

**ENTERED**

October 21, 2019

David J. Bradley, Clerk

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

ASSET GUARD PRODUCTS INC.; dba  
FALCON TECHNOLOGIES AND  
SERVICES, INC.,

Plaintiff,

VS.

SENTINEL CONTAINMENT, INC.,

Defendant.

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CIVIL ACTION NO. 4:17-CV-971

**ORDER**

Before the Court is Defendant Sentinel Containment, Inc.’s Motion for Partial Summary Judgment (Doc. No. 69). Plaintiff Asset Guard Products Inc. has filed a response (Doc. No. 70), and Defendant filed a reply (Doc. No. 72). After careful consideration, the Court **GRANTS** Defendant’s Motion.

**I. Background Facts**

Plaintiff is the owner by assignment of the United States Patent No. 9,410,302 (‘302 patent or patent-in-suit). That patent relates to the construction of an improved tank base, which is designed to protect against spills and leaks associated with wear-and-tear on tanks. Relevant to Defendant’s Motion, the ‘302 patent includes independent claims 1, 15, and 24 (Doc. No. 21, Ex. A at 9–10). These claims require, in relevant part, substrates that have: (1) first and second parts; and (2) elastomers encapsulating those parts. (*Id.*; Doc. No. 52 at 3).

After holding a hearing pursuant to *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 390 (1996), the Court issued its Memorandum and Order on Claim Construction (Doc. No. 42) (“*Markman* Order”). Among other terms, it construed the term “encapsulated/encapsulating” to

mean “coated on all surfaces.” (*Id.* at 4). Plaintiff then amended its complaint and filed its final infringement contentions (Doc. Nos. 52 and 54).

In its amended complaint, Plaintiff asserts that Defendant directly infringes claims 1–3, 5, 7–8, 10–17, 19, 21, 23–25, and 27 of the ‘302 patent (Doc. No. 52). Specifically, Asset Guard alleges infringement of its ‘302 patent through Sentinel’s logo tank pads and non-logo pads.<sup>1</sup> (*Id.* at 6). Plaintiff further contends that the logo pads include black paint and a “coating surround[s] each part, except for an uncoated portion that forms the Sentinel logo.” (Doc. No. 54 at 2, 15, 25).

Defendant initially moved for partial judgment on the pleadings alleging that Plaintiff admitted that Sentinel’s logo pads are not coated on all surfaces by an elastomer “because the logo on each part is admittedly not coated.” (Doc. No. 60 at 5). Plaintiff disputed Defendant’s contention that the black paint forming the Sentinel’s logo is not in fact an elastomer (Doc No. 62 at 11–12). The Court denied Sentinel’s Motion without prejudice and further ordered:

Defendant may reassert its motion as a motion for summary judgment pursuant to FED. R. CIV. P. 56 upon completion of the following:

- Defendant is ordered to provide Plaintiff the paint samples . . . by July 9, 2019.
- Upon completion of paint-sample testing, but no later than August 6, 2019, Plaintiff may file amended infringement contentions, if needed, with regard to the “Logo Pads” issue, only.
- If Plaintiff amends its contentions and if Defendant so wishes, Defendant may move for partial summary judgment on the “Logo Pad” issue by August 16, 2019.
- If [Defendant] so moves, [Plaintiff] has until August 30, 2019 to respond.

(Doc. No. 64). Plaintiff did not amend its infringement contentions. Nevertheless, Defendant moved for partial summary judgment on the logo pads issue on August 8, 2019 (Doc. No. 69). It

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<sup>1</sup> The top of the logo tank pads (“logo pads”) feature four images of Sentinel’s logo – a sentinel’s (or traditional Roman soldier’s) head.

asserts that its logo pads do not infringe the patent-in-suit because Sentinel's logo appears "on a major face of each part that is not coated with an elastomer but rather comprised of a non-elastomeric black paint." (*Id.* at 1).

## II. Legal Standard

Summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). "The movant bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of material fact." *Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 261 (5th Cir. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–25 (1986)). Once a movant submits a properly supported motion, the burden shifts to the non-movant to show that the Court should not grant the motion. *Celotex*, 477 U.S. at 321–25.

The non-movant then must provide specific facts showing that there is a genuine dispute. *Id.* at 324; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court must draw all reasonable inferences in the light most favorable to the nonmoving party in deciding a summary judgment motion. *Id.* at 255. The key question on summary judgment is whether there is evidence raising an issue of material fact upon which a hypothetical, reasonable factfinder could find in favor of the nonmoving party. *Id.* at 248.

Evaluation of a motion for summary judgment of noninfringement is a two-step process. *See Abbott Labs. v. Sandoz, Inc.*, 566 F.3d 1282, 1288 (Fed. Cir. 2009), *cert. denied*, 558 U.S. 1136 (2010). First, the claims are properly construed and then those construed terms are compared to the accused product. *Id.* "[A] determination of noninfringement, either literal or under the

doctrine of equivalents, is a question of fact.” *Crown Packaging Tech., Inc. v. Rexam Beverage Can Co.*, 559 F.3d 1308, 1312 (Fed. Cir. 2009). To infringe a claim literally, the accused product must incorporate every limitation in a valid claim, exactly. *Zodiac Pool Care, Inc. v. Hoffinger Indus., Inc.*, 206 F.3d 1408, 1415 (Fed. Cir. 2000). “Absent any limitation of a patent claim, an accused device cannot be held to literally infringe the claim.” *Id.* To infringe a claim under the doctrine of equivalents, the accused product must incorporate every limitation in a valid claim by a substantial equivalent. *Id.* As with literal infringement, there can be no infringement under the doctrine of equivalents if one limitation of a claim is not present in the accused device. *Id.* See also *Crown Packaging*, 559 F.3d at 1312 (“A finding of infringement under the doctrine of equivalents requires a showing that the difference between the claimed invention and the accused product was insubstantial.”).

### III. Discussion

As an initial matter, Plaintiff correctly points out that “the order denying Sentinel’s motion for partial summary judgment on the pleadings indicated a motion for summary judgment could be filed *if Plaintiff amended its contentions.*” (Doc. No. 70 at 2) (emphasis in the original) (quoting Doc. No. 64). Although the Court’s order may have implied that Defendant’s ability to move for summary judgment was dependent on Plaintiff amending its contentions, a party could have filed a dispositive motion at any time before the October 2, 2019 cutoff without first seeking leave to do so (Doc. No. 56). The Order was meant to accelerate the resolution of the logo pads issue, not to amend the dispositive motion deadline. In any event, Plaintiff’s counsel stated on the record that precluding Defendant from seeking summary judgment was not a consideration when Plaintiff chose to not amend its contentions; consequently, Plaintiff suffers no prejudice by the Court considering this motion. Accordingly, Defendant’s Motion is properly before the Court.

*A. Literal Infringement*

As explained above, the ‘302 patent’s claims 1, 15, and 24 are independent claims. (Doc. No. 21, Ex. A). Defendant only attacks the limitation on these claims requiring that the first and second substrates be encapsulated in an elastomer. (Doc. No. 69 at 4). As such, the Court will focus its analysis on construing this limitation. *See Abbott Labs.*, 566 F.3d at 1288.

Defendant argues that the logo pads cannot literally infringe the ‘302 patent because the sentinel head that appear on its substrates are covered only in black paint, not elastomer. Defendant further asserts that, despite having tested the black paint to determine whether it constituted an elastomer, Plaintiff has not provided evidence indicating that the black paint is an elastomer (Doc. No. 69 at 6). Defendant thus concludes that there is no evidence suggesting the surface area covered by the black paint is covered by an elastomer, and the logo pads do not meet the “encapsulated” claim limitations. (*Id.*).

Plaintiff does not provide any evidence to refute Defendant’s claim that the black paint is not an elastomer. Instead, Plaintiff focuses on the Court’s *Markman* Order, which construed “encapsulated/encapsulating” to mean “coated on all surfaces.” (Doc. No. 42 at 4). Plaintiff also contends that the *Markman* Order did not include any terminology accounting for the “degree” to which the object must be coated. (Doc. No. 70 at 4). Thus, Plaintiff urges the Court to deny Defendant’s motion because all surfaces of the logo pads are “coated with polyurea,” even though the top surface is “only partially coated”. (*Id.* at 11).

The Court finds that Defendant is entitled to partial summary judgment as to its logo pads. The ‘302 patent’s claim limitations require that the substrates be encapsulated – or coated on all surfaces – with *an elastomer*. (*See* Doc. 21, Ex. A at 9–10). There is no dispute that portions of the

logo pads are covered in non-elastomeric paint. Thus, as a matter of law, the logo pads' top surface is not encapsulated with an elastomer.

Plaintiff's argument that the logo pads are nevertheless encapsulated with an elastomer is unpersuasive. Although the Court declined to follow Defendant's proposed interpretation of "encapsulated/encapsulating" to mean "completely coated/coating on all surfaces with a continuous layer", it did adopt Sentinel's "all surfaces" condition. (Doc. No. 42 at 4). The plain and ordinary meaning of the word "surface" means the exterior or top layer of an object. *See Surface*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d. ed. 2002); *see also Surface*, BLACK'S LAW DICTIONARY (10th ed. 2014). Accordingly, under the Court's claim construction, the '302 patent requires all exterior or top layers of a substrate to be coated with an elastomer.<sup>2</sup>

No reasonable jury could find that all surfaces of Sentinel's logo pads is coated with an elastomer when part of the logo pad's top surface is covered by non-elastomeric paint. Therefore, no evidence exists that could entitle Plaintiff to a jury verdict for literal infringement as to Defendant's logo pads. *See Zodiac Pool Care*, 206 F.3d at 1415. In other words, Plaintiff failed to raise a genuine issue of material fact on literal infringement with the encapsulated with an elastomer claim limitation. *See Liberty Lobby*, 477 U.S. at 248. The Court therefore grants summary judgment on Plaintiff's literal infringement claims as to the logo pads.

*B. Infringement under the Doctrine of Equivalents*

When a plaintiff fails to prove literal infringement because the accused product does not meet a claim limitation exactly, infringement under the doctrine of equivalents may nevertheless

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<sup>2</sup> Additionally, the Court's construction of "encapsulated/encapsulating" to mean "coated on *all surfaces*" provided an amount that the '302 patent requires the substrates to be coated. (Doc. No. 42) (emphasis added). *See also All*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d. ed. 2002) ("[T]he whole amount or quantity . . ."). Plaintiff's interpretation that "coated on all surfaces" is satisfied when the logo pad's top surface is "only partially coated," renders the word "all" completely useless. (Doc No. 70 at 11).

be found if the only differences between the patented product and the accused product are insubstantial. *See Warner-Jenkinson Co., Inc. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 21 (1997); *Festo Corp. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 535 U.S. 722, 733 (2002). The doctrine of equivalents must be applied to the individual elements of the claim to determine whether the accused product achieves substantially the same result in substantially the same way, to achieve substantially the same result as the patented product. *Warner-Jenkinson*, 520 U.S. at 29, 40.

Local Patent Rule 3-1(d) requires a plaintiff to assert whether each element of each asserted claim is asserted to be literally present or present under the doctrine of equivalents. Here, Plaintiff has not asserted infringement under the doctrine of equivalents. (Doc. Nos. 52, 54). The Court granted Plaintiff leave to amend its infringement contentions subject to the results of the test on the black paint. (Doc. No. 64). The Plaintiff did not amend its final infringement contentions to include a theory of infringement under the doctrine of equivalents. Consequently, the Court grants summary judgment in favor of Defendant regarding any claims of infringement against Sentinel's logo pads.

#### IV. Conclusion

For the foregoing reasons, the Court **GRANTS** Defendant's Motion for Partial Summary Judgment as to Plaintiff's claims that Defendant's logo pads infringe the patent-in-suit.

Signed at Houston, Texas, this 21<sup>st</sup> day of October, 2019.



Andrew S. Hanen  
United States District Judge