

In the Matter of

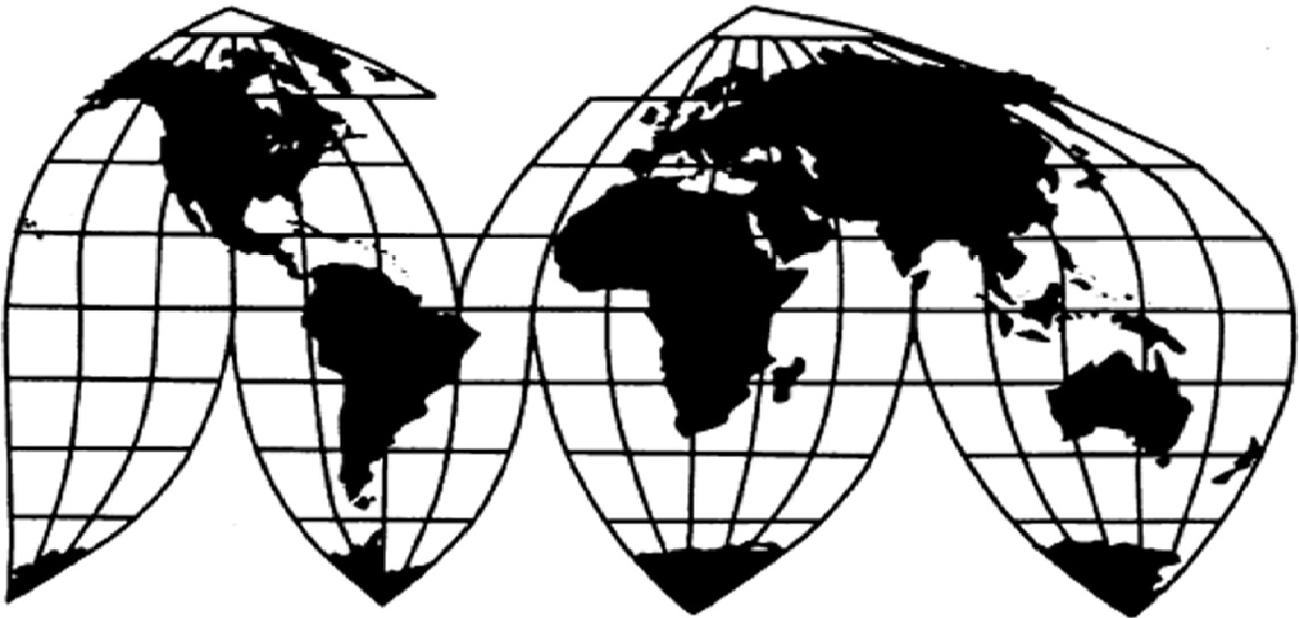
**Certain Pool Cues With Self-Aligning
Joint Assemblies
and Components Thereof**

Investigation No. 337-TA-536

Publication 3976

April 2008

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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United States International Trade Commission
Washington, DC 20436

U.S. International Trade Commission

Washington, DC 20436
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**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436**

In the Matter of

**CERTAIN POOL CUES WITH
SELF-ALIGNING JOINT ASSEMBLIES
AND COMPONENTS THEREOF**

Investigation No. 337-TA-536

**NOTICE OF COMMISSION DECISION
TO REVIEW IN PART AN INITIAL
DETERMINATION FINDING NO VIOLATION OF
SECTION 337 OF THE TARIFF ACT OF 1930;
TERMINATION OF INVESTIGATION**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part an initial determination ("ID") of the presiding administrative law judge ("ALJ") finding no violation of section 337 of the Tariff Act of 1930, as amended, in the above-captioned investigation. The Commission determined on review to decline to reach the issue of whether one claim term was met by the accused pool cues. The Commission has determined not to review the ALJ's determination that one other limitation of the claims at issue is not met by the accused products. The investigation is therefore terminated with a finding of no violation.

FOR FURTHER INFORMATION CONTACT: Michael K. Haldenstein, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3041. Copies of the public version of the ALJ's ID and all other nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-2000.

General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). The public record for this investigation may be viewed on

the Commission's electronic docket (EDIS-ON-LINE) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

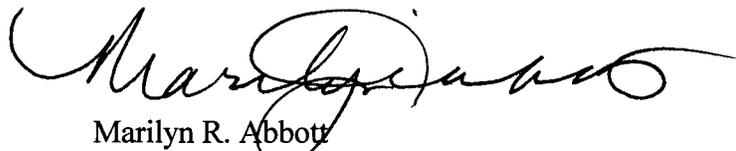
SUPPLEMENTARY INFORMATION: The Commission instituted the above-referenced investigation under section 337 of the Tariff Act of 1930 on April 4, 2005, based on a complaint filed by J. Pechauer Custom Cues, Inc. ("Pechauer") of Green Bay, Wisconsin. *70 Fed. Reg.* 7112. The complaint alleged infringement of U.S. Patent No. 6,582,317 (the '317 patent), in the importation, sale for importation, and sale within the United States after importation of certain pool cues covered by all 29 claims of the '317 patent. The Commission named the following companies as respondents in the investigation: Kaokao Industrial Co. LTD., aka Kaokao (Zhang Zhou) Sports ("Kao Kao") Equipment Co. Ltd. of Taiwan; CueStix International of Lafayette, Colorado; Sterling Gaming of Matthews, North Carolina; CueSight of Matthews, North Carolina; Imperial International of Hasbrouck Heights, New Jersey; Sigel's Unlimited Cues & Accessories of Winter Garden, Florida; Nick Varner Cues and Cases of Owensboro, Kentucky; J-S Sales Co. Inc. of Elmsford, New York; and GLD Products of Muskego, Wisconsin.

On September 1, 2005, the ALJ issued an ID (Order No. 5) granting Kao Kao's motion for summary determination of noninfringement and finding that Kao Kao's accused pool cues do not satisfy two limitations of the two independent claims of the '317 patent. On September 7, 2005, complainant Pechauer filed a petition for review of the ALJ's ID, and on September 19, 2005, the Commission Investigative Attorney and Kao Kao filed oppositions to Pechauer's petition for review. On September 22, 2005, the Commission extended the time for deciding whether to review the ID until October 17, 2005.

Having examined the record in this investigation, including the ID, the petition for review, and the responses thereto, the Commission has determined not to review the portion of the ID concerning the "slightly threaded anterior portion" limitation. The Commission has determined to review, and on review, to decline to reach the issue of whether the accused pool cues meet the "closed posterior end" limitation. Accordingly, the investigation is terminated with a finding of no violation.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in sections 210.42 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.42).

By order of the Commission.



Marilyn R. Abbott
Secretary to the Commission

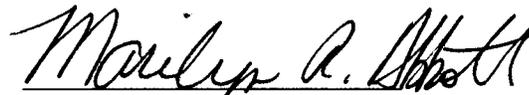
Issued: October 18, 2005

**CERTAIN POOL CUES WITH SELF-ALIGNING JOINT
ASSEMBLIES AND COMPONENTS THEREOF**

337-TA-536

CERTIFICATE OF SERVICE

I Marilyn R. Abbott, hereby certify that the attached **NOTICE OF COMMISSION DECISION TO REVIEW IN PART AN INITIAL DETERMINATION FINDING NO VIOLATION OF SECTION 337 OF THE TARIFF ACT OF 1930; TERMINATION OF INVESTIGATION** has been served on upon Commission Investigative Attorney, Erin Joffre, Esq., and all parties via first class mail and air mail where necessary on October 18, 2005.



Marilyn R. Abbott, Secretary
U.S. Int'l. Trade Commission
500 E Street, S.W.
Washington, D.C. 20436

ON BEHALF OF COMPLAINANT
J. PECHAUER CUSTOM CUES, INC.:

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J. Pechauer Custom Cues, Inc.
4140 Velp Avenue
Green Bay, Wisconsin 54313
P-920-434-7755
F-920-434-7757

ON BEHALF OF RESPONDENTS
SIGEL'S UNLIMITED CUES &
ACCESSORIES, STERLING GAMING,
CUESIGHT, NICK VARNER CUES AND
CASES, GLD PRODUCTS, KAOKAO
INDUSTRIAL CO. LTD., CUESTIX
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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN POOL CUES WITH
SELF-ALIGNING JOINT ASSEMBLIES
AND COMPONENTS THEREOF**

Investigation No. 337-TA-536

**Order No. 5: INITIAL DETERMINATION Granting Respondent Kao Kao's
Motion for Summary Determination of Noninfringement; and
Terminating the Investigation in Its Entirety**

I. Background

By publication of a notice in the *Federal Register* on April 4, 2005, the Commission instituted this investigation pursuant subsection (b) of section 337 of the Tariff Act of 1930 as amended, to determine:

[W]hether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain pool cues with self-aligning joint assemblies or components thereof by reason of infringement of one or more of claims 1-29 of U.S. Patent No. 6,582,317, and whether an industry in the United States exists as required by subsection (a)(2) of section 337.

70 Fed. Reg. 17112 (2005).

The notice of investigation lists as the complainant: J. Pechauer Custom Cues, Inc. ("Pechauer") of Green Bay, Wisconsin. *Id.* The notice of investigation lists as the respondents:

Kaokao Industrial Co. LTD., aka Kaokao (Zhang Zhou) Sports
("Kao Kao") Equipment Co. Ltd. of Taiwan;

CueStix International of Lafayette, Colorado;

Sterling Gaming of Matthews, North Carolina;
CueSight of Matthews, North Carolina;
Imperial International of Hasbrouck Heights, New Jersey;
Sigel's Unlimited Cues & Accessories of Winter Garden, Florida;
Nick Varner Cues and Cases of Owensboro, Kentucky;
J-S Sales Co. Inc. of Elmsford, New York; and
GLD Products of Muskego, Wisconsin.

Id.

The Commission Investigative Staff of the Office of Unfair Import Investigations (“OUII”) is also a party in this investigation. *Id.*

On July 15, 2005, respondent Kao Kao filed its “Motion for Summary Determination of No Violation Based upon Non-Infringement of the Asserted Claims.” Motion Docket No. 536-1. The motion is supported by several exhibits, including a copy of the ‘317 patent (Exhibit 1).

The motion directly addresses the question of whether Kao Kao’s pool cue joint assemblies infringe any claim of the asserted ‘317 patent. The remaining respondents are accused of violating section 337 only in connection with the importation and/or sale of Kao Kao joint assemblies and cues containing such assemblies. *See* Complaint at 2-5, ¶¶ 3-11; OUII Response at 2 n.2. Thus, a determination of noninfringement with respect to the Kao Kao products effectively means that no violation of section 337 can be found with respect to any respondent. If the requested summary determination is granted, this investigation should be terminated in its entirety.

On July 25, 2005, the complainant, Pechauer, filed an unopposed motion for a 14-day

extension of time, i.e., until August 10, 2005, in which to respond to Kao Kao's motion for summary determination. Motion Docket No. 536-2. The Administrative Law Judge granted Motion No. 536-2 for an extension of time.

On August 10, 2005, Pechauer filed its opposition to Kao Kao's motion. Pechauer's opposition consists of: (1) a brief in opposition to the pending motion, (2) a response to Kao Kao's proposed statement of undisputed facts ("Undisputed Facts"), (3) a Revised Response to Respondents' First Set of Requests for Admission, and (4) the August 9, 2005 Declaration of Jerrold Pechauer in Opposition to the pending motion.¹

On August 10, 2005, the Commission Investigative Staff filed its response to Kao Kao's motion, supported by several exhibits. Although the Staff does not support all grounds set forth by Kao Kao in the pending motion, it argues that the Administrative Law Judge should enter an initial determination of summary determination of noninfringement.

On August 19, 2005, Pechauer filed a motion for leave to reply to the response of the Commission Investigative Staff, and a reply. Motion Docket No. 536-5. Motion No. 536-5 for leave to reply is GRANTED.

II. Legal Standard for Summary Determination

Kao Kao's motion for summary determination was filed pursuant to Commission Rule 210.18. The Commission's Rules provide that any party may move with any necessary supporting affidavits for a summary determination of all or any of the issues to be determined in

¹The August 9, 2005 Declaration of Jerrold Pechauer contains three exhibits: (A) photographs and a drawing of the accused joint assembly produced in discovery, (B) a product infringement claim chart comparing a Kao Kao joint assembly to a Pechauer "preferred embodiment," and (C) the Declaration of Jerrold J. Pechauer and Joseph J. Pechauer, dated May 27, 2005, with accompanying photographs A-E ("Pechauer & Pechauer Declaration").

an investigation. The determination sought by the moving party shall be rendered if the pleadings and any depositions, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law. A party opposing a motion for summary determination may not rest upon mere allegations or denials of the opposing party's pleading, but by affidavits, answers to interrogatories or as otherwise provided for under the Commission's Rules, must set forth specific facts showing that there is a genuine issue of fact for the evidentiary hearing. 19 C.F.R. § 210.18(a)-(c).

The substantive aspects of the Commission's Rule on summary determination are analogous to Federal Rule of Civil Procedure 56. *See Certain Asian-Style Kamaboko Fish Cakes*, Inv. No. 337-TA-378, Order No. 15 (unreviewed initial determination) at 3 (Sept. 1996), 61 Fed. Reg. 33943 (1996)(Commission notice not to review); *Certain Modular Structural Systems*, Inv. No. 337-TA-164, Commission Memorandum Opinion, 1984 WL 273799 (FN20)(June 1984). Under Federal Rule 56, summary judgment is proper if there is a showing that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

The moving party bears the initial burden of establishing that there is an absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323. When such an initial showing is established, the opposing party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

When ruling on a motion for summary judgment, courts must examine all the evidence in

a light most favorable to the non-moving party, and all justifiable inferences are to be drawn in the non-moving party's favor. *Anderson*, 477 U.S. at 255. However, if the non-movant's evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Anderson*, 477 U.S. at 249-50; *see Litton Indus. Prods., Inc. v. Solid State Sys. Corp.*, 755 F.2d 158, 163-64 (Fed. Cir. 1985)("mere allegations by declaration or otherwise do not raise issues of fact needed to defeat a motion for summary judgment"); *see also D.L. Auld Co. v. Chroma Graphics Corp.*, 714 F.2d 1144, 50-51 (Fed. Cir. 1983), *cert. denied*, 474 U.S. 825 (1985)(affidavit which fails to raise specific issues of material fact insufficient to preclude grant of summary judgment).

The Commission's Rules provide that an order of summary determination constitutes an initial determination of the Administrative Law Judge. *See* 19 C.F.R. § 210.18(f).

III. Claim Construction

A. Legal Standards of Claim Construction

Kao Kao's pending motion seeks a determination that its cues do not infringe the asserted patent claims. In this instance, Pechauer has accused Kao Kao's cues of infringing all claims, i.e., claims 1-29, of the asserted '317 patent.

Any finding of infringement or non-infringement requires a two-step analytical approach. First, the asserted claims of a patent must be construed as a matter of law to determine their proper scope. Second, a factual determination must be made as to whether the properly construed claims read on an accused device. *See Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976, 979 (Fed. Cir. 1995)(*en banc*), *aff'd*, 517 U.S. 370 (1996).

As stated in the *Markman*, opinion, "the focus in construing disputed terms in claim

language is not the subjective intent of the parties to the patent contract when they used a particular term. Rather the focus is on the objective test of what one of ordinary skill in the art at the time of the invention would have understood the term to mean.” 52 F.3d at 986. *Accord Hoechst Celanese Corp. v. BP Chems. Ltd.*, 78 F.3d 1575, 1578 (Fed. Cir. 1996)(The court assigns a claim term the meaning that it would be given by persons experienced in the field of the invention.).

To construe a claim, one first looks to the claim language. *Pitney Bowes, Inc. v. Hewlett-Packard Co.*, 182 F.3d 1298, 1305 (Fed. Cir. 1999)(“The starting point for any claim construction must be the claims themselves.”); *Comark Communications, Inc. v. Harris Corp.*, 156 F.3d 1182, 1186 (Fed. Cir. 1998)(“The appropriate starting point . . . is always the language of the asserted claim itself.”). “It is a ‘bedrock principle’ of patent law that ‘the claims of a patent define the invention to which the patentee is entitled the right to exclude.’” *Phillips v. AWH Corp.*, 03-1269, -1286, – F.3d –, slip op. at 8 (Fed. Cir. July 12, 2005)(quoting *Innova/Pure Water, Inc. v. Safari Water Filtration Systems, Inc.*, 381 F.3d 1111, 1115 (Fed. Cir. 2004)).

Having looked to the claim language, one looks to the other intrinsic evidence, beginning with the specification and concluding with the prosecution history, if in evidence. *Vitronics Corp. v. Conceptoronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996); *Markman*, 52 F.3d at 979 (“Claims must be read in view of the specification, of which they are a part.”). “The descriptive part of the specification aids in ascertaining the scope and meaning of the claims inasmuch as the words of the claims must be based on the description. The specification is, thus, the primary basis for construing the claims.” *Standard Oil Co. v. Am. Cyanamid Co.*, 774 F.2d 448, 452

(Fed. Cir.1985)(quoted in *Phillips*, slip op. at 13-14).

Words of a claim are generally given their ordinary and customary meaning, which is “the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application.” *Phillips*, slip op. at 9. If the claim language is clear on its face, then a court’s consideration of other intrinsic evidence is restricted to determining if a deviation from the clear language of the claims is specified. A deviation may be necessary if a patentee has chosen to be his own lexicographer, and does not use words according to their ordinary meaning. *Vitronics*, 90 F.3d at 1582. Any such special definition given to a word must be clearly defined in the specification. *Markman*, 52 F.3d at 980. A deviation may also be necessary if a patentee has “relinquished [a] potential claim construction in an amendment to the claim or in an argument to overcome or distinguish a reference.”² *Elkay Mfg. Co. v. Ebc Co. Mfg. Co.*, 192 F.3d 973, 979 (Fed. Cir.), *cert. denied*, 529 U.S. 1066 (1999).

A person of ordinary skill in the art is deemed to read a claim term in the context of the particular claim in which it appears, and also “in the context of the entire patent, including the specification.”³ *Phillips*, slip op. at 10. One looks “to the specification to ascertain the meaning

²The Federal Circuit has stated: “we have acknowledged the maxim that claims should be construed to preserve their validity, we have not applied that principle broadly, and we have certainly not endorsed a regime in which validity analysis is a regular component of claim construction.” *Phillips*, slip op. at 36.

³With respect to other claims in the subject patent, the Federal Circuit has held that:

Other claims of the patent in question, both asserted and unasserted, can also be valuable sources of enlightenment as to the meaning of a claim term. *Vitronics*, 90 F.3d at 1582. Because claim terms are normally used consistently throughout the patent, the usage of a term in one claim can often illuminate the meaning of the same term in

(continued...)

of the claim term as it is used by the inventor in the context of the entirety of his invention.”

In general, examples or embodiments appearing in the written description may not be read into a claim. *Comark*, 156 F.3d at 1186-87; *Intervet Am., Inc. v. Kee-Vet Lab., Inc.*, 887 F.2d 1050, 1053 (Fed. Cir. 1989).

If the meaning of the claim limitation is apparent from the totality of the intrinsic evidence, then the claim has been construed. If, however, a claim limitation remains unclear, one may look to extrinsic evidence to help resolve the lack of clarity. Relying on extrinsic evidence to construe a claim is “proper only when the claim language remains genuinely ambiguous after consideration of the intrinsic evidence.” *Bell & Howell Document Mgmt. Prods. Co. v. Altek Sys.*, 132 F.3d 701, 706 (Fed. Cir. 1997); *Vitronics*, 90 F.3d at 1583-85 (“Such instances will rarely, if ever, occur.”).

Dictionaries are a form of extrinsic evidence with a special place in claim construction, and may sometimes be considered along with the intrinsic evidence. *See Vitronics*, 90 F.3d at 1584 n.6 (stating that, although technically the court is free to consult dictionaries at any time to help determine the meaning of claim terms, it may do so “so long as the dictionary definition

³(...continued)

other claims. *See Rexnord Corp. v. Laitram Corp.*, 274 F.3d 1336, 1342 (Fed.Cir.2001); *CVI/Beta Ventures, Inc. v. Tura LP*, 112 F.3d 1146, 1159 (Fed.Cir.1997). Differences among claims can also be a useful guide in understanding the meaning of particular claim terms. *See Laitram Corp. v. Rexnord, Inc.*, 939 F.2d 1533, 1538 (Fed.Cir.1991). For example, the presence of a dependent claim that adds a particular limitation gives rise to a presumption that the limitation in question is not present in the independent claim. *See Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 910 (Fed.Cir.2004).

Phillips, slip op. at 12-13.

does not contradict any definition found in or ascertained by a reading of the patent documents.”). “In some cases, the ordinary meaning of claim language as understood by a person of skill in the art may be readily apparent even to lay judges, and claim construction in such cases involves little more than the application of the widely accepted meaning of commonly understood words. In such circumstances, general purpose dictionaries may be helpful.”

Phillips, slip op. at 11.

In many other cases, the ordinary and customary meaning of a claim requires examination of terms that have a particular meaning in a field of art. Because the meaning of a claim term as understood by persons of skill in the art is often not immediately apparent, and because patentees frequently use terms idiosyncratically, the court looks to sources available to the public that show what a person of skill in the art would have understood disputed claim language to mean, including “the words of the claims themselves, the remainder of the specification, the prosecution history, and extrinsic evidence concerning relevant scientific principles, the meaning of technical terms, and the state of the art.” *Id.* (quoting *Innova*, 381 F.3d at 1116). In some circumstances, technical dictionaries may allow a court “to better understand the underlying technology” and the way in which one of skill in the art might use the claim terms. *Id.* at 18 (quoting *Vitronics*, 90 F.3d at 1582).

However, in no case should use of a dictionary focus “the inquiry on the abstract meaning of words rather than on the meaning of claim terms within the context of the patent.” *Id.* at 25. Further, “general dictionaries collect the definitions of a term as used not only in a particular art field, but in many different settings,” and “different dictionaries may contain somewhat different sets of definitions for the same words.” *Id.* at 26-27. “A claim should not rise or fall based upon

the preferences of a particular dictionary editor, or the court's independent decision, uninformed by the specification, to rely on one dictionary rather than another." *Id.* at 27. "[T]he authors of dictionaries or treatises may simplify ideas to communicate them most effectively to the public and may thus choose a meaning that is not pertinent to the understanding of particular claim language." *Id.* No extrinsic evidence should ever be used "for the purpose of varying or contradicting the terms in the claims." *Markman*, 52 F.3d at 981.

The Federal Circuit has held that "the specification is 'the single best guide to the meaning of a disputed term,' and that the specification 'acts as a dictionary when it expressly defines terms used in the claims or when it defines terms by implication.'" *Phillips* at 24 (quoting *Vitronics*, 90 F.3d at 1582).

B. The Claims at Issue

Pechauer has asserted only the '317 patent in this investigation, and has accused Kao Kao cues of infringing all 29 of the claims. It is undisputed that the '317 patent has only two independent claims, i.e., claims 1 and 9. *See* Undisputed Facts, ¶ 3; '317 Patent, col. 5, line 24 through col. 8, line 65. The limitations of those two independent claims are required by all their dependent claims. *See Jeneric/Pentron, Inc. v. Dillon Co.*, 205 F.3d 1377, 1383 (Fed. Cir. 2000); *Wahpeton Canvas Co. v. Frontier, Inc.*, 870 F.2d 1546, 1553 (Fed. Cir. 1989).

Claims 1 and 9 read on a joint assembly for detachably securing a first portion of a pool cue to a second portion of a pool cue. The claimed joint assembly is limited in several ways. For the purposes of the pending motion, only two claim limitations, which are shared by both claim 1

and claim 9, are in dispute.⁴ Those limitations are: (1) “a closed posterior end defining a base . . .” and (2) “an exterior surface comprising a posterior threaded portion and an anterior slightly threaded portion . . .” Those limitations are the primary focus of the parties’ briefs, and of this initial determination.⁵

Independent claim 1 of the ‘317 patent is as follows:

1. A joint assembly for detachably securing a first portion of a pool cue to a second portion of the pool cue, comprising:

a bushing fastened to the second cue portion having a centered threaded bore extending inwardly along a longitudinal axis from a center end face, the bushing comprising a side wall defining an open anterior end and an opening, and *a closed posterior end defining a base*, the side wall comprising:

an exterior surface comprising a posterior threaded portion and an anterior slightly threaded portion adapted to securely locate the bushing in the threaded bore of the second cue portion;

an interior surface comprising a threaded region one end of which is located proximate to the base and the opposite end of which comprises a tapered portion, a smooth bore region extending from the tapered portion of the threaded region to an angled entrance region located between the smooth bore region and

⁴Kao Kao states that by limiting its pending motion to two particular claim limitations, it does not concede the absence of other grounds for a finding of noninfringement. *See* Kao Kao Motion at 1 n.1.

⁵The law provides that rather than construing every claim term, a court may focus its attention in the first instance on fewer limitations if they can dispose of the case in an expeditious and efficient manner, thereby conserving public and private resources. *See, e.g., Ballard Med. Prods. v. Allegiance Healthcare Corp.*, 268 F.3d 1352, 1358 (Fed. Cir. 2001) (“If the district court considers one issue to be dispositive, the court may cut to the heart of the matter and need not exhaustively discuss all the other issues presented by the parties.”); *Vivid Techs., Inc. v. American Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999) (holding that claim “terms need be construed . . . only to the extent necessary to resolve the controversy”).

the opening of the bushing;

a pin fastened to the first cue portion having a centered threaded bore extending inwardly along a longitudinal axis from a center end face, the pin comprising:

a threaded tail portion adapted to securely locate the pin in the threaded bore of the first cue portion;

a threaded head portion to engage the threaded region of the bushing for coupling the pin to the bushing;

a middle portion located between said head and tail portions, the middle portion having a smooth surface and a diameter approximately equal to an internal diameter of the bore region of the bushing, the middle portion aligning the pin with the bushing during coupling; and,

a truncated nose portion atop the head portion, the nose portion having a smooth surface and a slight pointed tip, the nose, head and middle portions of the pin are sized to enable a simultaneous contact between the nose of the pin and the tapered region of the bushing, and between the middle portion of the pin and the bore region of the bushing when the pin is inserted into the bushing in a usual male-female coupling to secure the first portion of the pool cue to the second portion of the pool cue.

'317 Patent, col. 5, lines 24-65 (emphasis added).

Claim 9 of the '317 patent is as follows:

9. A pool cue comprising:

a first cue portion having a centered threaded bore extending inwardly along a longitudinal axis from a center end face;

a second cue portion having a centered threaded bore extending inwardly along a longitudinal axis from a center end face;

a joint assembly for detachably securing the first cue portion to the

second cue portion, comprising:

a bushing fastened to the second cue portion having a centered threaded bore extending inwardly along a longitudinal axis from a center end face, the bushing comprising a side wall defining an open anterior end and an opening, and **a closed posterior end defining a base**, the side wall comprising:

an exterior surface comprising a posterior threaded portion and an anterior slightly threaded portion adapted to securely locate the bushing in the threaded bore of the second cue portion; and,

an interior surface comprising a threaded region one end of which is located proximate to the base and the opposite end of which comprises a tapered portion, a smooth bore region extending from the tapered portion of the threaded region to an angled entrance region located between the smooth bore region and the opening of the bushing; and,

a pin fastened to the first cue portion having a centered threaded bore extending inwardly along a longitudinal axis from a center end face, the pin comprising:

a threaded tail portion adapted to securely locate the pin in the threaded bore of the first cue portion;

a threaded head portion to engage the threaded region of the bushing for coupling the pin to the bushing;

a middle portion located between said head and tail portions, the middle portion having a smooth surface and a diameter approximately equal to an internal diameter of the bore region of the bushing, the middle portion aligning the pin with the bushing during coupling; and,

a truncated nose portion atop the head portion, the nose portion having a smooth surface and a slightly pointed tip, the nose, head and middle portions of the pin being of a length and size to enable a

simultaneous contact between the nose of the pin and the tapered region of the bushing, and between the middle portion of the pin and the bore region of the bushing when the pin is inserted into the bushing in a usual male-female coupling to secure the first portion of the pool cue to the second portion of the pool cue.

'317 Patent, col. 6, line 49 through col. 7, line 30 (emphasis added).

C. Construction of the Claim Limitations at Issue

Kao Kao and the Commission Investigative Staff have proposed similar constructions of the claim limitations at issue. Pechauer did not address questions of claim construction separately from its discussion of the infringement issue.

The two claim limitations necessary for resolution of the pending motion for summary determination are discussed individually, i.e., in Sections III.C.1 (The Closed Posterior End) and III.C.2 (The Anterior Slightly Threaded Portion)).

1. The Closed Posterior End

By way of background to the claimed invention,⁶ the '317 patent specification teaches that:

Pool cues are commonly provided in two pieces that must be connected to assemble the pool cue for play. Typically, this connection is accomplished by means of a joint assembly comprising a pin portion and bushing portion, one located on each of the two pieces, to enable a standard type male-female coupling when the two portions are screwed together.

The most common joint pin and bushing on a pool cue, consists of a fully threaded pin that is screwed into a fully threaded (internal and external threads) brass insert. Aligning the two parts while trying to screw a two-piece pool cue together can be frustrating. If the two parts are not perfectly aligned, damage can be done when

⁶There is a scarcity of information in the parties' briefs concerning the level of ordinary skill in the relevant art. In this case, the intrinsic patent evidence is the best and virtually the only guide to understanding the meaning of the claims.

attempting to start the pin into the bushing, even to the extent of stripping the threads on one or both of the parts involved.

‘317 Patent, col. 1, lines 3-16.⁷

Both of the claim limitations at issue in Kao Kao’s motion for summary determination pertain to the “bushing portion” of the cue or joint assembly, rather than the pin.

a. Plain Claim Language

As seen in the plain language, claim 1 and claim 9, each provides that the bushing into which the pin is screwed must have “a closed posterior end defining a base.” Thus, while one end of the bushing must be open for insertion of the pin, the opposite or “posterior end” of the bushing is “closed” and thereby defines a base.

There is no dispute that one end of the bushing must be closed according to the plain language of the patent claims. Indeed, with respect to this limitation of the claimed invention there is no ambiguity in the text of the claims.

b. The Specification

Although the plain language of the claims is clear that the bushing must have “a closed posterior end,” the ‘317 patent specification also explains at least one reason for inclusion of the limitation in the claimed invention. The specification teaches that some prior art joint pin and bushing assemblies have “flaws such as a bushing portion that allows glue to enter the interior of the bushing during assembly causing corruption of the joint assembly.” ‘317 Patent, col. 1, lines 40-43. According to the specification, in the claimed invention, “[t]he bushing has a closed base

⁷See Undisputed Facts, ¶ 2 (“The patent is directed to a ‘bushing’ (female) and a ‘pin’ (male) which ‘couple in the normal male-female fashion’ to connect two halves of a pool cue.’ ‘317 Patent Abstract”).

to prevent glue from leaking into the bushing when the bushing is fastened to a portion of the pool cue.” ‘317 Patent, col. 1, lines 59-61 (“Brief Summary of the Invention”).⁸ This information from the specification confirms the unambiguous language of the claims that requires the posterior end of the bushing to be closed.

c. Other Evidence

No party relies on any other evidence, intrinsic or extrinsic to the patent, to propose an interpretation of this claim limitation.⁹ Nor does the Administrative Law Judge rely upon additional evidence.

d. Summary

Based on the plain claim language, as supported by the specification, the claims of the ‘317 patent require that the posterior end of the bushing be closed.

2. The Anterior Slightly Threaded Portion

a. Plain Claim Language

The plain language of the independent claims provides for a bushing with “an exterior surface comprising a posterior threaded portion and an anterior slightly threaded portion adapted to securely locate the bushing in the threaded bore of the second cue portion.” The dispute among the parties concerns the “anterior slightly threaded portion.”

⁸The requirement of a closed posterior end to the bushing is exemplified, and the teaching concerning glue is further amplified, in connection with one or more preferred embodiments of the claimed invention. *See, e.g.*, ‘317 Patent, col. 2, lines 42-47 (“Bushing **13** has a sidewall **34** defining an open anterior end and an opening **35**, and a closed posterior end defining a base **24**. The base is closed to prevent glue from entering the open interior portion of the bushing **13** when it is fastened to the second cue portion **14**.”).

⁹The ‘317 patent was allowed without amendment. *See* OUII Response at 12 (citing the prosecution history, a copy of which is found in the Complaint, Appendix A).

The claim language indicates that the portion in question is located in the “anterior” region of the bushing, as opposed to the “posterior” portion toward the closed end (which is discussed above). According to the claim language, although the posterior portion is “threaded,” the anterior portion is only “slightly threaded.” As is shown below, the claim term “slightly” – as opposed to “heavily” threaded or simply “threaded” – indicates that the threads in the anterior portion are not as deep as the other threads.

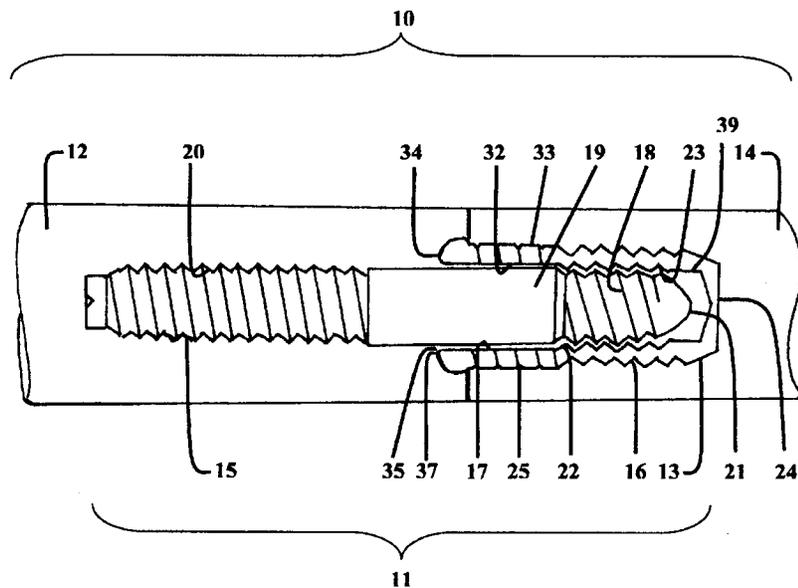
b. The Specification

Early in its description of the preferred embodiments, and with reference to the ‘317 patent Figures, the specification states that in the “anterior slightly threaded portion **25**,” located on the exterior sidewall of the bushing, the threads are “less dense than those of the posterior portion **16**.” ‘317 Patent, col. 2, lines 48-52. As noted by the parties, if read in isolation the phrase “less dense” might be understood to mean that in a preferred embodiment the threads of the anterior slightly threaded portion should be more sparse, or less numerous, or less compressed than those further along the bushing. However, the specification illustrates in text and Figures that such is not the case.

In fact, the specification requires that in a preferred embodiment, the number of threads per inch is the same along the exterior anterior and posterior portions of the bushing. The specification does, however, provide that the depth of the threads changes, with the threads in the anterior portion having less depth “to allow for glue” than those elsewhere along the bushing. *See* ‘317 Patent, col. 4, lines 13-24, Figs. 1a and 2; *see also* col. 5, lines 3-10 (discussion of the terminology “threads per inch” or “TPI”); Undisputed Facts, ¶ 10 (TPI terminology).

Thus, as illustrated in connection with a preferred embodiment, the threads of the anterior portion 25 are “slightly threaded” or not as deep, as those of the posterior portion 16. As discussed above, this meaning for the term “slightly threaded” is also understood from the plain

Figure 1a



claim language. The plain language of the claims is further shown to be unambiguous, and is simply reinforced by the disclosure of a preferred embodiment in the specification.¹⁰

¹⁰The claims require a “slightly threaded” anterior portion, and thus the anterior threads of a preferred embodiment bushing are not as deep as those located on the posterior portion of the bushing. A claim construction that excludes a specification’s preferred or only embodiment from the patent claims “is rarely, if ever, correct and would require highly persuasive evidentiary support.” *Elekta Instrument S.A. v. O.U.R. Scientific Int’l, Inc.*, 214 F.3d 1302, 1308 (Fed. Cir. 2000)(quoting *Vitronics*, 90 F.3d at 1583). See *Amgen, Inc. v. Hoechst Marion Roussel, Inc.*, 314 (continued...)

c. Other Evidence

The Commission Investigative Staff does not rely on any other type of evidence to propose an interpretation of this claim limitation. Pechauer's interpretation of this claim limitation is intertwined with its arguments concerning infringement. Kao Kao places some reliance on the dictionary definitions of "thread" and "dense." The Administrative Law Judge does not, however, find that reliance upon those definitions is necessary in this case.

d. Summary

The claims of the '317 patent require that along the exterior of the bushing, there is both a posterior threaded portion and an "anterior slightly threaded portion" such that in the anterior slightly threaded portion the threads are not as deep as those located in the posterior threaded portion.

IV. Question of Infringement

A. Legal Standards of Infringement

Literal infringement of a claim occurs when every limitation recited in the claim appears in the accused device, i.e., when "the properly construed claim reads on the accused device exactly." *Amhil Enters., Ltd. v. Wawa, Inc.*, 81 F.3d 1554, 1562 (Fed. Cir. 1996); *Southwall Tech. v. Cardinal IG Co.*, 54 F.3d 1570, 1575 (Fed. Cir. 1995). Literal infringement must be proven by a preponderance of the evidence. *Enercon v. Int'l Trade Comm'n*, 151 F.3d 1376 (Fed. Cir. 1998).

If the accused product does not literally infringe the patent claim, infringement may be

¹⁰(...continued)
F.3d 1313, 1349 (Fed. Cir. 2003)("Persuasive evidentiary support" was not present to read out a preferred embodiment. The Federal Circuit had done so only once, in its *Elekta* decision.).

found under the doctrine of equivalents. The Supreme Court has described the “essential inquiry” of the doctrine of equivalents analysis as follows: “[D]oes the accused product or process contain elements identical or equivalent to each claimed element of the patented invention?” *Warner-Jenkinson Co, Inc. v. Hilton Davis Chemical Co.*, 520 U.S. 17, 40 (1997). Under the doctrine of equivalents, infringement may be found if the accused product or process performs substantially the same function in substantially the same way to obtain substantially the same result. *Valmont*, 983 F.2d 1039, 1043 (Fed. Cir. 1993). The doctrine of equivalents does not allow claim limitations to be ignored. Evidence must be presented on a limitation-by-limitation basis, and not for the invention as a whole. *Warner-Jenkinson*, 520 U.S. at 29; *Hughes Aircraft Co. v. U.S.*, 86 F.3d 1566 (Fed. Cir. 1996). Thus, if an element is missing or not satisfied, infringement cannot be found under the doctrine of equivalents as a matter of law. *See, e.g., Wright Medical*, 122 F.3d 144, 1444 (Fed. Cir. 1997); *Dolly, Inc. v. Spalding & Evenflo Cos., Inc.*, 16 F.3d 394, 398 (Fed. Cir. 1994); *London v. Carson Pirie Scott & Co.*, 946 F.2d 1534, 1538-39 (Fed. Cir. 1991); *Becton Dickinson and Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 798 (Fed. Cir. 1990).

The scope of equivalents accorded an element is limited by prosecution history either through amendments to the claims or arguments made in support of patentability during prosecution of the applications that eventually matured into the patent at issue. Thus, the patentee cannot use the doctrine of equivalents to obtain coverage of subject matter relinquished during prosecution of the application. *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 734 (2002); *Wang Laboratories, Inc. v. Mitsubishi Electronics America, Inc.*, 103 F.3d 1571, 1577-1578 (Fed. Cir. 1997).

However, the patentee may obtain coverage of equivalents unforeseeable at the time of the amendment and beyond a fair interpretation of what was surrendered, or for aspects of the invention that have only a peripheral relation to the reason the amendment was submitted. *Festo*, 535 U.S. at 738; *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki*, 344 F.3d 1359, 1365-67 (Fed. Cir. 2003) (*en banc*). In order to obtain such coverage under the doctrine of equivalents, the patentee must show that at the time of the amendment one skilled in the art could not reasonably be expected to have drafted a claim that would have literally encompassed the alleged equivalent. *Festo*, 535 U.S. at 741.

B. The Products at Issue; New Kao Kao Assemblies Do Not Infringe

Kao Kao admits that it is the manufacturer of the accused joint assemblies and pool cues containing accused joint assemblies. The joint assemblies are imported and sold under various names, many of which are similar to the name “True-Lock” or “True-Loc.” Kao Kao currently has two joint assembly designs, i.e., an older design¹¹ upon which the complaint was based,¹¹ and a newer design whose manufacture apparently commenced before institution of this investigation and which has been the subject of discovery by Pechauer. *See* Kao Kao Responses to Pechauer’s

¹¹As pointed out by the Commission Investigative Staff, Pechauer has taken the position in discovery that the joint assemblies imported into the United States differ from the drawing provided in its complaint. The Staff argues such an argument should have no bearing on the pending motion because Pechauer had in its possession the drawing and an actual imported joint assembly at the time it filed its complaint, and Pechauer decided to include the drawing in its complaint. Further, Pechauer also included a photograph of a Kao Kao joint assembly in its complaint. Moreover, the Staff argues, the question to be determined at this juncture is whether the actual imported assemblies infringe. *See* Pechauer & Pechauer Declaration at 000380 (discussing alleged differences between the drawing and the imported assembly); OUII Response at 6 n.3. Indeed, the parties’ filings on the pending motion concern actual imported Kao Kao products, such as the physical exemplars of Kao Kao joint assemblies submitted with the pending motion (Ex. 9 and Ex. 10) and other actual assemblies such as those referred to in the Pechauer & Pechauer Declaration.

First Set of Requests for Admission (Staff Response Ex. 1), Nos. 1, 11-12, 54-57; Undisputed Facts, ¶ 18; Motion Exhibit 9 (a physical exemplar of an older Kao Kao joint assembly); Motion Exhibit 10 (a physical exemplar of a newer Kao Kao joint assembly).

Kao Kao and the Staff argue that the newer Kao Kao joint assembly is similar to the older accused assembly, and that neither design infringes the ‘317 patent. *See* Kao Kao Motion at 22-23, 27, 31-32, ; OUII Response at 6; Kao Kao Responses to Pechauer’s First Set of Requests for Admission, Nos. 5, 14 and 56 (Kao Kao admitted that its older and newer designs are “identical” within manufacturing tolerances).¹²

Pechauer apparently differs with Kao Kao and the Staff concerning the similarity of the older and newer Kao Kao designs. In connection with the pending motion, Pechauer takes the position that the newer Kao Kao joint assemblies do not satisfy the “anterior slightly threaded portion” limitation. Thus, Pechauer admits, the newer Kao Kao assemblies do not infringe the ‘317 patent. Undisputed Facts, ¶¶ 27, 32, 46, 50, 52.

While the parties may disagree as to whether or not the older and newer Kao Kao joint assemblies are “identical,” all parties, including Pechauer, take the position that the newer assemblies do not infringe any claim of the ‘317 patent. Consequently, Kao Kao is entitled to a determination at this time that no violation of section 337 has occurred in connection with the importation or sale of the newer assemblies. In the alternative, in view of the properly construed claims of the ‘317 patent, and the admissions of Pechauer in the Undisputed Facts document, the Administrative Law Judge finds that no question of material fact exists concerning

¹²Upon examination of an older and a newer Kao Kao assembly, the Administrative Law Judge found no perceivable difference between them.

noninfringement by Kao Kao's newer joint assemblies. Thus, Kao Kao is entitled to a finding as a matter of law that its newer joint assemblies do not infringe any claim of the '317 patent, and Kao Kao's motion for summary determination may be granted at least with respect to those assemblies and the cues that contain them.

The remaining question is whether the Kao Kao assemblies based on the older design infringe any claim of the '317 patent, and in particular, whether they satisfy the "closed posterior end" and "anterior slightly threaded portion" limitations of the independent claims. The following infringement analysis pertains to the older Kao Kao assemblies, such as those originally accused in the complaint. There has been no dispute concerning the fact that such assemblies are exemplified by Kao Kao's motion Exhibit 9. Exhibit 9 was submitted with Kao Kao's motion for summary determination, and a photograph of Exhibit 9 or a similar accused joint assembly is found at pages 5 and 22 of Kao Kao's motion.

1. Literal Infringement

a. "closed posterior end"

There is no dispute that the posterior end of the Kao Kao joint assembly has a hole in it. Kao Kao and the Commission Investigative Staff argue that therefore the "closed posterior end" limitation is not literally present in the accused assemblies. Pechauer's literal infringement argument is at best non-committal with respect to this claim limitation. *See* Kao Kao Motion at 7, 20; Pechauer Opposition at 1, 5-7; OUII Response at 16-17.

An opening is clearly seen centered in the end of the Kao Kao joint assemblies. Thus, there can be no literal infringement of the claims of the '317 patent at least with respect to the "closed posterior end" limitation.

b. “anterior slightly threaded portion”

Kao Kao argues that its accused joint assembly cannot infringe the claims of the ‘317 patent because the anterior portion of its bushing has a smooth surface with no slight grooves. It is argued that even Pechauer’s patent attorney (who has not appeared in this investigation) once advised Pechauer that the Kao Kao assembly could not literally infringe the ‘317 patent because the accused TRU LOC device “has threads of equal density – i.e., it is not divided into two portions, one of which [is] only “slightly threaded.”¹³ Kao Kao Motion at 6, 19-22.

The Commission Investigative Staff argues that Kao Kao’s joint assemblies appear to have only a single thread depth across the exterior of the bushing wherever there is threading. Thus, it is argued, the accused assemblies do not literally satisfy the “anterior slightly threaded portion” limitation. OUII Response at 20.

Pechauer argues that Kao Kao’s position is based on the incorrect argument that the “‘anterior slightly threaded portion’ should be limited to the helical ‘female’ thread or groove because that is what is shown in the preferred embodiment illustrated in the specification.” Pechauer argues that the Kao Kao “bushing includes threads, or helical ridges, at the anterior end of the exterior surface that have a lesser outside diameter than the threads at the posterior portion of the exterior surface.” Thus, it is argued, the Kao Kao assemblies literally infringe the independent claims of the ‘317 patent. Pechauer Opposition at 7-8. Pechauer also argues that the Staff has failed to consider Pechauer’s evidence that the threads at the anterior end of the threaded surface have a lesser outside diameter than the fully threaded posterior portion of the

¹³A copy of an October 31, 2003 opinion letter from counsel to Jerrold J. Pechauer was included in the complaint (Complaint Exhibit 15) and Kao Kao’s pending motion (Motion Exhibit 4).

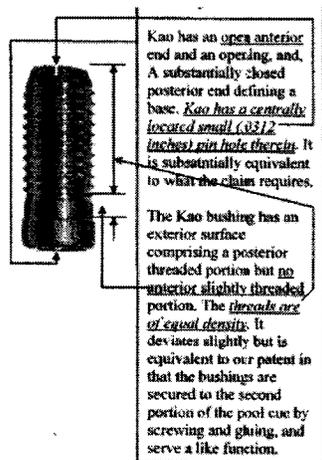
bushing, and thus the depth of the anterior threads is less. Pechauer Reply at 1-2.

As an initial matter, although the specification discloses only one way of “slightly” threading a portion of the bushing, there is no indication in the claims that the depth of the threads, or the “slightly threaded” nature of the anterior portion, must be determined exclusively by either (a) how high the ridges rise above the groove, or on the contrary (b) by the height of the groove. Without a further examination of the claims and specification to determine if, for example, the description and enablement requirements would be satisfied, it is conceivable that the anterior portion of the bushing may be “slightly threaded” because the groove rises high in relation to the helical ridges, or because the helical ridges of the thread are low (i.e., have a lesser outside diameter), or due to a combination of both factors.

In any event, whether one perceives thread depth as a function of the diameter of the helical ridges of the thread, the depth of the groove, or both, when one examines photographs of the Kao Kao joint assembly one observes that there are no threads near the anterior end of the bushing. More than one quarter of the exterior surface toward the anterior end of the bushing is smooth and devoid of threading.

Most of the remainder of the bushing is threaded. However, even if the “anterior” portion of the bushing commences approximately one quarter of the way down the bushing toward the posterior end, there is nevertheless no readily apparent variation in the threads on the exterior surface of the bushing. Looking at the photographs provided by Kao Kao and Pechauer, there is no apparent portion of the surface that is “slightly threaded.” As argued by the Staff, one sees only a single thread depth along that portion of the exterior surface of the bushing which is threaded.

The following photograph of a Kao Kao assembly and commentary was provided by Pechauer in connection with the complaint.¹⁴ A revised commentary, with the same or similar photograph was provided again in Pechauer’s opposition to the pending motion.

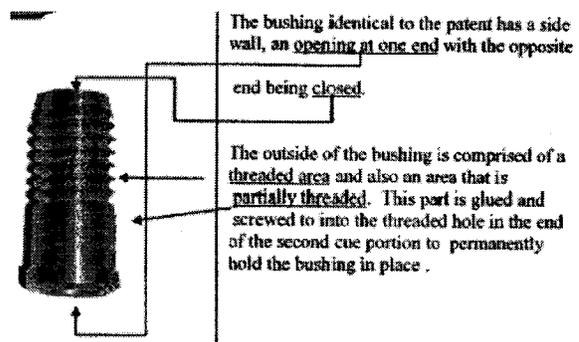


Kao Kao Motion at 21, Exhibit 6 (Complaint Exhibit 18); see also Pechauer Opposition, August 9, 2005 Declaration of Jerrold Pechauer, Exhibit B (revised Product Infringement Claim Chart).

As explained in Pechauer’s complaint, there is “no anterior slightly threaded portion” in the accused assembly. Moreover, as seen in the photograph, and pointed out by the lines and arrows added by Pechauer, the region extending forward from the lowest (as depicted) thread or helical ridge is smooth. Further, even if one were to assign the “anterior . . . portion” to a region further toward the posterior end of the bushing and away from the smooth anterior end, one would still observe that the thread forms only a single, uniform portion, with no difference between the ridges and groove nearest the posterior end as compared to those closer to the anterior end of the bushing.

¹⁴Kao Kao’s pending motion contains excerpts from Pechauer’s complaint. The photographs in this infringement analysis were copied from Kao Kao’s motion because in compliance with Ground Rule 3(b), Kao Kao provided an electronic copy of its filing.

Pechauer argues that Kao Kao has impermissibly compared the accused assembly to the preferred embodiment of the '317 patent specification. Yet, the lack of any “anterior slightly threaded portion” is apparent from photographs such as Pechauer’s photograph reproduced above, without any reference to a preferred embodiment. In addition, it is Pechauer’s product infringement claim charts, upon which Pechauer relies in its complaint and in opposition to the pending motion, that makes a side-by-side comparison between the “Pechauer Preferred Embodiment of Joint Assembly” and the “Kao Kao Assembly.” *See, e.g.*, August 9, 2005 Declaration of Jerrold Pechauer, Exhibit B (revised Product Infringement Claim Chart); Kao Kao Motion Exhibit 6 (Complaint Exhibit 18). The so-called Pechauer preferred assembly is pictured in the complaint as follows, and an identical or similar photograph is provided in Pechauer’s revised claim chart supplied in opposition to the pending motion.



As seen in this photograph of a Pechauer bushing, allegedly made in accordance with the patent claims and embodiment of the specification, there is a clearly identifiable albeit “slightly threaded” portion of the anterior surface of the bushing.

For the reasons discussed above in connection with claim construction and in this section,

an infringing assembly need not be necessarily constructed precisely as Pechauer manufactures its assemblies, and as it has set forth in its complaint and later used in opposition to the pending motion. An anterior slightly threaded portion that helps to secure the bushing may conceivably be executed in more than one way. However, in comparison to the Pechauer bushing, and more importantly when it is observed alone, the Kao Kao bushing is characterized by a seemingly uniform thread that commences noticeably far from the anterior position of the bushing, and in any event has no “slightly threaded” portion whatsoever.

In its revised claim chart and in opposition to the pending motion, Pechauer states that the Kao Kao assembly does in fact have an anterior slightly threaded portion. The reason for Pechauer’s change in analysis is unclear because there is no such region apparent in the photograph accompanying Pechauer’s revised claim chart, as there was no such region in the photograph supplied in the complaint. Further, in its reply to the Commission Investigative Staff’s brief, Pechauer argues that the Staff has failed to consider the fact that there is a threaded portion on the accused bushing with a reduced diameter (i.e., with a thread of less depth) as compared to the threading on the posterior portion of the bushing, and specifically refers to Exhibit A to the August 9, 2005 Declaration of Jerrold Pechauer supplied with its opposition brief. Pechauer Reply at 1.

Exhibit A of the Jerrold Pechauer declaration consists of two photographs and a Kao Kao design drawing of the accused assembly. Arrows supplied by Pechauer indicate an alleged “slightly threaded portion” in the accused assembly. Without any detailed analysis in the Exhibit itself, and with no detailed explanation in Pechauer’s opposition brief, it is difficult to discern the substance of the argument. However, it appears that Pechauer argues that because the thread

ridge closest to the anterior end of the bushing appears to ascend out of the bushing, that small area where the thread begins to take shape constitutes the entire “anterior slightly threaded portion” required by the independent claims of the ‘317 patent. That area of the commencement of the thread is minuscule and barely visible in the photograph provided by Pechauer, and would go virtually unnoticed except for the fact that Pechauer has drawn attention to it and labeled it in Exhibit A.¹⁵ In the Kao Kao drawing, also provided in Exhibit A, arrows supplied by Pechauer point to small features approximately 30% of the way down from the anterior opening, and those features appear to indicate the beginning of the thread, which Pechauer seems to equate with the “anterior threaded portion.”

The evidence supplied by Pechauer is extremely weak and barely probative of any “anterior slightly threaded portion” in the accused assembly. However, in the interest of evaluating all evidence, and doing so in a light most favorable to the opponent of summary determination, the Administrative Law Judge also referred to the physical exemplar of an accused assembly (Motion Ex. 9) provided by Kao Kao with the pending motion. On the bushing of that assembly, the Administrative Law Judge notes an area of the thread as it appears to rise up from the body of the bushing, or to slope down to it, depending on one’s perspective. After providing a certain depth vis-a-vis the groove (or attaining a certain height vis-a-vis the other ridges) the thread continues to form a spiral around the exterior surface of the bushing in a uniform fashion toward the posterior end. The ridge in question appears to attain its full depth

¹⁵Although it is not discussed in Pechauer’s opposition brief, the Administrative Law Judge has examined the Pechauer & Pechauer Declaration, Photograph C in which it appears that Pechauer identifies what it deems to be the “anterior slightly threaded portion” of the accused assembly.

within one turn around the bushing. There are no “helical ridges” in this area, as alleged in Pechauer’s opposition brief. There is only a small area of slope, some of which is nearly equivalent in height to the other ridges or portions of the thread around the bushing. It is only through careful examination of Kao Kao’s physical evidence that the Administrative Law Judge can determine that there is any portion of a thread which is not uniform. However, there is no explanation in the briefing or elsewhere in the record to justify equating such a *de minimis* characteristic of the beginning of a thread (one quarter to one third down the bushing) with the “anterior slightly threaded portion” required by the patent claims “to securely locate the bushing in the threaded bore of the second cue portion.”

The evidence of record is at best colorable, and it is certainly not significantly probative, of the allegation that the accused assembly contains an “anterior slightly threaded portion” required by the independent claims of the ‘317 patent. No genuine issue of material fact has been raised. Thus, it is found as a matter of law that there is no literal infringement of the claims of the ‘317 patent, due at least in part to the fact that the accused Kao Kao assemblies do not literally possess the required “anterior slightly threaded portion.”

2. The Doctrine of Equivalents

As discussed above, when there is no literal infringement of a patent claim, in appropriate cases there may nonetheless be infringement under the doctrine of equivalents.

a. “closed posterior end”

Pechauer argues that the so-called “pinhole” opening of 0.0312 inches in diameter in the posterior end of the Kao Kao bushing is equivalent to the claimed posterior end. It is argued that the opening serves the same function as the closed end of “disallowing the entrance of glue;” that

the opening performs the function in the same way as a closed end by “preventing seepage of the glue by providing a barrier across which glue cannot pass;” and that “the closed posterior end as claimed and the miniscule opening of the Kao posterior end also produce the same result, i.e. preventing glue from entering the interior and corrupting the joint.” Thus, Pechauer argues, the posterior end of the Kao Kao bushing is equivalent to the closed posterior end recited in independent claims of the ‘317 patent. Pechauer relies in part on an examination of a Kao Kao accused cue, as detailed in the Pechauer & Pechauer Declaration, in which no glue was found inside an accused assembly with the opening on the posterior end. It is argued that at the least an issue of fact exists with respect to infringement, and the pending motion should be denied. *See* Pechauer Opposition at 6-7, Pechauer & Pechauer Declaration (filed with the Opposition).

The Commission Investigative Staff argues that under the doctrine of equivalents the Kao Kao joint assemblies arguably contain the “closed posterior end” claim limitation when the facts are viewed in a light most favorable to Pechauer, and thus summary determination should not be granted with respect to this limitation. OUII Response at 17-18.

Kao Kao argues that Pechauer chose to require a “closed” posterior end, and is not now entitled to broaden the scope of its patent through the doctrine of equivalents to erase a meaningful structure and functional limitation. It is argued that to allow that an end with a hole is equivalent to an end without a hole simply vitiates the claim limitation, and in similar cases, the Federal Circuit has held on summary judgment that the doctrine of equivalents cannot be used to support a finding that vitiates a claim limitation. *See* Kao Kao Motion at 23-24 (quoting, *inter alia*, *Moore U.S.A. v. Standard Register Co.*, 229 F.3d 1091, 1106 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 1008 (2001)) (“If a minority could be equivalent to a majority, this [majority]

limitation would hardly be necessary.”); *Asyst Technologies, Inc. v. Emtrak, Inc.*, 402 F.3d 1188, 1195 (Fed. Cir. 2005)(“To hold that ‘unmounted’ is equivalent to ‘mounted’ would effectively read the ‘mounted on’ limitation out of the patent.”)).

In the alternative, Kao Kao argues that its accused assembly does not satisfy the function-way-result test often used in the doctrine of equivalents analysis. It is argued that in discovery, Pechauer admitted that glue can pass through the hole in the posterior end of the accused bushing, although Pechauer qualified its admission by stating that in “normal” installation in fact glue does not pass through. Kao Kao argues that the function of the claimed closed end is to prevent glue from entering the bushing, and the accused assembly with a hole in the posterior end cannot perform the same function in substantially the same way to achieve substantially the same result. *Id* at 26-27.

Having considered the arguments of the parties, it is useful to return to the plain language of the two independent claims of the ‘317 patent, both of which require a bushing with “a closed posterior end defining a base.” A posterior end with a hole in it is not closed. Although the hole in the posterior end of the Kao Kao bushing may be relatively small, it is present and it is easily visible to one viewing photographs of the end supplied in connection with the pending motion, or upon examination of the physical exemplar provided with the motion. *See* Pechauer & Pechauer Declaration (filed with Pechauer’s Opposition), Photograph A; Motion Exhibit 9.

It would be improper to attempt to use the doctrine of equivalents to hold that a surface with a hole in it is “closed,” as in the cases mentioned above in which it would have been improper to hold that something “unmounted” is “mounted,” or that through the use of a legal doctrine a “minority” could be transformed into a “majority.” The doctrine of equivalents cannot

erase meaningful structural and functional limitations that the public is entitled to rely on in avoiding infringement. *V-Formation Inc. v. Benetton Group SpA*, 401 F.3d 1307, 1313 (Fed. Cir. 2005).

The particular arguments set forth by Pechauer in relation to the doctrine of equivalents further emphasize the point that the doctrine of equivalents cannot change the meaning of words or erase claim limitations. Although Pechauer refers to the relatively small size of the hole in the posterior end of the Kao Kao bushings, Pechauer's doctrine of equivalents arguments are not framed in precisely such terms. Rather, it is argued that the "miniscule opening in the end serves the same function as a closed end, i.e. disallowing the entrance of glue;" that the "opening" also performs the same function in the same way;" and finally that the "opening" of the posterior end produces the same result as a closed posterior end. Pechauer Opposition at 6. Thus, taking Pechauer's arguments on their face, Pechauer would have the Commission determine that a hole or "opening" performs the same function as a closure, and that an opening does so in the same way and with the same result as a closed end. From the specification, one learns that at least one reason for limiting the claimed invention with a "closed posterior end" is to prevent glue from entering the interior of the bushing. It would simply be illogical to hold that an "opening" serves as a barrier to glue, and that it does so in the same way as a closed end.

Nevertheless, inasmuch as the infringement question in this instance is to be decided within the framework of a motion for summary determination, the Administrative Law Judge has examined all the evidence offered in order to determine whether there is a genuine issue of material fact that would prevent granting Kao Kao's pending motion. Pechauer has offered evidence in the form of a declaration with photographs and the representation that when

Pechauer cut an imported Kao Kao bushing in half along its longitudinal center axis it was able to examine whether glue had passed through the hole into the posterior end of the bushing. According to the declaration, no glue had passed into the bushing through the hole in the posterior end. That representation appears to be confirmed by the accompanying photographs. *See* Pechauer & Pechauer Declaration. This evidence comports with Pechauer's admission, mentioned by Kao Kao in its motion, to the effect that although glue "can" pass through the hole in the posterior end of the Kao Kao bushing, during normal installation it does not do so. *See* Motion Exhibit 5 (Pechauer admissions) at 7.

Aside from the fact that Pechauer's evidence is based on a small number of accused assemblies, and relates to the behavior of glue during supposed "normal" installation, Pechauer's declaration and other evidence do not explain why glue has not been found in the interior of a Kao Kao bushing. It is not clear whether the relatively small size of the hole played a role in maintaining glue on the outside of the bushing, or whether other factors related to the glue, the structure of the bushing or the Kao Kao manufacturing process are important. There is no evidence that a bushing with a small hole in it performs the desired function in the same way as a closed bushing, or in fact whether in the case of the Kao Kao assemblies the configuration of the posterior end of the bushing plays any role at all in the distribution of glue on the exterior surface of the bushing, and if so what that role may be.

Even if this were a case in which it would be appropriate to use the doctrine of equivalents to read a "closed" end on an end with a hole in it, or a substantially closed end, the evidence of record does not provide any basis for determining that differences between the accused assembly and the assembly claimed by the patent are insubstantial. There is a lack of

evidence concerning why no glue has been found in a small number of accused assemblies and what role if any the posterior end played in preventing the entry of glue. In summary, the evidence when viewed in a light most favorable to Pechauer fails to raise a genuine issue of material fact as to whether the Kao Kao assemblies infringe the claims of the '317 patent.

b. “anterior slightly threaded portion”

As discussed above, the Administrative Law Judge has rejected Pechauer’s primary argument that the accused Kao Kao assemblies literally satisfy the “anterior slightly threaded portion” requirement of the '317 patent claims. In the alternative, Pechauer argues in one paragraph of its opposition brief that the accused assemblies infringe under the doctrine of equivalents. Pechauer argues that the Kao Kao bushing has an anterior threaded portion that provides the same function as the claimed limitation, “i.e. both are configured to be inserted into a portion of a pool cue.” It is argued that the accused bushing functions in the same way, “i.e. by a threaded exterior having an anterior portion with a modified thread diameter.” It is argued that there is the “same result: the bushing is securely inserted within a portion of a pool cue.” Finally, it is argued that any differences in specific structure are insubstantial. Pechauer Opposition at 8 (citing August 9, 2005 Declaration of Jerrold Pechauer, Exhibit B (revised Product Infringement Claim Chart) at 2).

Kao Kao argues that its assemblies cannot infringe under the doctrine of equivalents because an “anterior slightly threaded portion” is a clear structural limitation that is completely missing in the accused products. The anterior portion of the accused assemblies is smooth, and there is no structure in the accused assemblies that corresponds to the “slight groove” in the claimed invention “allowing for glue.” Motion at 23-32.

The Commission Investigative Staff argues that the Kao Kao assemblies follow the prior art design by having only a single thread depth that extends the length of the exterior of the bushing, except for a smooth anterior region that has no threading. It argued that to allow such a bushing to be an equivalent of the claimed bushing would read the claim on the prior art, and would impermissibly eliminate the “anterior slightly threaded portion” from the claims. The Staff argues that even viewing the facts most favorably to Pechauer, it must be found that the accused assemblies do not infringe literally or under the doctrine of equivalents. OUII Response at 20-22.

The features of the Kao Kao bushing relative to any “anterior slightly threaded portion” are discussed in detail above in connection with the question of literal infringement. In summary, Pechauer’s briefing and evidence were vague as to which structure in the accused assembly bushing might correspond to the limitation at issue. However, the Administrative Law Judge, using evidence supplied by Kao Kao in addition to that supplied by Pechauer, was able to discern a *de minimis* feature on the Kao Kao bushing as a ridge that appears to rise to full height (or overall diameter) within one turn around the bushing, and which is located about one turn before the fully threaded portion of the bushing.

In connection with the doctrine of equivalents, the evidence relied upon by Pechauer is even more obscure. The portion of the revised claim charted cited by Pechauer simply states that the Kao Kao bushing includes an anterior slightly threaded portion adapted to perform the stated claim function of securing the bushing, and further states that the alleged anterior slightly threaded portion in the accused assembly “allows glue to enter therealong and is an insubstantial difference.” Arrows point to a photograph of a Kao Kao bushing which, as already discussed,

fails to distinguish a structure in the bushing that corresponds to the claimed limitation. *See* August 9, 2005 Declaration of Jerrold Pechauer, Exhibit B (revised Product Infringement Claim Chart) at 2. Such a mere statement or allegation is not sufficient to raise a question of material fact in opposition to a motion for summary determination. *See* 19 C.F.R. § 210.18(a)-(c); *Litton*, 755 F.2d at 163-64 (“mere allegations by declaration or otherwise do not raise issues of fact needed to defeat a motion for summary judgment”).

Neither the revised claim chart nor any other purported evidence filed in this investigation indicates that there is any threaded portion in the accused assembly that acts to secure the bushing in a manner that differs from the fully threaded portion which extends toward the posterior of the bushing. Pechauer apparently alleges that the small portion of threading identified by the Administrative Law Judge, and which is somewhat distant from the anterior of the bushing, and which appears to be the start of the thread on the remainder of the bushing, constitutes a structure that corresponds to the “anterior slightly threaded portion” of the claims. There is no evidence of how that small area might interact with the glue used in the process of securing the bushing.

Consequently, the evidence even when viewed in a light most favorable to the non-movant fails to raise a genuine issue of material fact with respect to the doctrine of equivalents, and Kao Kao is entitled to a determination of non-infringement as a matter of law.

C. Summary on the Question of Infringement

No party, including the complainant Pechauer, asserts that the newer Kao Kao joint assemblies infringe any claim of the ‘317 patent, and there is no basis upon which to find that the newer assemblies infringe. With respect to the Kao Kao assemblies based on the older design,

there is no literal infringement of any claim of the '317 patent, nor is there infringement under the doctrine of equivalents. Consequently, the Kao Kao assemblies do not infringe any claim of the '317 patent.

V. Conclusion

For the reasons stated herein, it is the INITIAL DETERMINATION of the Administrative Law Judge that respondents' Motion No. 536-1 for summary determination is GRANTED.

It is found as a matter of law that Kao Kao's newer and older joint assemblies and cues containing KaoKao assemblies do not infringe the asserted claims of the '317 patent. All respondents are accused of importing and/or selling only Kao Kao assemblies. Thus, based on the noninfringement of the Kao Kao assemblies, this investigation is terminated in its entirety.

Pursuant to 19 C.F.R. §§ 210.42(h), this initial determination shall become the determination of the Commission unless a party files a petition for review of the initial determination pursuant to 19 C.F.R. § 210.43(a), or the Commission, pursuant to 19 C.F.R. § 210.44, orders on its own motion a review of the initial determination or certain issues herein.


Sidney Harris
Administrative Law Judge

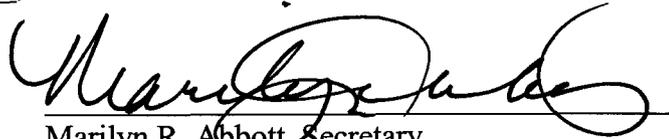
Issued: August 31, 2005

**CERTAIN POOL CUES WITH
SELF-ALIGNING JOINT ASSEMBLIES
AND COMPONENTS THEREOF**

INV. NO. 337-TA-536

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached Order (**Initial Determination**) was served upon Erin D.E. Joffe, Esq. and upon the following parties via first class mail, and air mail where necessary, on September 1, 2005.



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