

United States District Court,
E.D. Kentucky, Lexington Division.

PROMOTIONAL CONTAINERS, INC,
Plaintiff.

v.

AZTEC CONCRETE ACCESSORIES, INC,
Defendant.

Civil Action No. 04-336-JBC

July 27, 2005.

Helena E. Racin, Henry E. Kinser, Leila O'Carra, Wyatt, Tarrant & Combs LLP, Lexington, KY, Stephen J. Butler, Thompson Hine LLP, James D. Liles, Porter, Wright, Morris & Arthur, LLP, Cincinnati, OH, for Plaintiff.

Jeffrey C. Metzcar, Thompson Hine LLP, Dayton, OH, Stephen J. Butler, Thompson Hine LLP, Cincinnati, OH, Theodore Roberts Martin, Greenebaum, Doll & McDonald, PLLC, Lexington, KY, for Defendant.

ORDER

JENNIFER B. COFFMAN, District Judge.

This matter is before the court upon the parties' *Markman* briefs. A hearing was held before the court in Lexington, Kentucky, on April 15, 2005. The hearing addressed the issues of claim interpretation. The court, having reviewed the record and being otherwise sufficiently advised, will now rule on those issues.

I. BACKGROUND

The subject of this litigation is a patent of Promotional Containers, United States Patent No. 4,942,714 (the "'714 patent"), which was issued on July 24, 1990, to Promotional Containers' predecessor. This patent covers the construction of an invention entitled "Rebar and Beam Bolster, Slab and Beam Bolster Upper." The '714 patent has been the subject of previous litigation between the plaintiff's predecessor in interest, International Plastics Corporation, and the current defendant. There, Magistrate Judge James B. Todd issued a Report and Recommendation, including a section on claim construction. The parties, however, settled before the court decided whether to adopt or reject the Report and Recommendation. In the current action, Promotional Containers claims that Aztec has infringed claims one through seventeen of the '714 patent by making, using, and selling bolsters embodying the patented invention within the United States.

As claim construction was not intended to be an exercise in redundancy, this court will confine its interpretation to the claims in which language is disputed and which comprised the parties' *Markman* presentations. Further, although the court did not adopt the magistrate judge's Report and Recommendation in the previous case, the plaintiff attached it as an exhibit to its brief and the court will consider it a useful tool in completing the claim construction in this case. Finally, the procedural posture of this case requires the court only to construe the disputed language in the claims; no dispositive motion is before the court, so that it need not address the ultimate issue of infringement or apply the claim construction to the accused product.

II. ANALYSIS

The '714 patent consists of 1 independent claim and 16 dependent claims. Generally, each claim must be considered separately; however, since the plaintiff concedes that the dependent claims stand or fall with the independent claim, the court need not separately address each claim. *Rosco, Inc. v. Mirror Lite Co.*, 304 F.3d 1373 (Fed.Cir.2003). The independent claim states:

1. A bolster for supporting reinforcing steel such as beams and rebar in concrete during pouring and setting of said concrete, comprising:

an elongated support member having a surface for supporting said reinforcing steel and leg means for holding said support member in an upright position; said support member and leg means being constructed from nonbiodegradable material; said bolster further including first and second [1] *cross members* at [2] *opposite ends of said bolster* as well as means for positively connecting bolsters together in series, said connecting means including a resilient [3] *connecting clip* [4] *mounted to* said first cross member at one end of said bolster, said clip being sufficiently resilient to [5] *snap over and engage* a second cross member of an adjacent bolster.

U.S. Patent No. 4,942,714 (issued July 24, 1990) (emphasis added). Here, since the parties appear to agree on the applicable law relevant to this court's decision, the debate centers on the meaning of the five numbered and italicized phrases.

Proper claim construction includes an examination of the claim language, the written description and, if relevant, the prosecution history. *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576 (Fed.Cir.1996). The proper scope and meaning of claims is primarily determined from this intrinsic evidence. *Anchor Wall Sys., Inc. v. Rockwood Retaining Walls, Inc.*, 340 F.3d 1298 (Fed.Cir.2003). To construe a disputed claim term, the court first seeks the ordinary meaning of the claim term, resorting to relevant dictionary definitions to determine the ordinary meaning of the term. Also, a court looks at the usage of the disputed term in context.

There is a "heavy presumption" that a claim term carries its ordinary and customary meaning. *Sunrace Roots Enter. Co., LTD. v. SRAM Corp.*, 336 F.3d 1298 (Fed.Cir.2003). The court's task in construing a patent claim is not to limit the claim language so as to exclude particular devices because they do not serve a perceived purpose of the invention; rather, the court's function is to interpret the claim according to its plain language. *E-Pass Techs., Inc. v. 3Com Corp.*, 343 F.3d 1364 (Fed.Cir.2003).

The plaintiff relies heavily on the magistrate judge's interpretation from the previous case. In the previous case, the magistrate judge discussed construction of Claim 1. He found that the ordinary meaning of the word "clip" applies and would include any device that "grips, clasps, or hooks two objects together." He also found that the resilient connecting clip must "snap over and engage," meaning that the "clip that is mounted to one of the bolsters must be able to move sufficiently such that it expands to fit its corresponding part and then returns to its original shape to engage or hold together in such a manner that the two bolsters cannot be separated. The word 'over' is not limited to the vertical plane, but can also include a clip moving in the horizontal plane." Finally, the magistrate judge found that the resilient clip "must snap over and engage 'a second cross member of an adjacent bolster,' " meaning that the cross member would include "the perpendicular extension from the elongated spine of the bolster, but not the spine itself."

Promotional Containers agrees with the magistrate judge except for the meaning given to the phrase "mounted to." Instead of a requirement that the connecting clip be directly connected to the cross member, the plaintiff argues that the phrase also covers those clips that are indirectly connected to the cross member via an intermediary. In its brief, the defendant does not discuss the magistrate judge's prior Report and Recommendation; rather, the defendant presents its own proposals for the claim construction. At oral

argument, the defendant agreed with the court that it must look carefully at the Report and Recommendation, bearing in mind that the finding regarding the doctrine of equivalency is questionable in light of changing law. (Transcript at 12-13)

The court will consider in turn each of the disputed terms: (1) cross member; (2) snap over and engage; FN1 (3) connecting clip; (4) mounted to; and (5) opposite ends of said bolster.

1. Cross Member

Aztec contends that "cross member" is a structure that interconnects the legs to the support member. In contrast, Promotional Containers argues that "cross member" refers to any "transverse structural piece" - it does not necessarily have to have legs, although it may. The magistrate judge found that "cross member" refers not to the "spine" of the bolster or the elongated, planar support member, which, if measured, would be the longest part of the bolster; instead, it refers to the shorter portions that extend perpendicularly from the spine of the bolster. Aztec's interpretation would exclude multiple preferred embodiments, such as Figs. 1-5. An interpretation that does so is "rarely, if ever, correct." Vitronics Corp., 90 F.3d at 1583-84. As there is no evidence to overcome the "heavy presumption" that the ordinary and customary meaning applies and since the magistrate judge's interpretation properly incorporates such meaning, the court will adopt it. The term "cross member" refers to the shorter portions that extend perpendicularly from the spine of the bolster. The cross members traverse the elongated support member, which, if measured, is the longest portion of the bolster. The cross members need not have legs but may have them.

2. "Snap Over and Engage"

The ordinary meaning of this phrase is that the connecting clip must be able to move sufficiently to hold together the bolsters. As Promotional Containers argues and as the magistrate judge noted in the previous case, "over" is not limited to vertical movement. Although Aztec urges the court to find that "snap" has to do with the noise made when the clip comes together, the court finds that "snap" has more to do with the concept of resiliency and its ability to move quickly to its original shape or position after being stretched or compressed.

3. "Connecting Clip"

As used in the ordinary sense, this phrase means any device that grips, clasps, or hooks two objects together. The specifications of the '714 patent disclose a variety of clips. The term "clip" does not necessarily exclude male/female connectors, parallel latching plates, or pin/aperture structures.

4. "Mounted To"

Both parties argue that this phrase should be given its ordinary meaning, but they disagree about the essence of that meaning. Promotional Containers contends that "mounted to" simply means "connected to," while Aztec contends that it means "attached to." These two phrases are similar, but the interpretations differ in that Promotional Containers claims that "mounted to" is not limited to direct mountings but includes indirect mountings, whereas Aztec contends that it requires direct mounting. There is no support for the argument that indirect mountings are included.

In terms of this patent, the ordinary language of "mounted to" means that the connecting clip is "connected, affixed, or attached to" the cross member. As the magistrate judge noted, "mounted to" implies that the clip is not part of the cross member itself but is attached to or extends out from the cross member. The plaintiff's broader argument for including indirect connections must be rejected, as Promotional Containers has failed to point to any intrinsic evidence to show that in the pertinent art or in the context of the '714 patent the phrase "mounted to" means "connected indirectly." The Claim language does not include a modifier before the phrase "mounted to" that would indicate indirect mountings are included, nor are there other Claims that

indicate such an interpretation of the phrase is justified. In its ordinary and customary meaning, the phrase "mounted to" means that the connecting clip is directly connected or attached to the cross member.

The ordinary and customary meaning of "mounted to," however, also includes being directly mounted to the cross member via an intermediary, as long as they are all directly connected. Promotional Containers and Aztec agree that an interpretation that includes connections via an intermediary, as long as they are directly touching, is proper. (Transcript at 37 and 53) Further, this interpretation is consistent with the magistrate judge's recommendation.

5. "Opposite Ends of Said Bolster"

The common and ordinary meaning of this phrase is that the cross member to which the connecting clip is mounted must be located at the longitudinal extremities of the bolster or spine. Promotional Containers contends that this does not require the absolute end. The court agrees. In Claim 16, the patent describes the "distal end." Since distal refers to the relative distance from the end something is located, to interpret "distal end" the same as "end" would result in voiding the claim language. The court finds that the phrase "opposite ends of said bolster" does not require the absolute end; rather it refers to the relative location of the cross member. This interpretation is also consistent with other Claims in the patent that simply refer to the "end" of something.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the parties shall file a written proposed outline for proceeding no later than fifteen (15) days from the entry of this order.

FN1. The plaintiff did not include "snap over" as part of the disputed term initially, but agreed with the court that it is a real part of the disputed terms. (Transcript at 23)

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