

Ex. PGS 1023

(EXCERPTED)

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

WESTERNGECO L.L.C.,

Plaintiff,

v.

ION GEOPHYSICAL CORPORATION,

et al.,

Defendants.

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CASE NO. 4:09-CV-1827

MEMORANDUM AND ORDER

A number of motions for summary judgment are pending before the Court. Broadly, those motions can be divided into two categories: (1) motions addressing patent invalidity; and (2) motions addressing patent infringement. In this Memorandum and Order, the Court considers first the invalidity motions, including Defendants' Motion for Summary Judgment of Patent Invalidity of the Bittleston Patents (Doc. No. 273), and Defendants' Motion for Summary Judgment of Patent Invalidity of the Zajac Patent (Doc. No. 270). The Court also considers, in examining invalidity, the portion of Plaintiff's Motion for Summary Judgment of Willful Infringement of the '520 Patent (Doc. No. 276) in which Plaintiff moves for summary judgment on patent validity. After considering these three motions, all responses thereto, and the applicable law, the Court concludes that each motion must be denied.

The second category of motions at issue, those that address patent infringement, includes Defendants' Motion for Summary Judgment of Non-Infringement of the

In urging their interpretation of claim 18, Defendants compare claim 18 to claim 1, which requires “a control system configured to operate *in one or more control modes* selected from a feather angle mode, a turn control mode, and a streamer separation mode.” (‘520 patent at claim 1 (emphasis added).) Defendants acknowledge that the language in claim 1 “makes clear that the control system need only be configured to operate in one control mode.” (Doc. No. 298 at 9.) However, they suggest that because the “in one or more control modes” language is absent from claim 18, claim 18 requires something different from claim 1—it requires the control system to be configured to operate in all of the listed control modes.

Defendants are correct that, “[w]hen different words or phrases are used in separate claims, a difference in meaning is presumed.” *Nystrom v. TREX Co., Inc.*, 424 F.3d 1136, 1143 (Fed. Cir. 2005) (citing *Tandon Corp. v. United States Int’l Trade Comm’n*, 831 F.2d 1017, 1023 (Fed. Cir. 1987)). However, “[d]ifferent terms or phrases in separate claims may be construed to cover the same subject matter where the written description and prosecution history indicate that such a reading of the terms or phrases is proper.” *Id.* (citing *Tandon*, 831 F.2d at 1023-24). Here, the slightly different wording of the two claims, when read in the context of the specification and in light of general principles of claim construction, does not indicate that a difference in meaning was intended.

First, it is important to note the context in which the ‘520 patent’s 34 claims are provided. The claims are divided into 17 method claims and 17 apparatus claims. Each method claim has a corresponding apparatus claim. Claim 1 is the method claim that corresponds to the apparatus in claim 18; in examining these parallel claims, it seems

clear that the drafters intended them to require the same thing, that is, that the control system could be configured to operate in at least one of the enumerated modes.

More importantly, this interpretation of the claim language is supported by established principles of claim construction. The Federal Circuit has made clear that the use of the indefinite article “a”, as used in claim 18 (“a control system configured to use a control mode selected from”), denotes “one or more.” See *Crystal Semiconductor Corp. v. TriTech Microelectronics Int’l, Inc.*, 246 F.3d 1336, 1347 (Fed. Cir. 2001) (citing cases). Although *Crystal* and the cases cited therein consider the meaning of “a” when it is followed by open-ended transitional phrases, such as “comprising,” the Court finds the same interpretation applicable to this claim. Because the Court reads “a” to mean “one or more,” the Court reads claim 18 to mean “a control system configured to use one or more control modes, selected from” the list of four. As such, claim 18 is construed to include the same language that, when used in claim 1, convinced Defendants that the control system needed to be configured to operate in only one control mode. The Court’s interpretation of the indefinite article “a”, combined with Defendants’ interpretation of claim 1, persuades the Court that only one of the four options must be practiced in order for infringement to lie.

Finally, the use of the phrase “selected from” further supports this construction. “Selected from” denotes one of several styles known in patent practice as “*Markush* groups,” although the precise label is unimportant. A *Markush* group typically is expressed in the form: “a member selected from the group consisting of A, B, and C.” *Abbott Labs. v. Baxter Pharm. Prods., Inc.*, 334 F.3d 1274, 1280 (Fed. Cir. 2003). Where such a form is expressed, courts are to read the members of the *Markush* group as