

In the Matter of

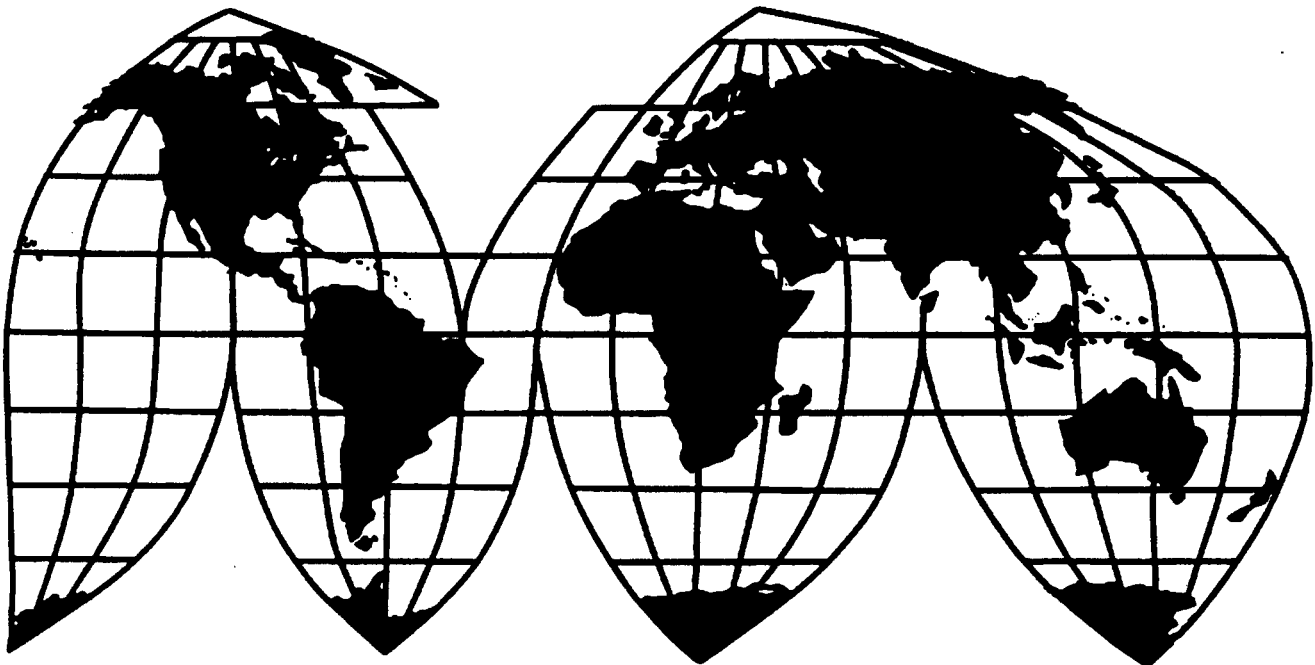
**Certain Truck Bed Ramps
and Components Thereof**

Investigation No. 337-TA-485

Publication 3665

January 2004

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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

In the Matter of

**CERTAIN TRUCK BED RAMPS
AND COMPONENTS THEREOF**

Inv. No. 337-TA-485

**NOTICE OF COMMISSION DECISION NOT TO REVIEW AN INITIAL
DETERMINATION FINDING NO VIOLATION OF SECTION 337
OF THE TARIFF ACT OF 1930 AND TERMINATING THE INVESTIGATION**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the presiding administrative law judge's ("ALJ's") initial determination ("ID") finding no violation of section 337 of the Tariff Act of 1930 and terminating the above-captioned investigation.

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 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) 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 this investigation on January 24, 2003, based on a complaint filed by Charles D. Walkden ("Walkden") of Homer, Alaska. 68 *Fed. Reg.* 3550 (2003). The complaint, as amended, alleged violations of section 337 in the importation, sale for importation, and sale within the United States after importation of certain truck bed ramps and components thereof that infringe claim 1 of U.S. Patent No. 5,795,125 ("the '125 patent"). The Commission named as respondents ETEC of Saskatoon, SK, Canada; Textron Inc. ("Textron") of Providence, Rhode Island; VIP Distributing of Anchorage, Alaska; Southwest Distributing Co. of Clinton,

Oklahoma; and Hamilton Equipment Inc. of Ephrata, Pennsylvania. *Id.* Textron was subsequently terminated from the investigation on the basis of a consent order.

On June 2, 2003, the Commission investigative attorney ("IA") moved pursuant to Commission rule 210.15(a) for summary determination of non-infringement. On July 10, 2003, the ALJ issued an ID granting the IA's motion. No petitions for review of the ID were filed.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and section 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: August 6, 2003

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached NOTICE OF COMMISSION DECISION NOT TO REVIEW AN INITIAL DETERMINATION FINDING NO VIOLATION OF SECTION 337 OF THE TARIFF ACT OF 1930 AND TERMINATING THE INVESTIGATION , was served upon the Commission Investigative Attorney, Thomas S. Fusco, Esq., all parties via first class mail and air mail where necessary on August 6, 2003.



Marilyn R. Abbott, Secretary
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PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN TRUCK BED RAMPS AND
COMPONENTS THEREOF**

Inv. No. 337-TA-485

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**ORDER NO. 6: INITIAL DETERMINATION GRANTING MOTION OF THE
COMMISSION INVESTIGATIVE STAFF'S FOR SUMMARY
DETERMINATION OF NO VIOLATION BASED UPON NON-INFRINGEMENT
OF THE CLAIM AT ISSUE AND TERMINATING THE INVESTIGATION**

(July 10, 2003)

I. BACKGROUND

On June 2, 2003, the Commission Investigative Staff ("Staff") filed a motion (485-004) for summary determination of no violation based on non-infringement of claim 1 of U.S. Patent No. 5,795,125 ("the '125 patent"; *see* Motion Ex. 3) pursuant to Commission Rule 210.15(a), 19 C.F.R. § 210.15(a).

On June 19, 2003, complainant Charles D. Walkden ("complainant" or "Walkden"), improperly filed a request for an extension to respond to the summary determination motion. The motion requested until June 30, 2003 to respond to the summary determination motion. In a notice dated June 20, 2003, the undersigned indicated that complainant's motion would not be considered because it was not properly filed with the Office of the Secretary and did not comply with the undersigned's ground rules issued in Order No. 2.

On June 23, 2003, complainant sent a letter to the undersigned regarding its previous extension request, which was not received by the undersigned until June 30, 2003. *See* Attachment A. This letter attempts to explain why complainant disregarded ground rules 1.8 and 3.2 when it filed its extension request and appears to be a motion for reconsideration. There was no explanation in the letter as to why the extension request was not properly filed with the Office of the Secretary, nor was the letter requesting reconsideration properly filed with the Office of the Secretary.

In the June 23rd letter, complainant states that Ground Rule 3.2 was not applicable because the motion for extension was made *ex parte* pursuant to Commission Rule 210.15(d). Ground rule 3.2 states that “[a]ll motions shall include a certification that the moving party has made reasonable, good-faith efforts to contact and resolve the matter with opposing parties prior to filing the motion, and shall state, if known, the position of the other parties on such motion.”¹ Order No. 2 expressly state that the “Ground Rules supplement the Commission’s Rules of Practice and Procedure, 19 C.F.R. Parts 201 and 210 (‘Commission Rules’), in order to aid the Administrative Law Judge in the orderly conduct of the Section 337 investigation pursuant to the Administrative Procedure Act, 5 U.S.C. § 556(c).”

In the June 23rd letter, complainant states that the extension request was timely, as required by Ground Rule 1.8, because the Staff’s motion was mailed on June 2, 2003.

¹ In addition, Mr. Hoyte, counsel for complainant, contacted the undersigned’s attorney-advisor on June 10, 2003 via telephone regarding the procedure of how to file an extension request, and the attorney-advisor specifically referenced the required certification of Ground Rule 3.2 during that conversation.

Commission Rule 210.15(c) provides that responses to motions must be made “[w]ithin 10 days after service of any written motion.” Commission Rule 201.16(d) provides an additional “three (3) calendar days” to be added to a prescribed time period whenever a party has the right to perform some act or take some action which is served by mail. As the Staff points out in its June 20, 2003 letter (*see* Attachment B), the motion for summary determination was *hand-delivered* to complainant on June 2, 2003, making the three-day service by mail provision inapplicable to complainant. Therefore, the due date for complainant’s response was ten days after June 2, 2003, or June 12, 2003. In addition, ground rule 1.8 states that “[a]ny request for extension of time must be made by written motion *before* the due date and good cause for such extension must be established” (emphasis added). Therefore, a timely motion for extension should have been filed by June 11, 2003.

The complainant has made no attempt to properly file a motion for extension to respond to the summary determination motion with the Office of the Secretary, despite the previously issued notice as to why the motion was not considered. Nor has the complainant made an attempt to file a motion for leave to file a late-filed response by the requested date of June 30, 2003 in its improperly filed motion for extension.

Commission Rule 210.18(c) requires a party opposing a summary determination motion to set forth specific facts and supporting evidence showing that a genuine issue of fact for the evidentiary hearing exists. No responses, whether in support or opposition to the summary determination motion have been received as of this date. Therefore, none of the

factual assertions made in the summary determination motion have been contested and they will be accepted as alleged for the basis of this order and initial determination.

This investigation was instituted on January 24, 2003. *See* 68 Fed. Reg. 3550. The investigation was based on the complaint filed by complainant on December 20, 2003, which was amended on January 7, 2003. The notice of investigation named five respondents, including: ETEC, Textron, Inc., VIP Distributing, Southwest Distributing Co., and Hamilton Equipment, Inc. An initial determination terminating Textron, Inc. from the investigation based on a consent order was issued on April 3, 2003. The Commission issued a notice not to review the initial determination on April 29, 2003. Therefore, there are four remaining respondents in the investigation.

The complainant contends that the sole allegedly infringing article is ETEC's "Load Pro" product. *See* Motion Ex. 2 "Complainant Charles D. Walkden's Answers to Commission Investigative Staff's First Set of Interrogatories," ¶ 11. The remaining respondents do not manufacture any products and merely distribute ETEC's Load Pro product. The Staff's motion for summary determination of non-infringement alleges that ETEC's Load Pro does not infringe the '125 patent.

II. RELEVANT LAW

A. Summary Judgement Standard

Pursuant to Commission Rule 210.18, summary determination "... shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file, together

with the affidavits, if any, 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.”²

“When ruling on a motion for summary judgment, all of the nonmovant’s evidence is to be credited, and all justifiable inferences are to be drawn in the nonmovant’s favor.”³ The trier of fact should “assure itself that there is no reasonable version of the facts, on the summary judgment record, whereby the nonmovant could prevail, recognizing that the purpose of summary judgment is not to deprive a litigant of a fair hearing, but to avoid an unnecessary trial.”⁴ “Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate.”⁵ “In other words, ‘[s]ummary judgment is authorized when it is quite clear what the truth is,’ [citations omitted], and the law requires judgment in favor of the movant based upon facts not in genuine dispute.”⁶

² 19 C.F.R. § 210.18(b); also see *DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1322 (Fed. Cir. 2001); *Wenger Mfg., Inc. v. Coating Machinery Systems, Inc.*, 239 F.3d 1225, 1231 (Fed. Cir. 2001).

³ *Xerox Corp. v. 3Com Corp.*, 267 F.3d 1361, 1364 (Fed.Cir. 2001).

⁴ *EMI Group North America, Inc. v. Intel Corp.*, 157 F.3d 887, 891 (Fed. Cir. 1998).

⁵ *Sandt Technology, Ltd. v. Resco Metal and Plastics Corp.*, 264 F.3d 1344, 1357 (Fed.Cir. 2001) (Dyk, C.J., concurring).

⁶ *Paragon Podiatry Laboratory, Inc. v. KLM Laboratories, Inc.*, 984 F.2d 1182, 1185 (Fed. Cir. 1993).

B. Claim Construction

Analyzing whether a patent is infringed “entails two steps. The first step is determining the meaning and scope of the patent claims asserted to be infringed. The second step is comparing the properly construed claims to the device or process accused of infringing.”⁷ The first step is a question of law, whereas the second step is a factual determination.⁸ To prevail, the patentee must establish by a preponderance of the evidence that the accused device infringes one or more claims of the patent either literally or under the doctrine of equivalents.⁹

Concerning the first step of claim construction, “[i]t is well-settled that, in interpreting an asserted claim, the court should look first to the intrinsic evidence of record, *i.e.*, the patent itself, including the claims, the specification and, if in evidence, the prosecution history Such intrinsic evidence is the most significant source of the legally operative meaning of disputed claim language.”¹⁰

“In construing claims, the analytical focus must begin and remain centered on the language of the claims themselves, for it is that language that the patentee chose to use to

⁷ *Dow Chem. Co. v. United States*, 226 F.3d 1334, 1338 (Fed. Cir. 2000) (“*Dow Chemical*”), citing *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed. Cir. 1995) (*en banc*), *aff’d*, 517 U.S. 370 (1996) (“*Markman*”).

⁸ *Markman, supra*.

⁹ *Bayer AG v. Elan Pharm. Research Corp.*, 212 F.3d 1241, 1247 (Fed. Cir.), *cert. denied*, 531 U.S. 993 (2000) (“*Bayer*”).

¹⁰ *Bell Atlantic Network Serv., Inc. v. Covad Communications Group, Inc.*, 262 F.3d 1258, 1267 (Fed. Cir. 2001) (“*Bell Atlantic*”).

‘particularly point [] out and distinctly claim [] the subject matter which the patentee regards as his invention.’”¹¹ Thereafter, if the claim language is not clear on its face, “[t]hen we look to the rest of the intrinsic evidence, beginning with the specification and concluding with the prosecution history, if in evidence” for the purpose of “resolving, if possible, the lack of clarity.”¹²

The specification is considered “always highly relevant” to claim construction and “[u]sually, it is dispositive; it is the single best guide to the meaning of a disputed term.”¹³ The prosecution history is also examined for a claim’s scope and meaning “to determine whether the patentee has relinquished a potential claim construction in an amendment to the claim or in an argument to overcome or distinguish a reference.”¹⁴

There is a “heavy presumption” that claim terms are to be given “their ordinary and accustomed meaning as understood by one of ordinary skill in the art,” and in aid of this interpretation, “[d]ictionaries and technical treatises, which are extrinsic evidence, hold a ‘special place’ and may sometimes be considered along with the intrinsic evidence when determining the ordinary meaning of claim terms.”¹⁵ Caution must be used, however, when

¹¹ *Interactive Gift Express, Inc. v. Compuserve Inc.*, 256 F.3d 1323, 1331 (Fed. Cir. 2001) (“*Interactive Gift Express*”), citing 35 U.S.C. § 112, ¶ 2.

¹² *Id.*

¹³ *Bell Atlantic*, 262 F.3d at 1268.

¹⁴ *Id.*

¹⁵ *Id.* at 1267-68.

referring to non-scientific dictionaries “lest dictionary definitions . . . be converted into technical terms of art having legal, not linguistic significance.”¹⁶

The presumption in favor of according a claim term its ordinary meaning is overcome “(1) where the patentee has chosen to be his own lexicographer, or (2) where a claim term deprives the claim of clarity such that there is ‘no means by which the scope of the claim may be ascertained from the language used.’”¹⁷ In this regard, “[t]he specification acts as a dictionary ‘when it expressly defines terms used in the claims or when it defines terms by implication.’”¹⁸

“[I]f the meaning of the claim limitation is apparent from the intrinsic evidence alone, it is improper to rely on extrinsic evidence other than that used to ascertain the ordinary meaning of the claim limitation. [citation omitted] However, in the rare circumstance that the court is unable to determine the meaning of the asserted claims after assessing the intrinsic evidence, it may look to additional evidence that is extrinsic to the complete document record to help resolve any lack of clarity.”¹⁹ “Extrinsic evidence consists of all evidence external to the patent and prosecution history”²⁰ It includes “such evidence

¹⁶ *Id.* at 1267 (internal quotation marks omitted).

¹⁷ *Id.* at 1268.

¹⁸ *Id.*

¹⁹ *Id.* at 1268-69.

²⁰ *Markman*, 52 F.3d at 980.

as expert testimony, articles, and inventor testimony.”²¹ But, “[i]f the intrinsic evidence resolves any ambiguity in a disputed claim, extrinsic evidence cannot be used to contradict the established meaning of the claim language.”²² “What is disapproved of is an attempt to use extrinsic evidence to arrive at a claim construction that is clearly at odds with the claim construction mandated by the claims themselves, the written description, and the prosecution history, in other words, with the written record of the patent.”²³

In interpreting particular limitations within each claim, “adding limitations to claims not required by the claim terms themselves, or unambiguously required by the specification or prosecution history, is impermissible.”²⁴ Further, a patent is not limited to its preferred embodiments in the face of evidence of broader coverage by the claims.²⁵ “[T]here is sometimes ‘a fine line between reading a claim in light of the specification, and reading a limitation into the claim from the specification.’”²⁶ On the other hand, a claim construction

²¹ *Bell Atlantic*, 262 F.3d at 1269.

²² *DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1322-23 (Fed. Cir. 2001) (“*DeMarini*”).

²³ *Markman*, 52 F.3d at 979.

²⁴ *Dayco Prod., Inc. v. Total Containment, Inc.*, 258 F.3d 1317, 1327 (Fed. Cir. 2001) (“*Dayco Products*”), citing *Laitram Corp. v. NEC Corp.*, 163 F.3d 1342, 1347 (Fed. Cir. 1998) (“*Laitram*”) (“a court may not import limitations from the written description into the claims”).

²⁵ *Acromed Corp. v. Sofamor Danek Group, Inc.*, 253 F.3d 1371, 1382-83 (Fed. Cir. 2001) (“*Acromed*”); *Electro Med. Sys. S.A. v. Cooper Life Sci., Inc.*, 34 F.3d 1048, 1054 (Fed. Cir. 1994) (“*Electro Med.*”) (“[P]articular embodiments appearing in a specification will not be read into the claims when the claim language is broader than such embodiments.”).

²⁶ *Bell Atlantic*, 262 F.3d at 1270.

that excludes the preferred embodiment in the specification of a patent is “rarely, if ever, correct.”²⁷

A patent claim limitation that is written in “means plus function” format is treated differently, however. Such a limitation identifies a function without reciting definite structure in support of that function, and as such is subject to the requirements of 35 U.S.C. § 112, ¶ 6 in discerning its meaning.²⁸ “Literal infringement of a claim containing a means clause requires that the accused device perform the identical function as that identified in the means clause and do so with structure which is the same as or equivalent to that disclosed in the specification.”²⁹ Thus, in distinct contrast to the general rule that particular embodiments in the specification are not read into claim limitations, “means plus function” claim limitations are construed according to “[d]isclosed structure . . . which is described in a patent specification, including any alternative structures identified.”³⁰ In other words, correctly construed “means plus function” limitations of claims cover “equivalents of the described embodiments.”³¹

²⁷ See *Vitronics Corp. v. Conceptoronic, Inc.*, 90 F.3d 1576, 1583-34 (Fed. Cir. 1996) (“*Vitronics*”).

²⁸ *Serrano v. Telular Corp.*, 111 F.3d 1578, 1582 (Fed. Cir. 1997) (“*Serrano*”).

²⁹ *Id.*

³⁰ *Id.* at 1583.

³¹ *Texas Instruments, Inc. v. U.S. Int’l. Trade Comm’n*, 805 F.2d 1558, 1562 (Fed. Cir. 1986) (“*Texas Instruments*”).

Claims amenable to more than one construction should, when it is reasonably possible to do so, be construed to preserve their validity.³² A claim cannot, however, be construed contrary to its plain language.³³ Claims cannot be judicially rewritten in order to fulfill the axiom of preserving their validity; “if the only claim construction that is consistent with the claim’s language and the written description renders the claim invalid, then the axiom does not apply and the claim is simply invalid.”³⁴

C. Infringement

1. Literal Infringement

Literal infringement is a question of fact.³⁵ Literal infringement requires the patentee to prove that the accused device contains each limitation of the asserted claim(s). Each element of a claim is considered material and essential, and in order to show literal infringement, every element must be found to be present in the accused device.³⁶ If any claim limitation is absent from the accused device, there is no literal infringement of that claim as a matter of law.³⁷

³² *Karsten Mfg. Corp. v. Cleveland Golf Co.*, 242 F.3d 1376, 1384 (Fed. Cir. 2001) (“*Karsten*”).

³³ *See Rhine v. Casio, Inc.*, 183 F.3d 1342, 1345 (Fed. Cir. 1999) (“*Rhine*”).

³⁴ *Id.*

³⁵ *Tegal Corp. v. Tokyo Electron America, Inc.*, 257 F.3d 1331, 1350 (Fed. Cir. 2001) (“*Tegal Corp.*”), *cert. denied*, 535 U.S. 927 (2002).

³⁶ *London v. Carson Pirie Scott & Co.*, 946 F.2d 1534, 1538 (Fed. Cir. 1991) (“*London*”).

³⁷ *Bayer*, 212 F.3d at 1247.

2. Infringement Under the Doctrine of Equivalents

Where literal infringement is not found, infringement nevertheless can be found under the doctrine of equivalents based on “the substantiality of the differences between the claimed and accused products or processes, assessed according to an objective standard” judged from “the vantage point of one of ordinary skill in the relevant art.”³⁸ Determining infringement under the doctrine of equivalents “requires an intensely factual inquiry.”³⁹

In *Warner-Jenkinson*, the Supreme Court noted that the doctrine of equivalents is subject to several limitations, including applying the doctrine to individual elements of a claim and not to the invention as a whole.⁴⁰ The court acknowledged that the commonly used “function-way-result” test is suitable in some instances, including analyzing mechanical devices.⁴¹

3. Prosecution History Estoppel

Although infringement can be demonstrated under the doctrine of equivalents in the absence of literal infringement, the doctrine of prosecution history estoppel “can prevent a patentee from relying on the doctrine of equivalents when the patentee relinquishes subject

³⁸ *Hilton Davis Chem. Co. v. Warner-Jenkinson Co., Inc.*, 62 F.3d 1512, 1518-1519 (Fed. Cir. 1995) (“*Hilton Davis*”), *rev’d*, 520 U.S. 17 (1997) (“*Warner-Jenkinson*”).

³⁹ *Vehicular Tech. Corp. v. Titan Wheel Int’l, Inc.*, 212 F.3d 1377, 1381 (Fed. Cir. 2000) (“*Vehicular Technologies*”).

⁴⁰ *Warner-Jenkinson*, 520 U.S. at 29.

⁴¹ *See Hilton Davis*, 62 F.3d at 1518 (“In applying the doctrine of equivalents, it is often enough to assess whether the claimed and accused products or processes include substantially the same function, way, and result”).

matter during the prosecution of the patent, either by amendment or argument.”⁴²

Prosecution history estoppel is a legal question for the court.⁴³

According to the rule of “amendment-based estoppel,” “when an applicant narrows a claim element in the face of an examiner’s rejection based on the prior art, the doctrine estops the applicant from later asserting that the claim covers, through the doctrine of equivalents, features that the applicant amended his claim to avoid. A patentee is also estopped to assert equivalence to ‘trivial’ variations of such prior art features.”⁴⁴ Under the rule of “argument-based estoppel,” “[c]lear assertions made during prosecution in support of patentability, whether or not actually required to secure allowance of the claim, may also create an estoppel.”⁴⁵ In determining whether estoppel exists, “[t]he legal standard for determining what subject matter was relinquished is an objective one, measured from the vantage point of what a competitor was reasonably entitled to conclude, from the prosecution history, that the applicant gave up to procure issuance of the patent.”⁴⁶

⁴² *Pharmacia & Upjohn Co. v. Mylan Pharm., Inc.*, 170 F.3d 1373, 1376-77 (Fed. Cir. 1999) (“*Pharmacia*”).

⁴³ *Bayer*, 212 F.3d at 1251-54; *Insituform Tech. v. Cat Contracting*, 99 F.3d 1098, 1107 (Fed. Cir. 1996) (“*Insituform*”), *cert. denied*, 520 U.S. 1198 (1997).

⁴⁴ *Litton Sys., Inc. v. Honeywell, Inc.*, 140 F.3d 1449, 1462 (Fed. Cir. 1998) (“*Litton Systems*”), *cert. dismissed*, 122 S. Ct. 914 (2002).

⁴⁵ *Southwall Tech., Inc. v. Cardinal IG Co.*, 54 F.3d 1570, 1583 (Fed. Cir.), *cert. denied*, 516 U.S. 987 (1995) (“*Southwall Technologies*”); *see also Canton Bio-Med., Inc. v. Integrated Liner Tech., Inc.*, 216 F.3d 1367, 1371 (Fed. Cir. 2000) (“*Canton Bio-Medical*”).

⁴⁶ *Hoganas AB v. Dresser Indus., Inc.*, 9 F.3d 948, 952 (Fed. Cir. 1993) (“*Hoganas*”).

In *Warner-Jenkinson, supra*, the Supreme Court ruled that the reason for an amendment is relevant to prosecution history estoppel, particularly when it is “tied to amendments made to avoid the prior art, or otherwise to address a specific concern -- such as obviousness -- that arguably would have rendered the claimed subject matter unpatentable.”⁴⁷ The Supreme Court further held that where the reason for an amendment is unclear, there is a presumption that prosecution history estoppel applies but is rebuttable “if an appropriate reason for a required amendment is established.”⁴⁸

In *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*,⁴⁹ the Supreme Court elaborated on its prosecution history estoppel ruling in *Warner-Jenkinson*. Concerning the kinds of amendments that may give rise to estoppel, the Supreme Court decided that “a narrowing amendment made to satisfy any requirement of the Patent Act may give rise to an estoppel.”⁵⁰ Thus, estoppel may arise not only from narrowing amendments to avoid prior art, but also from narrowing amendments to satisfy the statutory requirements of usefulness, novelty and non-obviousness (35 U.S.C. §§ 101-103) as well as the statutory requirements of adequate descriptiveness in the specification and claims, enablement, and setting forth the best mode of carrying out the invention (35 U.S.C. § 112).⁵¹ While some Section 112

⁴⁷ *Warner-Jenkinson*, 520 U.S. at 30-31.

⁴⁸ *Id.* at 33.

⁴⁹ *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 535 U.S. 722 (2002) (“*Festo*”).

⁵⁰ *Id.* at 736.

⁵¹ *Id.*

amendments may, according to the Supreme Court, be “truly cosmetic” and therefore would not narrow the patent’s scope or raise an estoppel, nevertheless “if a § 112 amendment is necessary and narrows the patent’s scope – even if only for the purpose of better description – estoppel may apply.”⁵²

The Supreme Court in *Festo* also addressed whether prosecution history estoppel bars the inventor from asserting infringement against any equivalent to the narrowed element, or whether some equivalents might still infringe.⁵³ In reversing the Federal Circuit’s ruling below that a complete bar applies, the Supreme Court instead ruled in favor of a “flexible bar” that “requires an examination of the subject matter surrendered by the narrowing amendment.”⁵⁴ Recognizing the inherent limitation of words to describe an invention, the Supreme Court held:

The narrowing amendment may demonstrate what the claim is not; but it may still fail to capture precisely what the claim is. There is no reason why a narrowing amendment should be deemed to relinquish equivalents unforeseeable at the time of the amendment and beyond a fair interpretation of what was surrendered. Nor is there any call to foreclose claims of equivalence for aspects of the invention that have only a peripheral relation to the reason the amendment was submitted. The amendment does not show that the inventor suddenly had more foresight in the drafting of claims than an inventor whose application was granted without amendments having been submitted. It shows only that he was familiar with the broader text and with the difference between the two. As a result, there is no more reason for holding the patentee to the literal terms of an amended claim than there is for

⁵² *Id.* at 736-737.

⁵³ *Id.* at 737-738.

⁵⁴ *Id.*

abolishing the doctrine of equivalents altogether and holding every patentee to the literal terms of the patent.⁵⁵

The Supreme Court in *Festo* went on to hold that there is a rebuttable presumption that a narrowing amendment creates an estoppel, and that the patentee bears the burden of rebutting the presumption by proving that the amendment does not surrender the particular equivalent in question.⁵⁶ “The equivalent may have been unforeseeable at the time of the application; the rationale underlying the amendment may bear no more than a tangential relation to the equivalent in question; or there may be some other reason suggesting that the patentee could not reasonably be expected to have described the insubstantial substitute in question.”⁵⁷ To rebut the presumption, “[t]he 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.”⁵⁸

III. DISCUSSION

A. Claim Construction

The ‘125 patent has five claims, only one of which – independent claim 1 – is at issue in this investigation. Claim 1 reads as follows:

⁵⁵ *Id.* at 738.

⁵⁶ *Id.* at 740-741.

⁵⁷ *Id.*

⁵⁸ *Id.* at 741.

An adjustable extendable ramp apparatus for mounting on a truck or other vehicle comprising:

a platform assembly having a top, opposing sides, a closed front end and an open rear end, and a hollow interior, said interior having a pair of longitudinally extending track members formed on opposite sides thereof and a plurality of evenly spaced transverse support members underneath said top, and mounting means for securely mounting said platform assembly to said vehicle;

a sliding platform contained within said platform assembly, said sliding platform having a pair of upstanding sidewalls, front and rear pairs of opposing wheels rotatably connected to said sidewalls, a single horizontal panel, said horizontal panel extending between and attached to a lower interior portion of said sidewalls of said sliding platform so as to form an open space between said sidewalls above said horizontal panel thereby providing clearance between said top and said horizontal panel, said pairs of wheels adapted to roll within said track members thereby allowing said sliding platform to be slidably displaced in the longitudinal direction within said hollow interior of said platform assembly;

an extendable ramp connected to said sliding platform and movable therewith between a fully extended position and a fully retracted position, said ramp having a pair of wheels on opposite sides thereof at a first end and a handle at a second end and also having an *extension member pivotally connected* to said ramp,

whereby clearance between said top panel and said horizontal panel of said sliding platform facilitates extension and contraction of said [sic]⁵⁹ under heavy load conditions.

See Motion Ex. 3 ('125 patent, col. 6: 9-43) (emphasis added).

⁵⁹ The original claim read “of said ramp under heavy load conditions” and it appears that the term “ramp” was inadvertently omitted as a typographical error when the patent was issued. The Staff argues that the omission does not affect the claim’s validity. Motion at 9, n. 4.

The original application for the '125 patent was filed on July 10, 1996. The original application had five claims, all of which were rejected on May 22, 1997 as unpatentable under 35 U.S.C. § 103 in view of Grant (U.S. Patent No. 5,257,894), Uher (U.S. Patent No. 4,624,619), Goeser *et al.* (U.S. Patent No. 4,685,857) and Tordella (U.S. Patent No. 4,294,571). *See* Appendix A to Amended Complaint, '125 Prosecution History. An amendment was filed on August 22, 1997 canceling claims 1-5 and adding claims 6-9. Originally filed claim 6, which subsequently became issued claim 1, read as follows:

An adjustable extendable ramp apparatus for mounting on a truck or other vehicle comprising:

a platform assembly having a top, opposing sides, a closed front end and an open rear end, and a hollow interior, said interior having a pair of longitudinally extending track members formed on opposite sides thereof and a plurality of evenly spaced transverse support members underneath said top, and mounting means for securely mounting said platform assembly to said vehicle;

a sliding platform contained within said platform assembly, said sliding platform having a pair of upstanding sidewalls, front and rear pairs of opposing wheels rotatably connected to said sidewalls, a horizontal panel extending between and attached to a lower interior portion of said platform assembly thereby providing clearance between said top and said horizontal panel, said pairs of wheels adapted to roll within said track members thereby allowing said sliding platform to be slidably displaced in the longitudinal direction within said hollow interior of said platform assembly;

an extendable ramp connected to said sliding platform and movable therewith between a fully extended position and a fully retracted position, said ramp having a pair of wheels on opposite sides thereof at a first end and a handle at a second end and also having an extension member pivotally connected to said ramp,

whereby clearance between said top panel and said horizontal panel of said sliding platform facilitates extension and contraction of said ramp under heavy load conditions.

See Appendix A to Amended Complaint, ‘125 Prosecution History.

The examiner and patentee agreed to two changes in originally filed patent claim 6, shown as follows, with deletions stricken and additions in brackets:

a sliding platform contained within said platform assembly, said sliding platform having a pair of upstanding sidewalls, front and rear pairs of opposing wheels rotatably connected to said sidewalls, ~~a horizontal panel extending between and attached to a lower interior portion of said~~ [a single horizontal panel, said horizontal panel extending between and attached to a lower interior portion of said sidewalls of said sliding] platform assembly [so as to form an open space between said sidewalls above said horizontal panel] thereby providing clearance between said top and said horizontal panel, said pairs of wheels adapted to roll within said track members thereby allowing said sliding platform to be slidably displaced in the longitudinal direction within said hollow interior of said platform assembly;

The claim, with the two changes noted above, was allowed on October 7, 1997. *See* Appendix A to Amended Complaint, ‘125 Prosecution History.

The specification provides that the general description of the invention “relates to extendable ramp assemblies for trucks. More specifically, it relates to an improved ramp assembly for trucks which is stowable underneath and contained within a platform.” *See* Motion Ex. 3 (‘125 patent, col. 1: 5-8). The specification also states that one of the objects of the invention is to “provide an improved truck ramp assembly having a movable plate assembly which allows for a substantially continuous surface from the ramp to the platform.” *See* Motion Ex. 3 (‘125 patent, col. 2: 30-34).

The primary issue relates to the “extension member” that is “pivotally connected” to a ramp. The specification states one of the functions of the “extension member” as follows:

the invention comprises an extendable ramp assembly for pickup trucks and the like. A platform assembly having a hollow interior is bolted to the floor of the truck bed. A sliding platform is adjustably positioned within the platform assembly to allow for adjusting the angle of incline of an extendable ramp which is attached thereto. The sliding platform is designed to have a minimal thickness so that compression of the platform assembly does not affect movement of the sliding platform. A hinge plate is connected to the ramp to allow for a relatively smooth and continuous surface between the ramp and the top surface of the platform assembly.

See Motion Ex. 3 (‘125 patent, col. 2: 3-14). Other functions of the “extension member,” which is labeled as “extension plate 96” are to “bridge the gap between the ramp 24 for extension or retraction” [*see* Motion Ex. 3 (‘125 patent, col. 5: 25-26)] and to be “foldable” when retracted into a storage position [*see* Motion Ex. 3 (‘125 patent, col. 5: 28-29)].

The specification also details the “pivotally connected” element as follows “[t]he extension plate 96 may then be pivoted to cover the gap between the ramp 24 and the weight bearing panel 42.” *See* Motion Ex. 3 (‘125 patent, col. 5: 47-49).

The “extension member pivotally connected” limitation of claim 1 serves two main functions: 1) it “bridges” and “covers” the gap between the ramp itself and the top of the assembly that is in the bed of the pickup truck, which is necessary in providing a “smooth and continuous surface”; and 2) it folds onto the ramp itself so that the ramp and extension member may be easily stowed in the hollow ramp assembly. Although these two elements

are not part of claim 1, the question of whether a substitute element can perform these two elements is central to the doctrine of equivalents analysis.

The undersigned concludes that the “extension member pivotally connected” language set forth in claim 1 constitutes a limitation, which is reflected in the entirety of the patent. Because the “extension member pivotally connected” language is a limitation, if the accused Load Pro device does not meet this limitation, it is undisputed that the sale or marketing of that product by respondents cannot constitute infringement.

B. Infringement

Having construed the claim term as a matter of law, the second part of the analysis requires application of the properly construed claim language to the Load Pro device. Complainant alleges that all but one of the limitations of claim 1 are literally present in the ETEC truck bed ramp. *See* Motion Ex. 2; “Complainant Charles D. Walkden’s Answers to Commission Investigative Staff’s First Set of Interrogatories,” ¶ 10. The complainant alleges that the only limitation in asserted claim 1 that is not literally infringed is the “extension member pivotally connected” to the ramp. *Id.* Complainant alleges that ETEC’s Load Pro “tailgate insert” is equivalent to the “extension member pivotally connected” limitation. *Id.*

ETEC maintains that its Load Pro product does not meet the “extension member pivotally connected” limitation. *See* Motion Ex. 4, “Response of Respondent ETEC to the Complaint Under Section 337 of the Tariff Act of 1930 as Amended and to the Notice of Investigation,” Exhibit C. ETEC alleges that complainant’s design of the extension member

increases the height of the ramp, in order to allow for storage of the extension member, which can result in the vehicle that is being loaded to “hang up” at the rear end of the platform. ETEC further alleges the Load Pro ramp avoids “the problem of vehicles hanging up at the transition” and minimizes “the height of the cavity,” but for low-slung vehicles, removable tailgate inserts provide transition from the ramp to the platform. *See* Motion Ex. 4, “Response of Respondent ETEC to the Complaint Under Section 337 of the Tariff Act of 1930 as Amended and to the Notice of Investigation,” Exhibit C. ETEC argues that its Load Pro product does not have an extension member because the removable tailgate inserts are “*not required to use the product, nor are they connected in any way to the product*” (emphasis in original). *See* Motion Ex. 6, “ETEC’s Response to Commission Investigative Staff’s Interrogatories,” ¶ 14.

ETEC’s Load Pro tailgate insert is described in an ETEC brochure as follows:

The ***Tailgate inserts*** are placed on the tailgate between the loading platform and the cargo deck. They have a specially designed “arched” profile to make it easier to load anything with minimal ground clearance. The mowing deck gage wheels actually ride on inserts to prevent scraping. When loading a motorcycle, you can move the inserts together in the center of the tailgate providing a smooth transition from the loading platform to the cargo deck. The inserts are molded rubber to protect the under carriage of your motorcycle if it does contact them. When you are finished loading, they can be stored behind the wheel well next to the tailgate.

(emphasis in original). *See* Motion Ex. 5, “Load Pro brochure.”

The Load Pro does not have an extension plate attached to the ramp itself, but has removable rubber “tailgate inserts” that must be put in place by the user in between the ramp

and the surface of the ramp assembly in which the ramp is stowed when not in use. Two tailgate inserts are included with each Load Pro that is sold. *See* Motion Ex. 6, “ETEC’s Response to Commission Investigative Staff’s Interrogatories,” ¶ 15. When loading vehicles with different wheelbases onto the truck bed ramp, the tailgate inserts must be repositioned. *See* Motion Ex. 7, “Load Pro Manual.” And when the tailgate inserts are not in use, they must be stowed in the pickup truck bed. *See* Motion Ex. 5, “Load Pro brochure.”

ETEC’s Load Pro tailgate insert is not equivalent to the “extension member pivotally connected” limitation. Specifically, (1) the tailgate inserts do not cover the gap between the ramp and the ramp assembly, and therefore do not perform the function of providing a smooth and continuous surface between the two components; and (2) it is not possible to fold the tailgate inserts and store them in the ramp assembly for storage when the ramp is not in use, and therefore is not “pivotally connected.” In fact, not only do the tailgate inserts not cover the gap between the ramp and the ramp assembly, but the tailgate inserts only fill a small portion of the gap, which results in a discontinuous surface between the ramp and the ramp assembly. This is further emphasized in the Load Pro manual which states that “Improper Tailgate Insert position when loading and unloading vehicles could result in serious personal injury and death.” *See* Motion Ex. 7, “Load Pro Manual.” In discovery, complainant acknowledged that there were differences between its products and ETEC’s Load Pro product. Complainant specifically stated that the “Load Pro was less versatile,

heavier to life and had to move the uhmw⁶⁰ blocks in and out for the various pieces of equipment.” *See* Motion Ex. 2; “Complainant Charles D. Walkden’s Answers to Commission Investigative Staff’s First Set of Interrogatories,” ¶ 12(f). Based on the foregoing, the Load Pro cannot perform in the same manner as the extension member called for in claim 1.

It is hereby concluded that, although the extension member referred to in claim 1 and the Load Pro’s tailgate insert both allow a user to load a vehicle onto a truck without having the vehicle fall into the gap between the tailgate and the ramp assembly, the two items are significantly different from in each other, do not operate in substantially the same way, and therefore are not equivalent. In addition, the Load Pro’s tailgate inserts are not pivotally connected to the ramp assembly, because they cannot be stored inside the ramp assembly and must be removed when not in use. The differences between the Load Pro and complainant’s extension member can easily be seen upon examination of the Load Pro. *See* Motion Ex. 5, “Load Pro brochure,” and Motion Ex. 7, “Load Pro Manual.” *See also* SPX-1, “loadall.com video clip.” Given the proper construction of the “extension member pivotally connected,” the accused Load Pro device does not literally infringe or infringe by the doctrine of equivalents, the asserted claim.

⁶⁰ According to the Staff, uhmw is an abbreviation for “ultra high molecular weight.” *See* Motion at 13, n. 6.

Although certain modifications were made to the claim language during the prosecution history, there is no issue regarding prosecution history estoppel because the “extension member pivotally connected” language was not the language modified during the prosecution history.

IV. CONCLUSION

Accordingly, the motion for summary determination (485-004) is hereby granted, and this investigation is terminated upon a finding of no violation of Section 337.

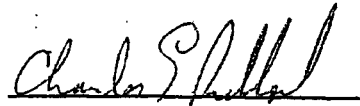
This initial determination is hereby certified to the Commission, along with supporting documentation. Pursuant to 19 C.F.R. § 210.42(h), this Initial Determination shall become the determination of the Commission unless a party files a petition for review of the Initial Determination pursuant to 19 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.

Within seven days of the date of this document, each party shall submit to the Office of the Administrative Law Judges a statement as to whether or not it seeks to have any portion of this document deleted from the public version. The parties’ submissions may be made by facsimile and/or hard copy by the aforementioned date.

Any party seeking to have any portion of this document deleted from the public version thereof must submit to this office a copy of this document with red brackets indicating any portion asserted to contain confidential business information. The parties’

submissions concerning the public version of this document need not be filed with the
Commission Secretary.

SO ORDERED.

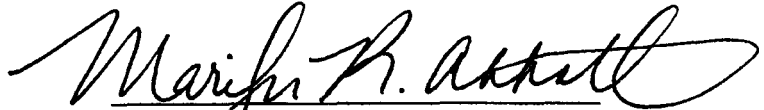

Charles E. Bullock
Administrative Law Judge

**IN THE MATTER OF CERTAIN TRUCK BED RAMPS
AND COMPONENTS THEREOF**

INV. NO. 337-TA-485

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **ORDER** was served upon, Thomas S. Fusco, Esq., Commission Investigative Attorney, and the following parties via first class mail and air mail where necessary on August 1, 2003.



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**IN THE MATTER OF CERTAIN TRUCK BED RAMPS
AND COMPONENTS THEREOF**

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CERTIFICATE OF SERVICE page 2

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**IN THE MATTER OF CERTAIN TRUCK BED RAMPS
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INV. NO. 337-TA-485

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