

United States District Court,  
M.D. Florida, Orlando Division.

**THERMAL TECHNOLOGIES, INC., Roland B. Leavens,**  
Plaintiffs.

v.

**DADE SERVICE CORPORATION,**  
Defendant.

No. 6:03-cv-1414-Orl-31JGG

**June 14, 2004.**

Gary R. Maze, Richard T. Redano, Rudolph J. Szabados, Duane Morris LLP, Houston, TX, Harvey Walter Gurland, Jr., James A. Weinkle, Duane Morris LLP, Miami, FL, Robert L. Wolter, Beusse, Brownlee, Wolter, Mora & Maire, P.A., Orlando, FL, for Plaintiffs.

Robert L. Wolter, Beusse, Brownlee, Wolter, Mora & Maire, P.A., Orlando, FL, for Defendant.

## **ORDER**

**GREGORY A. PRESNELL, District Judge.**

This case is before the Court on separate motions to construe terms in two patents. FN1 In regard to U.S. Patent 5,778,557 ("557 Patent"), Plaintiff Thermal Technologies, Inc. ("Thermal") filed an Opening Claim Construction Brief (Doc. 66), and Defendant Dade Service Corporation ("Dade") filed its Response (Doc. 70). In regard to U.S. Patent 5,531,158 ("158 Patent"), Dade filed an Opening Brief on Claim Construction (Doc. 67), and Thermal filed its Response (Doc. 69). On May 21, 2004, after the foregoing exchange of briefs, the Court held a hearing in this matter.

FN1. Such motions are generally referred to as *Markman* motions after *Markman v. Westview Investments, Inc.*, 52 F.3d 967 (Fed.Cir.1995).

### **I. BACKGROUND**

This case began with Thermal's Complaint (Doc. 1) against Dade for infringement of the 557 Patent, to which Thermal claims an exclusive license. Dade subsequently filed a counterclaim against Thermal for infringement of the 158 Patent, which Dade claims to own. (Doc. 38). Both the 557 Patent and the 158 Patent pertain to the art of commercial food storage and concern methods and apparatuses for regulating the circulation of fluid or gas in relation to stored food stuffs. In an effort to delineate the metes and bounds of their respective patents, the parties dispute the meaning of certain patent terms. FN2

FN2. In the exchange of briefs and at oral argument, the parties significantly reduced the number of disputed terms. The Court will address only those disputes that remain.

## II. ANALYSIS

It is well established that patent claim construction is a question of law for the Court's determination. *Markman*, 52 F.3d at 979. The goal is to determine how a patent claim's terms would be understood by a person of ordinary skill in the relevant art at the time of the invention. *Id.* at 986. This analysis begins with an examination of the intrinsic evidence, that is, the claims, the patent specification, and the prosecution history. *Apex Inc. v. Raritan Computer, Inc.*, 325 F.3d 1364, 1371 (Fed.Cir.2003). Among these forms of intrinsic evidence, the analysis begins first with a claim's terms and the "strong presumption" that they carry their ordinary meaning as viewed by a person of ordinary skill in the art. *Id.* Although the Court may rely on extrinsic evidence, such as expert testimony, that is appropriate only to the extent the Court is unable to construe the disputed terms from the totality of intrinsic evidence. *Vitronics Corp. v. Conceptronc Inc.*, 90 F.3d 1576, 1584 (Fed.Cir.1996).

Claim construction differs somewhat for a specific subset of patent limitations, defined and governed according to the following statutory language in the United States Code:

An element in a claim for a combination may be expressed as a means ... for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.

35 U.S.C. s. 112 para. 6. Such patent claim terms are known generally as "means-plus-function" limitations. *Apex*, 325 F.3d at 1371. A patent applicant may use means-plus-function limitations to claim a element of an apparatus functionally, that is, without reciting in the claim the structure to perform that function. *Id.*

If a patent claim uses the term "means," a rebuttable presumption arises that the claim presents a "means-plus-function" limitation. *Id.* Conversely, if the term "means" is not used, a rebuttable presumption arises that the claim does not present a "means-plus-function" limitation. *Id.* A party seeking to overcome either presumption must do so by a preponderance of evidence. *Id.* at 1372. When, for instance, the term "means" is not recited in a claim, a party seeking to portray the claim as a means-plus-function limitation must establish that "the claim term fails to recite sufficiently definite structure or else recites a function without reciting sufficient structure for performing that function." *Id.* (citations and internal quotation marks omitted). Absent a sufficient rebuttal, the existing presumption will prevail. *Id.*

### A. The 557 Patent's **Disputed Terms**

For the 577 Patent, the parties dispute the meaning of the terms set apart with emphasis in following claims:

[Claim] 19. Apparatus for controlling temperature or atmospheric effects on stored product, comprising:

[a.] a chamber defined by a floor, ceiling and sidewalls;

[b.] alignment structure within the chamber for spacing stored product apart from the sidewalls, the stored product having a height;

[c] a *flexible sealing member* for dividing the chamber into a first volume between the stored product and a sidewall and a second volume outside the first volume;

[d.] one or more parallel, *movable sealing baffles* operatively connected to the chamber and extending along the height of the product for forming a seal between the product and the sidewall; and

[e.] a fluid control unit for injecting fluid of a selected type or temperature into one of the first and second volumes, thereby causing the fluid to flow through the stored product.

[Claim] 35. Apparatus for controlling temperature or atmospheric effects on stored product, comprising:

[a.] a chamber defined by a floor, ceiling and sidewalls for storing product;

[b.] a *flexible sealing member* adjacent to the stored product for dividing the chamber into a first volume and a second volume;

[c] a *movable sealing baffle* operatively connected to the chamber and extending the height of the product for controlling fluid flow through the chamber; and

[d.] a fluid control unit for injecting fluid into one of the first and second volumes.

(Doc. 66, Ex. A, cols.8-10). FN3

FN3. At the outset of the Courts analysis for the 557 Patent's Claims 19 and 35 and, below, for the 158 Patent's Claim 1, the Court quotes the disputed claims and adds letter designations for each of the Claims' subclauses. These letter designations, such as 19a, are used for identification purposes in this Order and do not appear in text of the Patents.

## 1. "Flexible Sealing Member(s)"

Claims 19 and 35 of the 557 Patent present close variations in regard to the term "flexible sealing member," and neither claim uses the term "means" to recite any limitation of the claimed apparatus. ( *Id.* cls. 19c, 35b) Although Dade acknowledges that the term "flexible sealing member" is presumptively not a means-plus-function limitation, Dade contends that Claims 19 and 35 fail to recite sufficient structure to perform the desired function. (Doc. 70 at 3). As support for this assertion, Dade has provided the affidavit of a potential expert witness, who states that the term does not have a generally understood meaning in the art of food storage. ( *See id.* Ex. 8, para. 8). Dade's other support for its assertion is an analogy between language used in the 557 Patent's claims and in the patent claims at issue in *Mas-Hamilton Group v. LaGard, Inc.*, 156 F.3d 1206, 1213-1215 (Fed.Cir.1998).

*Mas-Hamilton* involved a patent for a "High Security Electronic Dial Combination Lock" which included, *inter alia*, a claim requiring: "a *movable link member* for holding the lever out of engagement with the cam surface before entry of a combination and for releasing the lever after entry of the combination." *Id.* at 1209, 1214 (emphasis in original). Although the claim did not contain the term "means," the *Mas-Hamilton* court opined that the language, as to the two functions the "movable link member" performs, is precisely what was

contemplated by the statute governing means-plus-function limitations. *Id.* at 1215. Accordingly, the court concluded that "movable link member" was such a limitation. *Id.*

According to Dade, *Mas-Hamilton* reveals the term "flexible sealing member" to be a means-plus-function limitation. Yet, unlike the context in *Mas-Hamilton*, Claims 19 and 35 of the 557 Patent set forth, in relevant part, simple structural limitations starting with "a chamber defined by a floor, ceiling, and sidewalls" which together with certain internal barriers direct fluid flow in relation to stored product. (Doc. 66, Ex. A). Dade concedes that "member" connotes a part of this apparatus, "flexible" indicates that the member is capable of being bent or flexed, and "sealing" indicates that the member prevents air leakage. (Doc. 70 at 3). In regard to the flow directing function in Claims 19 and 35, the term "flexible sealing member" is one in a set of sufficiently definite performing structures. The presumption against the term being a means-plus-function limitation, therefore, prevails, and this term carries the following ordinary meaning in the following claims:

*Claim 19c*: a flexible constituent part of the apparatus that divides and seals the chamber into a first volume between the stored product and a sidewall and a second volume outside the first volume; and

*Claim 35b*: a flexible constituent part of the apparatus that divides and seals the chamber into a first volume and a second volume. FN4

FN4. A flexible sealing member cannot divide the chamber into two separate volumes without forming a complete or substantially complete seal with stored product. Moreover, unless the member is interpreted to perform a sealing function, the "sealing" limitation is rendered superfluous.

## 2. "Movable Sealing Baffle(s)"

The parties' other claim-construction dispute concerns the meaning of the term "movable sealing baffle" in the following two limitations: "one or more parallel, movable sealing baffles operatively connected to the chamber and extending along the height of the product for forming a seal between the product and the sidewall," (Doc. 66, Ex. A, cl. 19d); and "a movable sealing baffle operatively connected to the chamber and extending the height of the product for controlling fluid flow through the chamber, ( *Id.* cl. 35c).

As to these limitations, Thermal and Dade propose competing interpretations, Thermal's toward abstraction, and Dade's toward a preferred embodiment. Thermal suggests that the term "movable sealing baffle" should be read broadly to include a baffle capable of partial movement, flexing, vibration, and compression in response to force. ( *See* Doc. 80 at 37). Dade contends that the term "movable sealing baffle" describes a unitary baffle capable of being moved, in its entirety, into or out of a sealing arrangement between the sidewall and the stored product, so as to change the volume of the chamber to account for different sized loads of stored product. (Doc. 70 at 11). Thermal, in response, points out that Claims 19d and 35c do not say a " 'baffle that's movable in its entirety.' It just says, 'a movable sealing baffle.' Dade is seeking to add extraneous limitations." ( *Id.* at 15).

To be sure, the Court cannot read extraneous limitations into a claim. *See* *Intervet America, Inc. v. Kee-Vet Labs., Inc.*, 887 F.2d 1050, 1053 (Fed.Cir.1989). Nevertheless, "[i]n judicial 'claim construction' the court must achieve the same understanding of the patent, as a document whose meaning and scope have legal consequences, as would a person experienced in the technology of the invention." *Toro Co. v. White*

Consol. Indus. Inc., 199 F.3d 1295, 1299 (Fed.Cir.1999). This is not achieved by simply relying on a dictionary of general linguistic usage. *Id.* The meaning of a claim is to be understood in context. *See id.*; *Renishaw PLC v. Marposh Societa' per Azioni*, 158 F.3d 1243, 1251 (Fed.Cir.1998).

Although, in certain contexts, the term "moveable" may be understood, in a very general sense, to connote any type of movement, including flexing, the context of the instant claims does not admit such a meaning. Thermal's construction of the term "movable sealing baffle" conflates that term with the term "flexible sealing member." Neither the claim, nor the other intrinsic evidence, would put a person of ordinary skill in the art on notice of such a meaning. Rather, the movement about which the 557 Patent gives notice is a baffle's capacity to be moved, as an entire unit, into and out of a sealing orientation in respect to the chamber and the stored product. FN5 The Court thus concludes that the term "movable sealing baffle" carries the following meaning in the following claims:

FN5. This understanding of the term "movable sealing baffle" extends to both Claims 19 and 35. The Court may undertake a more precise construction of that term once the issues, or contested embodiments, are drawn into sharper focus. Suffice it to say that the Court views the probable function of the movable sealing baffle(s) as being to reduce the volume (size) of the "first" or "second" volume into which the fluid control unit injects fluid. Variations in the amount of stored produce could create a need to reduce the volume into which fluid is injected. It appears, for instance, that a chamber half full of stored product would require a movable sealing baffle and a flexible sealing member to work together, in relation to the stored product, to create a division between-thus, creating-the first and second volumes.

*Claim 19d*: one or more parallel structures, operatively connected to the chamber and extending along the height of the product, that deflect, check, or regulate fluid flow by being positioned, as entire units, to create a seal between the sidewall and the stored product; and

*Claim 35c*: a structure, operatively connected to the chamber and extending the height of the product, that deflects, checks, or regulates fluid flow by being positioned, as an entire unit, to create a seal between the chamber FN6 and the stored product.

FN6. Claim 19 explicitly limits the sealing orientation to between the sidewall and the product. Claim 35 appears to contain the same limitation as the baffle "extends the height" of the product.

## **B. The 158 Patent's Disputed Terms**

For the 158 Patent, the parties dispute the meaning of the terms set apart with emphasis in the following claim:

[Claim] 1. A produce-ripening apparatus comprising:

[a.] a ripening chamber with front, rear and side walls, a floor and a ceiling;

[b.] the ripening chamber having design dimensions for containment of a pallet rack of a desired size and for providing design circulation of controlled atmosphere exterior to the pallet rack;

[c.] a door in a desired wall of the ripening chamber;

[d.] design airtightness of the ripening chamber with the door closed;

[e.] design thermal insulation of the walls, ceiling and floor of the ripening chamber;

[f.] an atmosphere conditioner in atmosphere-conditioning relationship to space inside of the ripening chamber;

[g.] at least two rack pillars of the pallet rack spaced apart a distance to receive two pallets juxtaposed on opposite sides of *a central circulation section* and to allow design side clearance intermediate outside lateral edges of the two pallets and inside lateral edges of the rack pillars;

[h.] the pallet rack being extended in length to receive a design plurality of juxtaposed pallets end-to-end;

[i.] the rack pillars being extended a vertical distance to receive at least one tier of produce crates stacked on the two pallets;

[j.] horizontal rack structure extended intermediate the rack pillars at a position vertically above the produce crates;

[k.] at least one top horizontal baffle positioned centrally *on* the horizontal rack structure;

[l.] at least one pressurizer positioned centrally on the top horizontal baffle and having fluid communication with conditioned atmosphere provided by the atmosphere conditioner;

[m.] at least one pressurization conveyance in fluid communication *intermediate the pressurizer and the central circulation section*; and

[n.] *circulation seal means in sealing relationship between the top horizontal baffle and a high-pressure plenum in a return conveyance to the pressurizer respectively for each of the design plurality of juxtaposed pallets from end-to-end of the pallet rack.*

(Doc. 68, Ex. 2, col.8).

From the foregoing language, it is clear that the 158 Patent contemplates a fairly definite and substantial internal structure. This internal structure provides a context from which to derive the meaning of the 158 Patent's disputed terms.

## 1. "On"

The most basic of the 158 Patent's disputed terms is the term "on" in the following limitation: "at least one top horizontal baffle positioned centrally on the horizontal rack structure." ( Id.) Thermal claims that "on" signifies that the top horizontal baffle is supported by the horizontal rack structure. (Doc. 69 at 10-11). Dade counters that "on" need not mean that those items touch one another; rather, "on" may signify that the top horizontal baffle is elevated above but in close proximity to the horizontal rack structure. (Doc. 67 at 10).

The full ordinary meaning of a term is presumptively the meaning the term carries in a patent. *See Johnson Worldwide Assocs., Inc., v. Zebco Corp.*, 175 F.3d 985, 989 (Fed.Cir.1999). Among the foregoing interpretations of the term "on," Thermal's uses the ordinary meaning, and Dade's uses a figurative one. To support its interpretation, Dade argues that "vertical seals" positioned beneath the top horizontal baffle could provide independent support for the baffle. ( *See* Doc. 68, Ex. 2, fig. 1, items 26-27). Yet the Claim itself provides no structure for, nor does it even mention, vertical seals. Instead, the vertical seals to which Dade refers are described in the 158 Patent's specification as extending down from the top horizontal baffle,FN7 and all relevant indicators suggest that those vertical seals are themselves supported by the horizontal rack structure.FN8 Dade's construction is strained to say the least. The top horizontal baffle is not simply near the horizontal rack structure.

FN7. The specifications specifically states that "[a]n upper vertical seal is extended vertically down from opposite sides of the top horizontal baffle to sealing contact with top inside edges of a top tier of produce crates stacked on a top tier of pallets." ( *Id.* col. 2).

FN8. Even if it were appropriate for the Court to import limitations from the patent specification into the claims, the specification indicates that the vertical seals do not have a supportive function. As the vertical seals rest against the stored product, Dade appears to suggest an absurd design in which key internal structures would collapse, if not otherwise supported, when product is removed from the chamber. The rack pillars are the only apparatus structures indicated in the claim as supporting the horizontal rack structure and the structures on and extending down from the horizontal rack structure.

To put the top horizontal baffle in perspective, at least one pressurizer (fan) FN9 rests centrally on the top horizontal baffle, (Doc. 68, Ex. 2, claim 11); the baffle, itself, rests centrally on the horizontal rack structure, ( *id.* cl.1k); the horizontal rack structure spans between, and rests on, at least two rack pillars, ( *id.* cl.1j); the horizontal rack structure is thereby suspended vertically above an area of space between the rack pillars, separated wide enough to receive two pallets juxtaposed on opposite sides of a "central circulation section," ( *id.* cls. 1g, j). Consistent with these structural limitations, the top horizontal baffle, and pressurizer(s), are centrally suspended above a "central circulation section." The term "on" in Claim 1 means "on, that is, supported by, ..."

FN9. Dade indicates that a "pressurizer" is a fan. (Doc. 67 at 11)

## **2. "Intermediate the pressurizer and the central circulation section "**

In regard to the foregoing relative arrangement, the Patent further provides for "at least one pressurization conveyance in fluid communication intermediate the pressurizer and the central circulation section." ( *Id.* cl. 1m). Thermal contends that the term "intermediate the pressurizer and the central circulation section" means "located between the pressurizer and the central circulation section." (Doc. 69 at 12). Dade contends that the same term means "a gas flow mechanism that transports air, such as a duct or venturi, at least a portion of which is between the pressurizer-fan and the central circulation section." (Doc. 67 at 11).

In light of the foregoing proposed claim constructions, the Court finds no dispute as to the term "intermediate the pressurizer and the central circulation section." FN10 In Claim 1, the term "intermediate

the pressurizer and the central circulation section" means between the pressurizer and the central circulation.

FN10. Dade's construction unaccountably redirects the dispute, if any, to the term "conveyance." In this way, Dade has simply failed to put the Court on notice of what it disputes. To avoid further confusion, however, the Court reads Claim 1m to mean: at least one structure to convey pressurized fluid (gas) between the pressurizer and the central circulation section. *See infra* analysis of the term "pressurization conveyance" in relation to the term "central circulation section."

### 3. "Central circulation section"

A further stage in the above-described internal structure is the disputed "central circulation section." (Doc. 68, Ex. 2, cl.1g). The dispute, in this regard, is not its location; it is centrally located beneath the horizontal rack structure and between juxtaposed pallets. Rather, the parties dispute whether the "central circulation section" has a functional attribute, i.e., a high-pressure state in operation. Thermal contends that the central circulation section is a high-pressure plenum. (Doc. 69 at 7). Dade counters that this is not necessarily so. (Doc. 67 at 8-9). In regard to this dispute, the 158 Patent's prosecution history dictates what the foregoing analysis clearly implies, to wit, that the central circulation section is a high pressure plenum.

In the course of the 158 Patent's prosecution, the Patent Applicant filed with the U.S. Patent Office a document containing the following statement:

Applicant elects Group I for examination which is represented by drawing figures 1-4, which group is distinguished by the inclusion of a central high pressure plenum 25, FN11 and covered by claims 1 (generic), 2, 3, 4, 5, 6, 17, 18, 19, 20, 21, 22, 23, 24, 27, 28 and 29.

FN11. This numeric reference as well as the reference to drawing figures 1-4 refer to figures 1-4 ultimately contained in the 158 Patent.

Applicant makes this election with traverse as Applicant has noted that the central high pressure plenum is contained in **all embodiments** and any additional items are merely minor improvements or modifications and thus, **all claims** should be kept in the same application for examination.

(Doc. 68, Ex. 3, at 69-70).

Thermal claims that the foregoing statement is a prosecution disclaimer, which prevents Dade from recapturing through claim construction a meaning foreclosed by unambiguous representations the Applicant made in prosecuting the patent application. *See Omega Eng'g., Inc. v. Raytek Corp.*, 334 F.3d 1314, 1324 (Fed.Cir.2003). The Court agrees. Although Dade argues that the statement refers to fewer than all possible embodiments of the invention, ( *see* Doc 67 at 8-9), that argument is incorrect. The statement unambiguously refers to **all embodiments** and was made to pursue all claims-not simply those claims enumerated in the statement, but all claims from 1 through 29. (Doc. 68, Ex. 3, at 69-70). Specifically, the statement was made in response to a U.S. Patent Office action requiring the Applicant to elect from Claims 1 through 29, or restrict all those claims to, one patentable species of invention. ( *Id.* at 64-65, 69). The Applicant's response, in part, restricted all embodiments of Claims 1 through 29 to embodiments containing a central high pressure plenum. FN12 ( *Id.* at 69-70). Accordingly, Dade is estopped from claiming that the central circulation section is not a high pressure plenum.

FN12. The U.S. Patent Office thereafter issued the 158 Patent on Claims 1 through 28, which include claims not specifically enumerated (elected) in the Applicant's above-quoted statement. Only Claim 29 was denied, and it was denied as being anticipated by the prior art. ( Id. at 72-74).

Even if this patent history disclaimer had not occurred, the context of Claim 1 reveals that the central circulation is a high pressure plenum. As previously discussed, Claim 1's horizontal rack structure, top horizontal baffle, and pressurizer(s) are centrally suspended above a "central circulation section," and located between the pressurizer(s) and the "central circulation section" is a "pressurization conveyance," which Dade describes as a duct. From these limitations, the pressurizer(s) can conceivably operate in only two ways, either to drive fluid (gas) into the central circulation section or to draw it out. In an area beneath a pressurizer, the latter operation would create a vacuum that would extend through the "pressurization conveyance" into the central circulation section, and thereby improperly render the "pressurization conveyance" a "vacuum conveyance." FN13 In its immediate context, the term "pressurization conveyance" carries with it the unambiguous connotation that it conveys fluid (gas) at high pressure from a pressurizer into a central circulation section. In this way, the central circulation section becomes a high pressure plenum relative, for instance, to the area above the pressurizer(s). Accordingly, the term "central circulation section" means a central high-pressure plenum.

FN13. The Court readily accepts Dade's characterization of the "pressurization conveyance" as a duct because such structures fulfill a containment function that the Court recognizes as essential to conveying gases. Ducts convey gas at low or high pressure relative to their exterior. If it were not sealed in some manner, the conveyance would serve no operative function in regard to the Claim's other recited limitations. To interpret the conveyance as conveying gas at low pressure (vacuum), would read the word "pressurization" out of the relevant limitation.

#### **4. "Circulation seal means...."**

The parties' final claim-construction dispute concerns the following limitation: "circulation seal means in sealing relationship between the top horizontal baffle and a high-pressure plenum in a return conveyance to the pressurizer respectively for each of the design plurality of juxtaposed pallets from end-to-end of the pallet rack." (Doc. 68, Ex. 2, cl.1n). Yet because the parties agree that this is a means-plus-function limitation, the dispute concerns only which structures recited in the 158 Patent's specification function as a circulation seal means. *See* 35 U.S.C. s. 112 para. 6. In resolving this dispute, the Court need not address parties' arguments in tedious detail because the structures (items) that contribute to the circulation seal are sufficiently clear from the following text in the 158 Patent's specification:

*An upper vertical seal is extended vertically down from opposite sides of the top horizontal baffle to sealing contact with top-inside edges of a top tier of produce crates stacked on a top tier of pallets. A lower-tier vertical seal is extended from bottom-inside edges of a pallet-guide sealing rail on which the top tier of produce crates is stacked and positioned in sealing relationship to top-inside edges of a lower tier of produce crates. Vertical cell baffles are extended vertically between top-inside and bottom-inside edges of the stacks to complete a sealed compartment between all sides of the space between separate modular pairs of crates. A pressurization fan is positioned to pressurize conditioned air from a room conditioner to a separate high-pressure plenum within each sealed compartment. The pressurized and refrigerated air ... is then directed through ventilation apertures in the crates where it contacts produce in the crates. The air*

escapes horizontally to low-pressure plenums at outside edges of the tiers and is recirculated. \* \* \* This embodiment is primarily for processing bananas.

Controlled ripening of other types of produce ... can also be profitable. Other produce, however, is packed in a wide variety of crates that do not conform to the sealing and ventilating features with the uniformity of banana crates. For this purpose, general ripening rooms for produce packed in different sizes and shapes of crates can be provided with a high-pressure plenum comprising entire rooms of pallet stacks instead of only an interstitial space between them.

This is accomplished by extending the top horizontal baffle to a position above outside edges of stacks. A controllable plenum valve, preferably a long butterfly type, is positioned between an inside periphery of the room and the extended top baffle plate.

(Doc. 68, Ex. 2, cols.2-3) (emphasis added).

It is readily apparent that, for Claim 1 of the 158 Patent, the "circulation seal means ... for each of the design plurality of juxtaposed pallets from end-to-end of the pallet rack" can involve a combination of some or all of the items described in the foregoing text and further identified in patent figures as items 26, 27, 28, 29, 36, 37, 38, 39, 42, and 45. ( *See id.* & figs. 1-6, 8).FN14 Thermal argues to no avail that the plenum valve described in the foregoing text is the only possible circulation seal means. The plenum valve, further identified in patent figures as item 50, is a distinguishing aspect of Claim 9 of the 158 Patent. ( *See id.* cols. 10-11 & figs. 5-8).

FN14. One way in which Claims 1 and 2 of the 158 Patent may be differentiated is the explicit location of seals recited in Claim 2. ( *See id.* cols. 8-9).

### **III. CONCLUSION**

The Court construes the disputed terms in Claims 19 and 35 of the 557 Patent and in Claim 1 of the 158 Patent as stated in the foregoing analysis.

**DONE and ORDERED.**

M.D.Fla.,2004.

Thermal Technologies, Inc. v. Dade Service Corp.

Produced by Sans Paper, LLC.