United States District Court,
C.D. California.

ENOVSYS LLC,
Plaintiff.
v.
NEXTEL COMMUNICATIONS, INC., et al,
Defendants.

No. CV 06-05306 RSWL (SHx)

Feb. 26, 2008.

Gregory S. Dovel, John Jeffrey Eichmann, Dovel & Luner, Santa Monica, CA, for Plaintiff.

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Claim Construction Order

RONALD S.W. LEW**, Senior District Judge.**

Presently before the Court is Claim Construction for this case. The Court has considered all papers and argument in this matter and rules as follows:

As a preliminary matter, the Court **sustains** Plaintiff's Objections to Defendants' Newly Proposed Claim Construction and Claim Construction Arguments in its entirety. Provenz v. Miller, 102 F.3d 1478, 1483 (9th Cir.1996) ("where new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without giving the [non-]movant an opportunity to respond."); *see also* Contratto v. Ethicon, Inc., 227 F.R.D. 304, 309 (N.D.Cal.2005) ("It is well settled that new arguments cannot be made for the first time in reply.").

1. Terms in the U.S. Patent No. 5,918,159 ("the '159 patent")

a. "global position" and "global location"

Court construes "global position" as "the position or location (of an object or person) on the face of the earth estimated with a high degree of accuracy, such as from using the Global Positioning System." *See* the '159 patent, 5 :17-19 (Referring to "global position" from previous sentence: "Such positioning information has an accuracy of about one hundred meters and could further be improved to an accuracy of five meters ..."). The specification also discloses use of Global Positioning System to get global position. Id.

Next, the Court construes "global location" as "location on the face of the earth." *See* the '159 patent, 4 :44-

50 ("If the positioning disclosure feature is active, the control station retrieves the coordinates of the call receiver's global position and encodes that information before transmission to the caller. Such information may describe the latitude and longitude of the subscriber including a more simplified information such as the country, city or town were [sic] the message was sent." In other words, "global location" sent to the caller need not be as accurate.).

b. "space satellites"

Plaintiff argues that space satellites need not transmit paging information.

Defendants argue that at least one space satellite should be adapted to transmit paging information. Defendants' argument is based on the phrase in the claim element "space satellites and terrestrial stations, some of which are adapted for the purpose of transmitting paging information ..."

However, the phrase does not necessitate a construction that requires a space satellite to transmit paging information, as "some of which" is directed at a group of terrestrial stations *and* space satellites.

Moreover, the invention as disclosed in the specification does not require a space satellite to transmit paging information. *See* the '159 patent, 3 :56-58 (In describing the final step before the message reaches the call receiver: "This station could be an earth station that transmits directly to satellite, or a ground based transmitter.").

Therefore, claim 1 of the '159 patent does not require "at least one space satellite adapted to transmit paging information and at least one other space satellite adapted to transmit positioning information."

c. "paging information" and "positioning information"

The Court construes the term "paging information" as "information comprising or accompanying a paging message," and "positioning information" as "information comprising or used to determine the global position (of an object or person)." *See, e.g.,* the '159 patent, 4 :27-30 ("Each call receiver will have a special code whereby if identified in a caller's paging information, will allow the paging control station to disclose the call receiver's global position").

d. "call receiver or pager" and "means to resolve a global position from satellites or earth based communication means"

Defendant proposes to construe "call receiver or pager" as "pager (excludes a cellular telephone)." FN1

The term "call receiver or pager" should not be construed to exclude cellular telephone because the patent specification does not evidence "a clear intention to limit the claim scope using words or expressions of manifest exclusion or restriction." Innova/Pure Water, Inc. v. Safari Water Filtration Sys., 381 F.3d 1111, 1117 (Fed.Cir.2004).

This is further supported by the fact that modern cellular telephones have capabilities to receive pages. Although the patent mentions pagers as distinct from cellular telephones in the "BACKGROUND" section of the patent specification, there is no indication that this is meant to be a limitation. The invention was conceived before 1999, and the distinction was made at a time when cellular telephone was much more expensive and had limited capabilities compared to more modern phones.

The Court construes "call receiver or pager" as "small, portable device to receive short messages sent electronically." This construction is consistent with the ordinary meaning of the words. *See* http://www.di scretewireless.com/products/Glossary/gloss ary.asp ("Pager-Small portable receivers that are generally inexpensive, reliable, and have nationwide coverage.").

Next term, "**means to resolve a global position from ...,**" is a limitation that invokes 35 U.S.C. s. 112, para. 6.FN2 Elbex Video, Ltd. v. Sensormatic Elecs. Corp., 508 F.3d 1366, 1370 (Fed.Cir.2007). Construction of a means-plus-function limitation requires two steps: (1) "determine the claimed function," and (2) "turn to the specification to determine which structures disclosed in the specification perform that function." *Id*.

The claimed function in this case is "to resolve a global position from satellite or earth based communication means," as specified in the language of the element. This language needs no further construction.

Next, the structures disclosed in the specification that perform that function are transceiver, connecting circuitry, CPU, satellite receiving means, terrestrial receiving means, decoders, and temporary store. The parties are not in dispute as to these structures.FN3

In conclusion, "means to resolve a global position from satellites or earth based communication means" is construed to have function "to resolve a global position from satellites or earth based communication means," and structures comprising "transceiver, connecting circuitry, CPU, satellite receiving means, terrestrial receiving means, decoders, and temporary store."

e. "callers"

The Court construes "caller" as "a party initiating a message to the call receiver." *See* the '159 patent, 2 :64-3 :3 (describing the process of a caller transmitting a message).

f. "the system divulging to certain or all callers the global location of a callee in possession of the said call receiver white [sic] blocking such information from being divulged to certain or all other callers."

Both Parties agree that "white" is misspelled, and should be "while."

Plaintiff argues that "while" is used to reconcile two seemingly conflicting principles or phenomena (e.g. "although on the one hand" or "whereas"). *See* Dictionary.com ("while: ... 5. even though, although").

Defendants argue that "while" should be time specific (e.g. "at the same time"). Following Defendants' arguments, this element requires a physical impossibility, because one cannot "divulge to ... all callers ... while [at the same time] blocking such information ... to ... certain ... callers ."

However, Plaintiff's construction of "while" should be adopted because "claims should be construed to preserve their validity." Phillips v. AWH Corp., 415 F.3d 1303, 1327 (Fed.Cir.2005). Defendant's emphasis on temporal simultaneity should be rejected.

Therefore, the last element of claim 1 of the '159 patent is construed as "the system divulging to certain or all callers the global location of a callee in possession of the said call receiver, although also capable of

blocking such information from being divulged to certain or all other callers."

2. Terms in the '461 Patent

a. "mobile remote unit," "mobile remote receiving unit," and "mobile remote"

The Court construes "mobile remote unit" as "a small, portable device used to send or receive communication transmission from a remote location" because it is supported by the specification and ordinary meaning.

Similarly, the Court construes "mobile remote receiving unit" as "a small, portable device that is used to receive communication transmissions from a remote location" because it is supported by the specification and ordinary meaning.

The specification indicates that the terms "mobile remote unit" and "mobile remote" are used interchangeably. (*See* the '461 patent, claims 23 and 25.) Therefore, the Court construes "mobile remote" as "a small, portable device used to send or receive communication transmission from a remote location."

b. "to establish"

The Court construes "to establish" as "to bring about; bring into existence" because it is supported by ordinary meaning and the specification.FN4 American Heritage Dictionary ("establish: to bring about; generate").

c. "pre-authorized"

From the mere reading of the claims, it is unclear what has been authorized in advance. For instance, Claim 28 of the '461 patent states "a location access field indicating whether said preauthorized resource identified in the profile should be allowed/disallowed to access the location information ..." Such a statement reveals that the term "preauthorized" does not mean that the request for the callee's location is authorized in advance.

The specification and the prosecution history reveal that "preauthorized" means the permission to submit a request has been granted in advance. *See* the ' 461 patent, 4:54-58 (describing use of "special code" to determine whether the request was "authorized"); Decl. of Pascal in Support of Sur-Reply, Ex. 4 at NEX-002-095839 (prosecution history describing use of "location disclosure code" to "pre-authorize" callers). In order for the caller to get the callee's location information, the caller's request has to be (1) "preauthorized" [i.e. permission to submit a request has been granted in advance], and (2) the request must be granted after it has been validly submitted.

Therefore, the Court construes "pre-authorized" (and "preauthorized") as "authorized to submit a request in advance of determining whether the request will be granted."

d. "continuously tracked"

The Court construes "continuously tracked" as "kept track of (i.e. observed or known about) without interruption" because it is supported by plain and ordinary meaning of "continuous" and "track."

e. "location information disclosure instruction"

The Court construes "location information disclosure instruction" as "information specifying or instructing whether the location information can or should be disclosed" because it is supported by the plain and ordinary meaning and the specification.

f. "profile"

The Court construes "profile" as "a set or collection of information, attributes, or parameters relating to a particular person, device, application, or subject" because it is supported by ordinary meaning and the specification. *See* Merriam-Webster Online Dictionary (defining profile as "a set of data often in graphic form portraying the significant features of something"); the '461 patent, 3:1-6 ("The pre-selected areas, pager ID, paging protocol and other relevant information of the remote receiving unit are stored in the data library ...").

g. "location access field"

The Court construes "location access field" as "a field, element or item of data in a profile that indicates, or contains information indicating, whether access to location information can or should be allowed" because it is supported by the specification. *See* the '461 patent, 5:10-31 (explaining the use of a location access field).

All other terms not construed above need no further construction.

IT IS SO ORDERED.

FN1. When the Parties met and conferred before Plaintiff filed the opening brief, Defendants construed "call receiver" as "a device with an assigned telephone number for receiving pages from the satellite paging system, which has a means to resolve a global position from satellites or earth based communication means." At that time, Defendants also asserted that "call receiver or pager" was indefinite. (*See* Decl. of Eichmann in Support of Plaintiff's Reply, Ex. 19 (a chart showing Defendants' changes in position).)

FN2. 35 U.S.C. s. 112, para. 6 states: "An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof."

FN3. Plaintiff uses the term "satellite signal circuitry" instead of "satellite receiving means," and "terrestrial signal circuitry" instead of "terrestrial receiving means." However, the specification uses the "receiving means" language, and are adopted by the Court.

FN4. To address Defendants arguments, the claim language as it is written is clear that the location information is stored at and retrieved from the network. Claim 1 of the '461 patent recites "establish[ing] mobile remote unit location information *at the network* " and being "able to access the location of the mobile remote unit *at the network*." Therefore, Defendants' construction should be rejected because it adds extraneous and redundant limitations.

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