IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LEARNING CURVE BRANDS, INC.,

OPINION and ORDER

Plaintiff,

09-cv-416-bbc

v.

MUNCHKIN, INC.,

Defendant.

- -

Plaintiff filed this civil action for infringement contending that defendant's newly re-designed screw-on top sippy cups infringed plaintiff's United States Patent No. 7,185,784 (the '784 patent). In an earlier suit, plaintiff and a co-plaintiff had alleged infringement of the same patent by defendant's snap-on top sippy cups. After that case settled, plaintiff discovered that defendant was selling sippy cups with screw-on tops. Plaintiff brought a motion for contempt which was denied, and then brought this second suit. Judgment was entered in this case on October 1, 2010 after I granted defendant Munchkin, Inc.'s motion for summary judgment of noninfringement. I concluded that plaintiff failed to submit evidence that would allow a reasonable jury to find that the accused screw-on top "sippy cups" satisfied the elements of the sole claim at issue in the case, claim 1 of the '784 patent.

Now before the court is plaintiff's motion to alter or amend the judgment under Fed. R. Civ. P. 59 and motion for leave to file a reply brief in support of its Rule 59 motion. Plaintiff contends that the judgment was a result of manifest error of law or fact because the court resolved factual disputes related to the scope of the prior art and the infringement of the accused products, relied on new and unwarranted constructions of claim terms and disregarded evidence of infringement under the doctrine of equivalents. I will grant the motion for leave to file a reply brief; however, I will deny the Rule 59 motion. None of plaintiff's arguments persuade me that it was error to conclude that plaintiff failed to show that the accused products contain semi-circular arcs of similar radii or their equivalent.

DISCUSSION

A. Prior Art

Plaintiff contends that the court erred in assessing the scope of the prior art and comparing that prior art to the accused products in this case. In particular, plaintiff says that the court construed the facts related to the prior art in favor of defendant, made factual findings lacking support in the record and imposed new claim limitations. It challenges the findings that none of the prior art showed arcs sized as differently as they appear in the accused products, that the "sizes of each arc would appear to allow nearly continuous contact" in the prior art and that unlike the arcs disclosed in prior art, the size of the arcs

in the accused products was affected by interfering design features (threads) instead of imperfections in shape.

Plaintiff's arguments show that it has forgotten the significance of the prior art references. They matter in this case only because I concluded that the proper construction of "semi-circular arcs of similar radii" had to take into account the fact that defendant had asserted in a previous lawsuit that the prior art at issue disclosed semi-circular arcs of similar radii. Because the prior art showed spaces, I concluded that "defendants must accept the possibility that some spaces may exist between the semi-circular arcs of 'similar radii.'" Order Construing Claims, dkt. #37, at 13. In other words, the prior art serves to circumscribe the degree to which the radii must be similar as a function of defendant's concession that the prior art meets that requirement.

Plaintiff points to the degree of contact in the prior art and the size of the gaps as proof that the accused products are infringing. However, defendant's concession that the prior art satisfied the claim limitation did not come with a concession that the gap size in the prior art was negligible or that the degree of contact in the prior art was "nearly continuous" and thus infringing. Indeed, defendant did not explain at all why it believed the prior art disclosed this limitation, and the court did not decide the present construction of "semi-circular arcs of similar radii" requiring "nearly continuous" contact until after defendant had made its concession about the prior art. Thus, it would be improper to do as

plaintiff suggests and assume that the scope of defendant's "concession" necessarily covers any product containing gaps of comparable size or arcs of comparable contact. All defendant conceded was that gaps could be present in a product containing semi-circular arcs of similar radii and that the particular examples provided in the prior art demonstrated such arcs.

As I explained in the order granting defendant's motion for summary judgment, the prior art images defendant had cited were not drawn to scale so defendant cannot be deemed to have conceded that a particular gap size is always negligible. Moreover, I explained that the prior art illustrations each contained distinguishable features including differences in the shape and placement of the arcs and the fact that the accused products contained gaps created by design features (threads).

These observations merely emphasize what plaintiff failed to prove. Despite the fact that it was its burden to prove infringement, plaintiff attempted to ride on the coattails of defendant's supposed prior art concession without addressing the prior art's differences in shape and location of the arcs or the other features of the prior art distinguishing it from the accused products. Moreover, plaintiff failed to show that the shape and location of the arcs shown in the prior art did not matter to the relative size of their radii, which may have supported a conclusion that the prior art's gap sizes alone were the basis for defendant's "concession." Even in its Rule 59 motion, plaintiff merely asserts without citing the record that "[t]he gaps in the accused products, like the gaps in the prior art, are also caused by the

arcs being of slightly different shape." Dkt. #168, at 8.

B. Evidence that Accused Products in "Nearly Continuous Contact"

Plaintiff contends that the court disregarded the evidence that nine of 24 cross-sections prepared by plaintiff's expert showed 100% contact and instead resolved factual issues in defendant's favor in reliance on prior art drawings and the CT scans. Cf. Pfaff v. Wells Elecs. Inc., 5 F.3d 514, 519 (Fed. Cir. 1993) (district court erred when it made factual findings using rough drawings that court of appeals found supported opposite findings or were ambiguous). Plaintiff is mistaken. Indeed, despite a challenge to plaintiff's method, I took this evidence at face value but I concluded that it was insufficient. Across the entire cup, only nine cross sections showed 100% contact using plaintiff's method. The remainder showed less, so much so that only a total of 80% of the extent of the arcs around the cups was in contact. Moreover, as explained above, my reliance on the prior art references went no further than identifying apparent distinct features in those references that plaintiff failed to explain away.

Plaintiff contends that it was error to conclude that the products' 80% contact did not satisfy the "nearly continuous" contact requirement because that limitation comes down to a question of degree, which must be left for a jury. However, in this setting, the "question of degree" at issue is one related to the proper scope of the claim term, a question for the

judge, not the jury. The "nearly continuous contact" requirement is the court's construction of the term "similar radii." Once the record developed, the parties' disputes sharpened and they needed a more precise description of the scope of "similar radii" than the "nearly continuous contact" requirement provided. In other words, the "question of degree," whether 80% contact is "nearly continuous," was a dispute about the proper scope of the claim term. Whether the term "similar radii" can be read so broadly as to allow arcs having only 80% contact or less is not a jury question.

Plaintiff argues that the conclusion that 80% was insufficient amounted to a new claim limitation unsupported by the patent. However, at most, the conclusion was simply a clarification of the boundaries of the "nearly continuous contact" requirement I had already concluded applied to the claim term. Plaintiff contends that there is "no basis whatsoever to impose such a quantitative limitation on the term." Plt.'s Br., dkt. #168, at 17. To the extent plaintiff is pointing out that there is no discussion of 80% continuous contact in the specification, that is unsurprising because neither the claim nor the specification speaks in terms of "contact." The "continuous contact" requirement and the later clarification that 80% or less contact is not enough were the court's attempt to describe the boundaries on "similar radii." As I explained in the order construing claims, the only way for two radii to be "similar" is for the length of the radii to be similar, and the only apparent rationale for requiring such similarity would be to create a snug fit. Dkt. #37, at 13. At some point, two

radii are not sufficiently similar to satisfy the requirements of the claim term. Regardless whether the specification describes any specific boundaries to that "similarity," the nature of the claim term and its apparent purpose supports the conclusion that, wherever the exact line might be between "nearly continuous" and not sufficiently continuous contact, it requires more than a mere 80% contact.

Plaintiff's contention that there is no basis to impose "such a quantitative limitation" on the term has implications more troubling for plaintiff than it seems to appreciate. Although plaintiff seems to think this argument supports its view that a jury must sort out the dispute, in reality, it only supports a finding of invalidity. Because the proper scope of the claim term is a question of law, the absence of guidance on a quantitative limitation for the claim term could be a basis for finding that the claim is "insolubly ambiguous" and therefore invalid as indefinite. Exxon Research and Engineering Co. v. United States, 265 F.3d 1371, 1375 (Fed. Cir. 2001) (claim is indefinite if it is "insolubly ambiguous, and no narrowing construction can properly be adopted"); Honeywell International, Inc. v. International Trade Commision, 341 F.3d 1332, 1338-42 (Fed. Cir. 2003) ("If the court determines that a claim is not 'amenable to construction,' then the claim is invalid as indefinite under 35 U.S.C. § 112, ¶ 2.").

As the Court of Appeals for the Federal Circuit explained in Power-One, Inc. v. Artesyn Technologies, Inc., 599 F.3d 1343, 1348 (Fed. Cir. 2010), a "relative" claim term

could be found to be "insolubly ambiguous" if it "provide[s] no guidance to those skilled in the art as to the scope of that requirement." In Power-One, the terms "near" and "adapted to" were found not to be insolubly ambiguous, but only because the specification included language that would allow a person of ordinary skill in the art to understand the scope of the requirement. Id. at 1348-49. Although plaintiff is correct that the specification does not offer guidance on whether the 80% contact is enough, this is because it offers no guidance at all on what it means for the radii to be "similar" except an image showing 100% overlap. '784 pat., fig. 15.

To the extent plaintiff is rejecting the notion that the claim limitation requires radii sized closely enough to require contact over more than 80% of the arcs, it must be because it believes that the specification does not describe any boundaries on the term "similar." (The only "boundary" plaintiff identifies in relation to the required "similarity" of the radii is that they should be similar enough to allow the surrounding limitations to be met. The satisfaction of other limitations in a patents is not itself a separate limitation.) Without any guidance, however, the claim term becomes insolubly ambiguous and the claim becomes invalid. Cf. Halliburton Energy Services, Inc. v. M-I LLC, 514 F.3d 1244, 1256 (Fed. Cir. 2008) (term "fragile gel" insolubly ambiguous because no guidance as to at what point a gel became sufficiently "fragile" to satisfy claims or when gel was "adequate" for suspending drill

cuttings).

Plaintiff characterizes as inappropriate the conclusion that 80% contact was not enough because it was decided in light of the accused products, citing SRI International v. Matsushita Electrical Corp. of Am., 775 F.2d 1107, 1118 (Fed. Cir. 1985); and Wilson Sporting Goods Co. v. Hillerich & Bradsby Co., 442 F.3d 1322, 1331 (Fed. Cir. 2006). However, the same rule forbidding a court from "tailoring a claim construction to fit the dimensions of the accused product or process" also permits "awareness of the accused product or process to supply the parameters and scope of the infringement analysis, including its claim construction component." Wilson Sporting Goods, 442 F.3d at 1331. Designed to avoid making infringement a matter of judicial whim, the rule requires only that the claims be construed without reference to the accused device, SRI, 775 F.2d at 1118; it does not require ignoring specific details relevant to the device when determining the scope of the claim term.

As this case bears out, construing claims in the dark often causes trouble because the construction must be artificially general and becomes unhelpful once the record is developed and the parties' disputes have sharpened. Plaintiff would have the jury decide any remaining questions about the scope of claim terms once the stab in the dark has been made (in this case whether arcs with 80% contact or less is "nearly continuous"). That ignores the fact

that legal questions are for the judge, not the jury, no matter how narrow the legal question has become.

Even if it were improper to clarify the scope of the requirement that the arcs have "nearly continuous contact," I would reach the same conclusion. Applying the requirement that the arcs be in "nearly continuous contact," the accused products fall far short of this. Using plaintiff's numbers and figures, one-fifth of the extent of the arcs is not in contact, all on one side of the arcs. This reflects a substantial difference in size between the respective radii, far more substantial than any "difference in degree" that must be decided by the jury. Ethicon Endo-Surgery, Inc. v. U.S. Surgical Corp., 149 F.3d 1309, 1321 (Fed. Cir. 1998) (only "subtle difference[s]" must go to the jury; a "clear, substantial difference or difference in kind" may still warrant entry of summary judgment). Leaving such a large portion of the arcs out of contact on one side of the arcs is more than a "subtle" difference, especially in light of the fact that the apparent rationale for requiring "similar radii" is to create a snug fit throughout the extent of the arcs, as I explained previously. Order Construing Claims, dkt. #37, at 13.

C. Doctrine of Equivalents

Plaintiff also contends that it was error to reject its theory of infringement under the

doctrine of equivalents. In particular, plaintiff contends that I disregarded "particularized evidence" that the accused arcs function in substantially the same way as the patented invention. According to plaintiff, this evidence was included in the declaration of its expert, Tim Osswald. Dkt. #151, ¶¶ 79-88. However, the evidence plaintiff cites does not support a conclusion that the arcs function in substantially the same way. Instead, Osswald focuses on explaining how the differing arc sizes of the accused products do not interfere with certain "interlocking features" of the cup and allow an "interference fit" to be produced. However, "interlocking features" and an "interference fit" are separate requirements of claim 1 (the asserted claim). Under the "all limitations" rule, *each* limitation or its equivalence must be present in an accused product before infringement can be found. E.g., Freedman Seating Co. v. American Seating Co., 420 F.3d 1350, 1358 (Fed. Cir. 2005). A product lacking a particular claim limitation cannot be equivalent merely because it satisfies all other claim limitations.

Plaintiff describes the role of the semi-circular arcs in several different ways. The cited passages from Osswald's declaration describe the role of the semi-circular arcs as being sized to "align" the lips and "produce a nominal radial interference" and allowing a "snap fit" and "seal" to form. Dkt. #151, at ¶ 86. In its brief, plaintiff characterizes the role of the arcs as "facilitating" the interlocking features by "guid[ing]" the lips into an interlocking

relationship and "facilitating" a seal. Plt.'s Br., dkt. #168, at 23. Osswald explains his determination that the accused products are equivalent:

> Based on my personal observations and the measurements and images obtained from the micro-CT scans, the size of the radii of the semi-circular arcs formed by the upper, inner surface of the groove defined about the edge of the lid and the upper, outer surface of the cup rim in the Twist Tight Cups are similar enough to each other so that the inboard lips on the lid and the cup rim align to provide a snap fit and secure seal when the lid and cup body are engaged. That is, the upper, inner surface of the groove about the lid and the upper, outer surface of the rim of the main body in the Twist Tight Cups define semi-circular arcs having radii sufficiently similar in size to align the lips on the upper, inner surface of the groove lid and the upper, outer surface of the cup rim (namely, the claimed "interlocking features") to produce a nominal radial interference as the lid and main body are engaged.

Osswald Decl., dkt. #151, at ¶ 86. Plaintiff's position on the role of the arcs comes down to a view that the size of the semi-circular arcs serves only to help insure that other claim limitations are met. The patented invention independently requires "nominal radial interference" between the lips, a "snap fit," a "seal" and "interlocking features." However, to comport with the all limitations rule, there must be something more to semi-circular arcs of similar radii than meeting other claim limitations. As I explained in the order construing claims and in the order granting defendant's motion for summary judgment, that something more is the ability of similarly-sized arcs to create a "snug fit" between each other.

Despite framing the role of the arcs in terms of merely facilitating interlocking features, plaintiff acknowledges that they must create a snug fit. Osswald asserts that the

products perform "in substantially the same way" because "the semi-circular arcs are shaped and sized to closely follow each other and snugly fit together," dkt. #151, ¶ 87; however, as I explained in the order granting defendant's motion for summary judgment, plaintiff supplied no evidence to support this assertion. Osswald says he "confirmed [this] conclusion" by removing the threads and reassembling the lid to the cup body, but to do this he cut away not only the threads, but also a substantial part of one of the arcs. Id. at 35-36.

Plaintiff contends that rejecting Osswald's half-arc test amounts to imposing a new limitation not found in the patent that there be a "snug fit at both ends of the arcs," but plaintiff is mistaken. Osswald's test is defective not because there must be a snug fit at both ends of the arcs but because his test purported to show that the similar *size of the radii of the arcs* created a snug fit as opposed to something else. It is not apparent why a test showing a "snug fit" between an arc and a piece of another arc shows that the relative size of the radii of the two arcs causes the fit. On its face, the test suggests that something else altogether creates the fit, such as the tightness between the lid and the cup, or perhaps the shape or angle of the remaining piece of the arc as it relates to the arc below it. This is not to say that a half-arc test could never show that the size of radii of two arcs create a fit, only that, if Osswald believed that his test showed what he asserted, he needed to explain why.

To be useful to plaintiff's theory of equivalence (which assumes that the radii of the

arcs are not sufficiently similar), the half-arc test still had to show that the *arcs* created a snug fit despite their difference in radius sizes. Without such a showing, the test cannot show that the claimed function performed in "substantially the same way." On its face, Osswald's half-arc test does not seem to support even that finding; it is not clear how the remaining piece of arc played a role in creating a snug fit. If, as mentioned above, snugness came about simply because there was a tight fit between the lid and cup at the innermost part, then the extent of the curvature along the arc may have added nothing. Before the test could be accepted as evidence of the *arc's* role in creating a snug fit, Osswald needed to explain how the test demonstrated that role. He did not.

Plaintiff's arguments fall short of showing that it was error to conclude that plaintiff did not submit sufficient evidence that the accused products contained arcs with similar radii or its equivalent. Therefore, I will deny plaintiff's Rule 59 motion.

ORDER

IT IS ORDERED that

1. Plaintiff Learning Curve Brands, Inc.'s motion for leave to file a reply in support of its motion to alter or amend the judgment, dkt. #176, is GRANTED. Its proposed reply brief, dkt. #176-1, is ACCEPTED.

2. Plaintiff's motion to alter or amend the judgment under Fed. R. Civ. P. 59, dkt. #167, is DENIED.

Entered this 12th day of April, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge