 reaches forwardly to place the baby in the seat or to remove the child from the seat, *there is no interference by or contact with a cross piece* as is typically a problem with many available baby swing support structures.

JMA at 21 (emphasis added). Plaintiff's citation to this portion of the draft specification clearly indicates that he intended to import the "no cross piece" limitation from the specification into Claim 1. Thus, there can be no doubt that, although not stated as such, Claim 1 includes a limitation that there can be no cross piece between the hubs. Therefore, Defendants' construction of "wherein said structure has a top and is open at the top, and between said hubs" has to be correct.

Accordingly, the Court concludes that "wherein said structure has a top and is open at the top, and between said hubs" means that "there is no structure, such as a crossbar, located at the top and between the hubs."

B. *Claim 2*

Claim 2 is a dependent claim of Claim 1. Claim 2 claims "[t]he baby swing support structure of claim 1, and further comprising a stabilizing means joining said post lowermost ends adjacent said post lowermost ends." '033 Patent, col. 4, ll. 32-34. With respect to this claim, the parties dispute the meaning of "stabilizing means joining said post lowermost ends adjacent said post lowermost ends." More specifically, the parties disagree whether Claim 2 is a "means-plus-function" limitation to be construed according to paragraph 6 of 35 U.S.C. s. 112.

Defendants argue that use of the word "means" in Claim 2 presumptively demonstrates that it is a means-plus-function claim. The import of a means-plus-function claim is that if the claim does not recite sufficient structure, the patentee is limited to the structure disclosed in the specification and its equivalents. 35 U.S.C. s. 112, para. 6; CCS Fitness, Inc. v. Brunswick Corp., 288 F .3d 1359, 1369 (Fed.Cir.2002). FN1 Therefore, Defendants' proposed definition of this term refers to the ' 033 Patent's description of the preferred embodiment: "Function: stabilizing and joining the lowermost ends of the posts; Structure: a stabilizing step 42 having a central section 48 and side segments 44 which receive the lowermost ends 40 of support posts 20."

FN1. In turn, if the specification does not describe a structure that corresponds to the function, the claim will be invalid as indefinite. Biomedino, LLC v. Waters Tech. Corp., 490 F.3d 946, 950 (Fed.Cir.2007).

Plaintiff, however, disputes that Claim 2 is a means-plus-function claim. Plaintiff argues that Claim 2 is not a means-plus-function limitation because it uses the term "means," and not "means for," as synonym for "by any means" or "device." Therefore, Plaintiff suggests that this term means "the material that connects the ends of the support posts at their points farthest from the hubs." Plaintiff further argues, however, that even if Claim 2 is a means-plus-function limitation that the Court should reject Defendants' definition because the specification demonstrates at least three stabilizing structures.

In construing this term, the Court's first step is to determine whether Claim 2 is a means-plus-function limitation. Use of the word "means" creates a presumption that the claim is a means-plus-function limitation. Wenger Mfg., Inc. v. Coating Mach. Sys., Inc., 239 F.3d 1225, 1232 (Fed.Cir.2001). However, a limitation that uses the word "means" but that does not recite a function that corresponds to the means is not a means-plus-function limitation." *Id*. In addition, a claim will not be construed as a means-plus-function

limitation if the claim recites sufficient structure, material, or acts to perform the recited function." *Id.;* Rodime PLC v. Seagate Tech., Inc., 174 F.3d 1294, 1302 (Fed.Cir.1999). Second, if the claim is a means-plus-function limitation, the Court must identify the corresponding structure in the written description that performs the function. Wenger Mfg., 239 F.3d at 1233.

In this case, because Claim 2 employs the word "means," the Court starts with the rebuttable presumption that Claim 2 is a means-plus-function limitation. In determining whether the presumption has been rebutted, the Court's first task is to determine whether Claim 2 recites a function. When identifying the claimed function, s. 112, para. 6 "does not permit limitation of a means-plus-function claim by adopting a function different from that explicitly recited in the claim." ACTV, Inc. v. Walt Disney, Inc ., 346 F.3d 1082, 1087 (Fed.Cir.2003) (quoting Generation II Orthotics, Inc. v. Medical Tech, Inc., 263 F.3d 1356, 1363 (Fed.Cir.2001)). Correctly identifying the claimed function is critical, because "an error in identification of the function can improperly alter the identification of the structure corresponding to that function." *Id*. Here, the parties essentially agree as to the function recited by Claim 2. At oral argument, Plaintiff stated that the function of the stabilizing means recited in Claim 2 is "joining the lowermost ends of the front support posts." Doc. No. 32, at 44. Defendants stated that the function of the stabilizing means is "stabilizing and joining the lowermost ends of the posts." *Id*. at 101. Defendants' identification of the function of Claim 2 is more accurate than the function suggested by Plaintiff. As Defendants observe in their brief, Claim 2 refers to both a "stabilizing" function and a "joining" function. Doc. No. 28, at 19. Therefore, the Court concludes that the function of the stabilizing means disclosed in Claim 2 is stabilizing and joining the lowermost ends of the support posts.

Having identified the function of Claim 2, the Court must determine whether Claim 2 discloses sufficient structure to perform the function in order to avoid being construed as a means-plus-function limitation. The Court agrees with Defendants, however, that Claim 2 does not recite any structure to perform the function of stabilizing and joining the lowermost ends of the support posts. The absence of structure in Claim 2 is clearly demonstrated by comparing Claim 2 to dependent Claim 3, which also uses the word "means," but additionally includes a recitation of structure. Claim 3 claims "[t]he baby swing support structure of claim 2, and wherein said stabilizing means *comprising step means adapted for floor support and positioned to be stepped on as a baby is removed from said seat*." '033 Patent, col. 4, ll. 35-39 (emphasis added). The italicized segment of Claim 3 is the structure to perform the stabilizing and joining function, i.e., a step means adapted for floor support and positioned to be stepped on. Read in light of Claim 3, Claim 2 obviously makes no reference to a structure to perform the stabilizing and joining function. Accordingly, the Court concludes that Claim 2 is a means-plus-function limitation.

Finally, having determined that Claim 2 is a means-plus-function limitation, the Court must identify in the specification the corresponding structure that performs the function. Importantly, the limitation in the written description must be disclosed in a manner such that one skilled in the art will know and understand what structure corresponds to the means limitation. Atmel Corp. v. Information Storage Devices, Inc., 198 F.3d 1374, 1382 (Fed.Cir.1999). In this case, Defendants argue that the structure disclosed in the specification is limited to a stabilizing step whereas Plaintiff argues that the specification discloses at least three structures which correspond to the stabilizing means limitation. In addition to the stabilizing step, Plaintiff points out that, with respect to the support legs, the specification notes that a tubular cross bar or a U-shaped cross bar can be used to join and stabilize the support legs. Plaintiff argues that a person skilled in the art would realize that any means that could be used to stabilize and join the support legs could be used to stabilize and join the support posts. Plaintiff contends that Defendants are improperly attempting to limit the structure disclosed in the specification to the preferred embodiment.

Although Plaintiff is correct that in a means-plus-function claim structure is not limited to that shown by the preferred embodiment, Micro Chem., Inc. v. Great Plains Chem. Co., Inc., 194 F.3d 1250, 1258 (Fed.Cir.1999), FN2 "structure disclosed in the specification is 'corresponding' structure only if the specification or prosecution history clearly links or associates that structure to the function recited in the claim." B Braun Med., Inc. v. Abbott Lab., 124 F.3d 1419, 1424 (Fed.Cir.1997). In this case, the specification does not clearly link or associate using a tubular or U-shaped cross bar as a means for joining and stabilizing the support posts. Rather, the specification only refers to use of a cross bar to stabilize and join the support legs. Although a tubular or U-shaped cross bar could, as Plaintiff argues, provide the necessary structure to fulfill the function of joining and stabilizing the support posts, that fact is immaterial without the link between the specification and the claim. *See* Medtronic, Inc. v. Advanced Cardiovascular Sys., Inc., 248 F.3d 1303, 1311 (Fed.Cir.2001) ("We agree with Medtronic that each of these structures is capable of performing the recited function. However, that is not the focus of the inquiry. We must determine whether the straight wire, hooks, or sutures is clearly linked or associated with the function of connecting adjacent elements together.") (internal citation omitted). While Plaintiff argues in his brief that one skilled in the art would understand that the stabilizing and joining means for the support legs could be employed as to the support posts, there is no evidence in the record concerning the level of understanding of one skilled in the art. The conclusory assertion by Plaintiff's attorney as to the understanding of one skilled in the relevant art is insufficient to demonstrate that the joining and stabilizing means for the support legs relates to the function recited in Claim 2. *See* Budde v. Harley-Davidson, Inc., 250 F.3d 1369, 1382 (Fed.Cir.2001). FN3

FN2. *But see* Signtech USA, Ltd. v. Vutek, Inc., 174 F.3d 1352, 1356 (Fed.Cir.1999) ("Although patentees are not necessarily limited to their preferred embodiment, interpretation of a means-plus-function element requires this court to consult the structure disclosed in the specification, which often, as in this case, describes little more than the preferred embodiment.") (internal citation omitted).

FN3. The *Budde* Court stated:
Harley-Davidson points to its expert's testimony at the *Markman* hearing that the expert "didn't see any description in the patent of the vacuum sensor other than that [the invention] has one and it's in the diagram." Relying on *Atmel,* Harley-Davidson argues that testimony from those skilled in the art is instructive as to whether the specification discloses structure corresponding to the claimed function. Atmel, 198 F.3d at 1379, 53 USPQ2d at 1228. However, HarleyDavidson's expert misses the mark in not shedding any light on the significance to, or understanding of, one skilled in the art of the described "commercially available" vacuum sensor.

Plaintiff also relies on the prior art references of Doyle and Krupsky for the proposition that one skilled in the art would understand that a U-shaped support frame could be used as a stabilizing and connecting means for the support posts. Prior art references of record may be used to establish what one skilled in the art would understand from reading the specification. Creo Prod ., Inc. v. Presstek, Inc., 305 F.3d 1337, 1347 (Fed.Cir.2002). However, there is nothing in the specification that provides a link between the prior art references cited by Plaintiff in his brief and the function claimed in Claim 2. *Compare with* Atmel, 198 F.3d at 1382 (specification recited sufficient structure where it cited article concerning high-voltage circuit and expert testified that the title of the article would be sufficient to indicate to one skilled in the art the precise structure of the means recited in the specification); Depuy, Inc. v. Zimmer Holdings, Inc., 276 F.Supp.2d

910, 918 (N.D.Ill.2003) ("DePuy asserts that what the prior art calls a transition part is the same thing as a body. Whether or not that is true, the patent's discussion of the prior art does not clearly link or associate the structure described by the prior art (in which the neck is integral with the transition part) to the function of attaching a head member to a body member."). Accordingly, Doyle and Krupsky do not establish that the specification recites that a tubular cross bar and U-shaped frame provide the structure necessary to perform the function claimed in Claim 2.

Finally, Plaintiff argues that claim differentiation precludes the Court from adopting Defendants' definition of "stabilizing means." Plaintiff contends that Defendants' definition of "stabilizing means" for Claim 2, which they adopted from the specification, reads on the "stabilizing means" recited by dependent Claim 3. Plaintiff points out that under the claim differentiation doctrine, limitations in dependent claims are presumed not to be present in the independent claim. The doctrine of claim differentiation, however, cannot be used to override the requirement of 35 U.S.C. s. 112, para. 6 that structure be recited in the specification. Laitram Corp. v. Rexnord, Inc. 939 F.2d 1533, 1538 (Fed.Cir.1991). Stated another way, the doctrine of claim differentiation does not preclude the Court from construing Claim 2 to recite the same structure as Claim 3. Trinity Ind., Inc. v. Road Sys., Inc., 121 F.Supp.2d 1028, 1039 (E.D.Tex.2000) ("In other words, a means plus function claim is limited to the corresponding structure disclosed in the specification, despite the fact that the patent contains another claim that specifically recites the same structure, even if the result is that the two claims have the same meaning and scope.").

In summary, for the reasons stated, the Court concludes that Defendants' construction of Claim 2 is correct. Accordingly, the Court holds that "stabilizing means joining said post lowermost ends adjacent said post lowermost ends" is a means-plus-function limitation which means: "Function: stabilizing and joining the lowermost ends of the support posts; Structure: a stabilizing step 42 having a central section 48 and side segments 44 which receive the lowermost ends 40 of support posts 20."

C. *Claim 10*

The construction of the following terms of Claim 10 are in dispute:

1. "upper hubs";

2. "support legs, each secured to and extending downwardly and rearwardly from one of said hubs";

3. "support posts each secured to and extending downwardly from one of said hubs";

4. "said structure having a top and being open at the top, and between said hubs."

As can be seen, these terms are the same terms construed by the Court with respect to Claim 1 in Parts IV.A.1 through IV.A.4, *supra,* respectively. The general rule is that the terms of a patent should be construed consistently throughout the patent. Phillips, 415 F.3d at 1314; Rexnord Corp. v. Laitram Corp., 274 F.3d 1336, 1342 (Fed.Cir.2001) ("[A] claim term should be construed consistently with its appearance in other places in the same claim or in other claims of the same patent.").

Accordingly, here the Court incorporates by reference the definitions it rendered for these terms with respect to Claim 1 in Parts IV.A.1 through IV.A.4 of this order.

IT IS SO ORDERED

S.D.Ohio,2007.
Kohus v. Toys "R" Us, Inc.

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