

United States District Court,
W.D. Texas, Austin Division.

Robert RODGERS,
Plaintiff.

v.

JOHNSON HEALTH TECH. CO., LTD.; Epix, Inc. d/b/a Vision Fitness; Matrix Fitness Systems, Inc.; and Horizon Fitness, Inc,
Defendants.

No. A-02-CA-731-SS

Dec. 8, 2003.

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AMENDED CLAIM CONSTRUCTION ORDER

SAM SPARKS, District Judge.

On October 23, 2003, this Court issued an Order construing the disputed claim terms of five of Plaintiff Robert Rodgers' U.S. Patents related to elliptical exercise equipment. Defendants subsequently filed objections and comments regarding the Court's October 23, 2003 Claim Construction Order [# 101]. Plaintiff responded [# 108] and Defendants replied [# 120]. The Court reviewed its claim construction and the following represents the Court's amended construction.

BE IT REMEMBERED that on the 3rd day of October 2003 the Court, in accordance with *Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed.Cir.1995), *aff'd*, 517 U.S. 370 (1996), held a hearing at which the Parties appeared by representation of counsel and made oral arguments on their proposed claims construction. After considering the briefs, responses, the case file as a whole, and the applicable law, the Court enters the following opinion and Order.

I. Background

This suit involves Defendants' alleged infringement of five of Plaintiff Robert Rodgers' U.S. Patents related to elliptical exercise equipment: United States Patent Nos. 5,573,480 ("the '480 Patent"), 5,813,949 ("the '9 Patent"), 5,938,567 ("the '567 Patent"), 5,924,962 ("the '962 Patent"), and 5,540,637 ("the '637 Patent").

II. Principles for Claim Construction

Claim construction is a question of law for the Court. *Markman*, 517 U.S. at 384; *Tex. Digital Sys. Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1201 (Fed.Cir.2002). Claim construction begins with the claim language itself. *Vitronics Corp. v. Conceptoronic, Inc.*, 90 F.3d 1576, 1582 (Fed.Cir.1996); *Inverness Med. Switzerland GmbH v. Warner Lambert Co.*, 309 F.3d 1373, 1378 (Fed.Cir.2002). Terms within a claim are to be accorded their ordinary and accustomed meaning. *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366 (Fed.Cir.2002). Moreover, "a technical term used in a patent is interpreted as having the meaning a person of ordinary skill in the field of the invention would understand it to mean." *Bell Atlantic Network Serv., Inc. v. Covad Communications Group, Inc.*, 262 F.3d 1258, 1267 (Fed.Cir.2001). Dictionaries are useful resources to assist the Court in determining the ordinary and customary meanings of claim terms as well as the meanings that would have been ascribed to technical terms by those of skill in the relevant art. *Tex. Digital Sys.*, 308 F.3d at 1202. However, a technical term will not be assigned its ordinary meaning by one skilled in the art if it is clear from the patent and the file history that the inventor assigned a different meaning to the term. *Phillips Petroleum v. Huntsman Polymers*, 157 F.3d 866, 871 (Fed.Cir.1998) (quoting *Hoechst Celanese Corp. v. BP Chems. Ltd.*, 78 F.3d 1575, 1578 (Fed.Cir.1996)). "[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 Corp.*, 90 F.3d at 1582.

In an effort to reconcile a disputed claim term, courts should initially examine the intrinsic evidence (the patent itself, the specification, and the claims). *Id.* If an examination of the intrinsic evidence reveals a clear meaning of a disputed term, then that meaning shall apply. *Frank's Casing Crew & Rental Tools, Inc. v. PMR Techs., Ltd.*, 292 F.3d 1363, 1374 (Fed.Cir.2002). However, extrinsic evidence (including expert and inventor testimony) may be utilized where the claim language remains unclear after consulting the intrinsic evidence. *Id.*

III. Construction of Claim Terms

As an initial matter, the claim terms the Court will define are used in related Rodgers' U.S. Patents. The Court therefore will give these terms the same definitions. *See Abtox, Inc. v. Exitron Corp.*, 131 F.3d 1009, 1010 (Fed.Cir.1997) (stating that identical or similar claim terms contained in related patents must be interpreted consistently); *Kimberly-Clark Corp. v. Tyco Intern., Inc.*, 4 Fed.Appx. 946, 950 (Fed.Cir.2001); *Epcor Gas Systems, Inc. v. Bauer Compressors, Inc.*, 279 F.3d 1022, 1030-31 (Fed.Cir.2002).

A. Meaning of "Foot member"

The term "foot member" is used in claim 6 of the '480 Patent, claim 16 of the '637 Patent, and claim 16 of the '9 Patent. Defendants' proffered claim construction limits the definition of "foot member" to "foot support that obligates the elliptical path of the user's foot." Brief of Defendants [# 62] ("Defendants' Brief"), Ex. C, para. 1. Conversely, Plaintiff proposes the following definition: "a member having at least a portion adapted to contact or support a foot." Plaintiff's Response to Defendants' Brief [# 73] ("Plaintiff's Response"), at 3. The Court agrees with Plaintiff.

Plaintiff's meaning is consistent with the specifications of the Rodgers' Patents. For example, the '480 Patent states:

In the preferred embodiment, the present invention also includes two foot members, *or contact members*, 40.

Each foot member 40 is pivotally attached proximate a first end 42 through a pinned connection 44 to the reciprocating arm 32. A foot pad 50 is attached to the top surface of each foot member 40 at its first end 42.

See Brief of Plaintiff [# 59] ("Plaintiff's Brief"), Ex. F, col. 3, ll. 29-34 (emphasis added). Figure 1 of the '480 Patent shows each foot member (number 40) to have a rear portion adapted to contact or support a foot. In addition, nothing in the prosecution history limits the scope of "foot member" to obligate the elliptical path of the user's foot. Accordingly, the Court holds "foot member" means "a member having at least a portion adapted to contact or support a foot."

B. Meaning of "Linkage assemblies for orienting the bottom of the feet of the user of the apparatus so that each foot of the user follows a substantially elliptical path"

This language or substantially similar language is found in claim 1 of the '480 Patent, and claim 9 of the '962 Patent. Plaintiff asserts this language should be construed as "linkage assemblies that, in cooperation with other elements of the apparatus, affect the orientation of the bottom of the feet of the user, with each foot following a substantially elliptical path during operation of the apparatus." *See* Plaintiff's Brief, at 8-9. Defendants respond the term should be construed as "foot support that obligates the elliptical path of the user's foot." Defendants' Brief, Ex. C, para. 1.

The language of claim 1 of the '480 Patent discloses "linkage assemblies for orienting the bottom of the feet of the user of the apparatus so that each foot of the user follows a substantially elliptical path." The Court finds this language to be sufficiently clear and does not require additional definition.

C. Meaning of "Proximal" and "Proximate"

The term "proximal" is used in claims 1 and 3 of the '567 Patent. The term "proximate" is used in claims 10 and 19 of the '480 Patent, and claim 5 of the '962 Patent. Defendants' proffered claim construction limits the definition of "proximal" and "proximate" to "next to." Defendants' Brief, Ex. C, para. 2. Defendants argue this Court should accept the ordinary meaning of "proximal" and "proximate," as submitted by Defendants. Defendants' Brief at 13. Defendants maintain "proximal" in the '567 Patent, at its extreme, means "closer to the top end than the bottom end of the handle bar." Defendants' Brief, Ex. C, para. 2.

Conversely, Plaintiff asserts "proximal" and "proximate" mean "a point on an element closer to one end than to the other end." Plaintiff's Response, at 7. To support its position, Plaintiff relies on standard dictionary definitions. The Federal Circuit has indicated "dictionaries, encyclopedias and treatises, publicly available at the time the patent is issued, are objective resources that serve as reliable sources of information on the established meanings that would have been attributed to the terms of the claims by those of skill in the art." *Tex. Digital Sys.*, 308 F.3d at 1202-03.

The Court concludes the ordinary meaning of "proximal" and "proximate" offered by Plaintiff is applicable. "Proximal" is defined as "proximate ... nearest." FN1 WEBSTER'S NEW WORLD DICTIONARY (3d ed.1991). "Proximate" is defined as "nearest in space, order, time, etc." *Id.* The language of the '567, '480, and the '962 Patents does not appear to rebut the ordinary meaning of these terms, FN2 rather the specification language appears to support interpreting "proximal" and "proximate" broadly. For example, the '567 Patent specification states when discussing "proximal" that: "Each arm member 48 is also pivotally attached proximal its other end to the top portion 16 of frame 10." *See* Plaintiff's Brief, Ex. I, col. 3, ll. 38-40. Also, the '480 Patent specification discusses the term "proximate" as follows: "Each foot member 40 is pivotally attached proximate a first end 42 through a pinned connection 44 to the reciprocating arm 32." *See*

Plaintiff's Brief, Ex. F, col. 3, ll. 29-32. This language defines "proximal" and "proximate" simply as a point on an element closer to one end than to the other end; the specifications definition is consistent with the dictionary definitions of "proximal" and "proximate." Based on the terms' usage in the specifications, there exists a "heavy presumption" that the terms mean what they say. *CCS Fitness*, 288 F.3d at 1366. The Court therefore construes the terms "proximal" and "proximate" in accordance with Plaintiff's proffered definition; "proximal" and "proximate" refer to a location that is closer to one end than to the other end.

FN1. "[W]here there are several common meanings for a claim term, the patent disclosure serves to point away from the improper meanings and toward the proper meaning." *See Renishaw PLC v. Marposs Societa' per Azioni*, 158 F.3d 1243, 1250 (Fed.Cir.1998).

FN2. For example, claim 1 of the '567 Patent states: "first and second arm linkage assemblies, each said arm linkage assembly pivotally connected at one end to a reciprocating member and pivotally connected proximal the other end of said arm linkage assembly to said frame."

D. Meaning of "Connected to" and "Attached to"

Defendants next challenge Plaintiff's use of the terms "connected to" and "attached to" as used in claims 10 and 19 of the '480 Patent. Defendants argue these terms should be limited or narrowed to "a direct connection between the reciprocating members and the foot members." Defendants' Brief, Ex. C, para. 3. Plaintiff argues "connected to" and "attached to" includes more than just a direct connection, and should be defined to include "either a direct or an indirect connection" which Plaintiff claims is a sufficiently narrow description. Plaintiff's Response, at 7. The Court agrees with Plaintiff, and will adopt its proposed definition.

The general sense of Defendants' argument is the terms in the claims provide for material limitations which should be construed in their natural meaning to comprise a specific connection between the respective elements involved. The term "connect" is defined in Webster's New World Dictionary, Third Edition, 1991, as follows: "to join or fasten;" "link;" "to show or think of as related." The derivative of the term "connect" is defined in the same dictionary as follows: connected-"linked together; united." The above definition of the term "connect" is plain and unambiguous. It is clear the accepted definition of the term "connected" is restricted to neither a direct nor an indirect connection, and is consistent with the specification. *See* Plaintiff's Brief, Ex. F, col. 3, ll. 29-32 ("Each foot member 40 is pivotally attached proximate a first end 42 through a pinned connection 44 to the reciprocating arm 32"). The term is therefore applicable to an indirect connection as claimed by Plaintiff. *See Genentech, Inc. v. Chiron Corp.*, 12 F.3d 495, 501 (Fed.Cir.1997) (To be joined or connected does not necessitate a direct joining or connection).

E. Meaning of "Substantially parallel with the floor"

The next term at issue is "substantially parallel with the floor ." Specifically, the claims of the '637 and '9 Patents require that the "reference plane remains *substantially parallel* with the floor." *See, e.g., '637 Patent*, claim 1 (emphasis added). Defendants argue the term "substantially parallel" means the same as "parallel." Defendants' Brief, Ex. C, para. 4. Plaintiff argues the Rodgers Patents disclose an apparatus in which the foot platforms are not "perfectly" parallel, but inherently are "substantially parallel." Plaintiff's Response, at 9.

While the term "substantially parallel," is mathematically imprecise, the Court notes words of

approximation, such as "generally" and "substantially," are descriptive terms "commonly used in patent claims 'to avoid a strict numerical boundary to the specified parameter.' " *Ecolab, Inc. v. Envirochem, Inc.*, 264 F.3d 1358, 1367 (Fed.Cir.2001) (quoting *Pall Corp. Micron Separations, Inc.*, 66 F.3d 1211, 1217 (Fed.Cir. 1995)); *see, e.g.*, *Andrew Corp v. Gabriel Elecs. Inc.*, 847 F.2d 819, 821-22 (Fed.Cir.1988) (noting "substantially equal," and "closely approximate" are ubiquitously used in patent claims and that such usages, when serving reasonably to describe the claimed subject matter to those of skill in the field of the invention and to distinguish the claimed subject matter from the prior art, have been accepted in patent examination and upheld by the courts). And, while ideally, all terms in a disputed claim would be definitively bounded and clear, such is rarely the case in the art of claim drafting. In this case, exact parallelism is sufficient, but not necessary, to meet the limitation of the claim term "substantially parallel."

It is undisputed in this case that ordinarily, "parallel" means everywhere equal distant. Additionally, the relevant definition of "substantially" is "considerable in ... degree." *AMERICAN HERITAGE COLLEGE DICTIONARY* (4th ed.2002). Because the claim language itself expressly ties the adverb "substantially" to the adjective "parallel," the ordinary meaning of the phrase "substantially parallel" envisions some amount of deviation from "exactly parallel."

In fact, the Rodgers Patents provide guidance for a person skilled in the art for determining what "substantially parallel" means:

[T]he top portion of foot platform 50 will remain substantially parallel through at least a portion of the forward end of the lower half of the ellipse. This provides for preferred anatomical and ergonomical benefits during the exercise motion of the foot, ankle and knee as described herein.

See Plaintiff's Response, Ex. J, col. 5, ll. 62-67. Moreover, nothing in the prosecution history limits the scope of "substantially parallel" such that the adverb "substantially" does not broaden the meaning of parallel. Accordingly, the Court holds the phrase "substantially parallel with the floor" allows a reasonable deviation from exactly parallel with the floor.

F. Meaning of "Means for attaching said second ends of said first and second reciprocating members to said pulley"

This language is used in claims 1, 6, 10, and 19 of the '480 Patent, claims 5, 9, and 12 of the '962 Patent, claims 1, 7, 12, 16, and 28 of the '637 Patent, and claims 1, 7, 16, and 28 of the '9 Patent. Plaintiff's proposed definition is "includes the structures described in the specification and all equivalents thereof that correspond to the function of attaching the second end of each reciprocating member to the pulley." *See* Plaintiff's Brief, at 19. Defendants' proposed definition is "a single structural member that extends from the pulley's axis of rotation radically outward to the front end of the reciprocating member." Defendants' Brief, Ex. C, para. 5. The Court adopts Plaintiff's proposed definition.

A means-plus-function element should be construed to cover only the precise structure described in the specification for performing the specified functions and the equivalents of those described structures. *See* 35 U.S.C. s. 112 para. 6; *Valmont Indus., Inc. v. Reinke Mfg., Inc.*, 983 F.2d 1039, 1042 (Fed.Cir.1993). An "equivalent" results from an insubstantial change which adds nothing of significance to the structure, material or acts disclosed in the patent specification. *See id.* at 1043. Equivalents do not include structure that were disclaimed during the prosecution proceedings. *See Apex Computer Corp. v. Nintendo Co. Ltd.*, 102 F.3d 1214, 1221 (Fed.Cir.1996), cert.denied, 521 U.S. 1104 (1997).

According to the specification, the structure may include, for example, crank members 24 that attach ends 38 of reciprocating member 32 to pulley 22. *See* Plaintiff's Brief, Ex. F, col. 3, ll. 12, 20-28. In accordance with the specification, the Court construes the language "means for attaching said second ends of said first and second reciprocating members to said pulley" as "includes the structures described in the specification and all equivalents thereof that correspond to the function of attaching the second end of each reciprocating member to the pulley."

G. Meaning of "Means for orienting the bottom of each foot of the user of the apparatus"

Plaintiff asserts this claim language should be construed as "includes the structures described in the specification and all equivalents thereof that correspond to the function of orienting the bottom of each foot of the user, including, for example, a linkage assembly having foot member 40 and arm member 48." *See* Plaintiff's Brief, at 17. Defendants do not dispute this claim construction. *See* Defendants' Objections, at 6-7. The Court finds this definition consistent with the specifications; and in light of the fact that the claim construction is undisputed, the Court adopts the above construction of this term.

IV. Summary of Court's Claim Construction of Disputed Terms

For the reasons set forth above, the Court adopts the following as its claim construction of the disputed terms of the Patents-in-suit:

"Foot member"

This term means "a member having at least a portion adapted to contact or support a foot."

"Linkage assemblies for orienting the bottom of the feet of the user of the apparatus so that each foot of the user follows a substantially elliptical path"

This language means "linkage assemblies for orienting the bottom of the feet of the user of the apparatus so that each foot of the user follows a substantially elliptical path."

"Proximal" and "Proximate"

These terms mean "a point on an element closer to one end than to the other end."

"Connected to" and "Attached to"

These terms mean "a direct or an indirect connection."

"Substantially parallel with the floor"

This language means "a reasonable deviation from exactly parallel with the floor."

"Means for attaching said second ends of said first and second reciprocating members to said pulley"

This language means "includes the structures described in the specification and all equivalents thereof that correspond to the function of attaching the second end of each reciprocating member to the pulley."

V. Summary of Court's Claim Construction of Undisputed Terms

"Means for orienting the bottom of each foot of the user of the apparatus"

This claim language means "includes the structures described in the specification and all equivalents thereof that correspond to the function of orienting the bottom of each foot of the user, including, for example, a linkage assembly having foot member 40 and arm member 48."

Accordingly, the Court enters the following Orders:

IT IS ORDERED that the above construction of the claims will be incorporated into any jury instructions given in this cause and will be applied by the Court in ruling on the issues raised in summary judgment;

IT IS FURTHER ORDERED that all other pending objections are OVERRULED and DENIED; and

IT IS FINALLY ORDERED that the Parties shall have ten (10) days to supplement pending motions.

W.D.Tex.,2003.

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