

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WESTERNGECO L.L.C.,

Plaintiff,

v.

ION GEOPHYSICAL CORPORATION,

Defendant.

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) Civil Action No. 4:09-CV-01827
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) **Jury Trial Demanded**
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WESTERNGECO'S REPLY CLAIM CONSTRUCTION BRIEF

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disclosed embodiments. *Verizon*, 503 F.3d at 1305 ("We normally do not interpret claim terms in a way that excludes disclosed examples in the specification."); *Colorquick, LLC v. Eastman Kodak Co.*, No. 6:06-CV-390, 2008 WL 5771324, at *7 n.9 (E.D. Tex. June 25, 2008) (distinguishing *Honeywell* on this basis).

In fact, it is the "cardinal sin of claim construction" to limit claims terms to a preferred embodiment. *Teleflex, Inc. v. Ficoso N. Am. Corp.*, 299 F.3d 1313, 1324 (Fed. Cir. 2002). It is also generally improper for a proposed construction to render superfluous other terms in the claim. *Merck & Co., Inc. v. Teva Pharms. USA, Inc.*, 395 F.3d 1364, 1372 (Fed. Cir. 2005). And a proposed construction that would render two claims identical in scope violates the doctrine of claim differentiation. *Phillips*, 415 F.3d at 1314-15. Extrinsic evidence is "less significant than the intrinsic record" and cannot override these rules. *Id.* at 1317.

II. PROPOSED CONSTRUCTIONS FOR THE BITTLESTON PATENTS

(a) "streamer positioning device(s)"

Claim	Term	WesternGeco's Proposed Construction	ION's Proposed Construction
'017-1, 3-5, 7-8, 16; '967-1-9, 15; '607-1, 4-6, 8-9, 15; '520-1, 9, 18, 26	"streamer positioning device(s)"; "the positioning device"	a device that controls the position of a streamer as it is towed (e.g., a "bird")	device(s) used to steer/position the streamer both vertically and horizontally ¹

As set forth in WesternGeco's Opening Brief, there is no contention that "streamer," "positioning" or "device" have any unusual meanings or would be confusing for a jury. (WGOB at 10-11) Therefore, this term is properly construed by "the application of the widely accepted meaning of commonly understood words." *Phillips*, 415 F.3d at 1314. WesternGeco's proposed construction tracks the ordinary meaning of the term, and is based on the specification's broad disclosure of various streamer positioning devices which control only vertical position, control

¹ ION's Response Brief deletes any requirement of vertical and horizontal steering for its "revised" proposed constructions of "global control system" and "local control system." (IRB at 7-8 & 7 n.4) However, ION has not similarly corrected its proposed construction of "streamer positioning device."

only horizontal position, or control both. (WGOB at 11-12; Ex. 1 at 1:24-27; 1:34-36; 1:47-52; 2:5-6; 10:23-30)² ION does not dispute these facts. (IRB at 4-6)

ION's proposed construction improperly excludes some of these embodiments. See WGOB at 11-12; *Verizon*, 503 F.3d at 1305 (rejecting construction "that excludes disclosed examples in the specification"). It is additionally improper because it would render other claim language superfluous, e.g., "to steer the streamer positioning device laterally." See WGOB at 11; *Stumbo v. Eastman Outdoors, Inc.*, 508 F.3d 1358, 1362 (Fed. Cir. 2007); *Merck*, 395 F.3d at 1372; *Phillips*, 415 F.3d at 1314. And it commits the "cardinal sin of claim construction" by limiting the claim term to a preferred embodiment. See WGOB at 11-12; Ex. 1 at 3:29-30 ("**Preferably** the birds 18 are both vertically and horizontally steerable.");³ *Halliburton Energy Svcs., Inc. v. M-I LLC*, 514 F.3d 1244, 1251 (Fed. Cir. 2008) (noting that the use of "preferably" "strongly suggests that . . . [it] is simply a preferred embodiment"); *Teleflex*, 299 F.3d at 1324; *DSW, Inc. v. Shoe Pavilion, Inc.*, 537 F.3d 1342, 1348 (Fed. Cir. 2008) ("[I]t is well-settled that claims are not to be confined to [a preferred] embodiment.").

ION's Response Brief fails to address these flaws, or to even cite *Phillips*, *Stumbo*, *Merck*, *DSW* or *Teleflex*. (IRB at 4-6) The only purported evidence ION raises is: (1) a description of "the invention" that discusses lateral steering; (2) a disclosure of preferred "modes" purportedly including vertical and horizontal steering; and (3) extrinsic evidence. None of this supports ION's proposed construction.

First, ION's purported reliance on *Verizon* and *Honeywell* for construing claim terms in

² Exs. 1-45 refer to exhibits submitted with WesternGeco's Opening Brief.

³ Unless otherwise indicated, all emphases are added.