

Defendant[] . . . ETS-Lindgren Inc. . . . are competitors in the field of over-the-air measurement systems, including multi-probe systems. See Doc. No. [19], p. 2. Among other things, such systems can be used to measure various parameters relating to antennas used in wireless devices, including wireless cellular communication devices. See id. Plaintiff Microwave Vision owns the rights to U.S. Patent No. 7,443,170 (the “170 Patent”), which issued on October 28, 2008, and is entitled “Device and Method for Determining at Least One Variable Associated With the Electromagnetic Radiation of an Object Being Tested.” See Doc. No. [1], ¶17; Doc. No. [1-1]. Plaintiffs believe that Defendants' . . . multi-probe array measurement system utilizes technology claimed by the 170 Patent. Accordingly, Plaintiffs have filed the present action accusing Defendants of patent infringement. See Doc. No. [1]. . . . Defendants [then] filed counterclaims seeking declarations that (1) [they] have not infringed the '170 Patent, and (2) the '170 Patent is invalid. See Doc. Nos. [17]-[19].

Microwave Vision, S.A. v. ESCO Techs. Inc., No. 14-CV-1153-SCJ, 2015 WL 11237099, at *1 (N.D. Ga. July 15, 2015) (“Markman Order”) (footnote omitted), reconsideration denied Microwave Vision, S.A. v. ETS-Lindgren Inc., No. 1:14-CV-1153-SCJ, 2016 WL 4111361 (N.D. Ga. Feb. 2, 2016) (“Reconsideration Order”).

The Markman Order construed three terms in the 170 Patent:

1. “network of probes” is construed to mean “multiple probes having a fixed and coplanar relationship to one another”
2. “means for providing a plurality of measurements using the network of probes, the plurality of measurements corresponding to a plurality of angular positions of a given one of the network of probes relative to the test object” is construed as follows:

Claimed Function:

“providing a plurality of measurements using the network of probes, the plurality of measurements corresponding to a plurality of angular positions of a given one of the network of probes relative to the test object”

Associated Structure:

(1) “a mast that supports the object under test, and that extends radially from a base and along the main axis of support to an opposite end that is nearer the geometric center of the arc formed by the network of probes, and that pivots in a relative fashion with respect to the network of probes”

(2) “a mast that supports the object under test, and that extends radially from a base and along the main axis of support to an opposite end that is nearer the geometric center of the arc formed by the network of probes, and with respect to which the network of probes pivots in a relative fashion”

3. “means for pivoting one or more of the network of probes and the support about a point located in the plane formed by the network of probes or about a point located in the plane parallel to the plane formed by the network of probes to vary, between successive ones of the plurality of measurements, an angle formed between the given one of the network of probes and the main axis of the support by a fraction of the angular pitch of the network of probes so that a total number of measurements in the plurality of measurements is greater than a total number of probes in the network of probes” is construed as follows:

Function:

“pivoting the network of probes, the support, or both about a point located in the plane formed by the network of probes, or in a parallel plane”

Structure (for Pivoting the Network of Probes):

“an arc mounted on rollers and an electric motor drive”

Structure (for Pivoting the Support):

“an electric motor, an actuator that extends more or less horizontally in the plane of the arc and is hinged to one end of the base, and a convex bottom surface on the base of a mast, which rests, by means of one or more rollers, on a complementary concave surface”

2015 WL 11237099, at *18 (underlining added).

Having argued that Claim 12’s “pivoting one or more of the network of probes and the support” language meant that the “means” must “pivot” *both* the “support” and “network of probes,”² but not one or the other (Doc. 43 at 16-21), ETS disagreed with the Court’s construction of Claim 12. It consequently moved for reconsideration, where it advanced the same argument again. See Doc. 62 at 7 (“ETS contends that [‘one or more of the network of probes and the support’] only means” that both the support and network can pivot, but not one or the other). ETS also insisted that the Markman Order failed to address its alternative argument that the same phrase suffered fatal indefiniteness issues because “it is unclear which

² ETS also argued that “one or more” applied only to “network of probes” such that

[interpretation] is correct.” Id.

The Court declined to rehash its Claim 12 construction, finding that ETS illuminated no clear error to justify reconsideration. Doc. 89 at 2 (“The Court finds Defendant’s motion essentially to be asking the Court to ‘give it another try’ which is not a permissible basis for a motion for reconsideration.”). It then noted that it considered both parties’ construction arguments (as well as all intrinsic evidence), and in doing so found that Claim 12’s functions included pivoting either the support, the network of probes, or both. Id. at 4.

“Implicit in [the Markman Order] ruling, therefore, is a finding that the claim was not indefinite.” Id. More specifically, in rejecting ETS’ contrary argument, the Court made clear “that [Claim 12] was not indefinite because . . . in light of the specification and prosecution history, [it] informe[d] those skilled in the art about the scope of the invention with reasonable certainty.” Id. Going further, the Court stated that it “specifically rejected [ETS’] argument that the patent failed to disclose and clearly link any structure that corresponds to [Claim 12’s] proposed function and therefore should be invalid for indefiniteness.” Id. at 5.

As it litigated this case, ETS made the same Claim 12 construction

less than all probes moved at the same time.

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