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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ALLIANCE PACKAGING LLC, a  
Washington limited liability company,

Plaintiff,

v.

SMURFIT-STONE CONTAINER  
CORPORATION, a Delaware corporation, et  
al.,

Defendants.

C07-112Z

CLAIM CONSTRUCTION  
ORDER

This matter comes before the Court pursuant to Markman v. Westview Instruments, Inc., 52 F.3d 967 (Fed. Cir. 1995), aff'd 517 U.S. 370 (1996), to construe various terms of the patent at issue in this case. The Court held a hearing on February 19, 2008. The Court has reviewed all of the briefing, the records and files herein, and now enters the following Order.

**I. BACKGROUND**

On January 24, 2007, Alliance Packaging, LLC (“Alliance”) filed a complaint against Altivity Packaging, LLC (“Altivity”), alleging infringement of its patent for a container with

1 an integrated spout. Compl., docket no. 1, ¶¶ 24-27.<sup>1</sup> The patent at issue is U.S. Patent No.  
2 7,156,287 (the “ ‘287 Patent”). Compl. ¶ 20, Ex. A. The parties now ask this Court to  
3 construe three claim terms contained in independent product claims 1 and 6, and claims  
4 dependent thereon, of the ‘287 Patent: (1) “lower side,” (2) “acute angle,” and (3) “cover the  
5 concavity.”

## 6 **II. LEGAL STANDARD FOR CLAIM CONSTRUCTION**

7 Claim construction is “a matter of law exclusively for the court,” even if the case is  
8 designated to go to a jury trial. Markman, 52 F.3d at 970-71. “While a judge is well-  
9 equipped to interpret the legal aspects of the [patent] document, he or she must also interpret  
10 the technical aspects of the [patent] document, and indeed its overall meaning, from the  
11 vantage point of one skilled in the art.” Pitney Bowes, Inc. v. Hewlett-Packard Co., 182 F.3d  
12 1298, 1309 (Fed. Cir. 1999).

13 To interpret the claims of a patent, a court considers “the intrinsic evidence of record:  
14 the claim, the specification, and, if in evidence, the prosecution history.” Metabolite Labs.,  
15 Inc. v. Lab. Corp. of Am. Holdings, 370 F.3d 1354, 1373 (Fed. Cir. 2004). The intrinsic  
16 evidence is “the most significant source of the legally operative meaning of disputed claim  
17 language.” Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed. Cir. 1996).  
18 Within the intrinsic evidence, a court first looks “to the words of the claims themselves, both  
19 asserted and non-asserted, to define the scope of the patented invention.” Vitronics, 90 F.3d  
20 at 1582. “It is a bedrock principle of patent law that the claims of a patent define the  
21 invention to which the patentee is entitled the right to exclude.” Phillips v. AWH Corp., 415  
22 F.3d 1303, 1312 (Fed. Cir. 2005) (internal quotations and citations omitted). The words of a  
23 claim “are generally given their ordinary and customary meaning.” Id. (quoting Vitronics, 90  
24 F.3d at 1582). “[T]he ordinary and customary meaning of a claim term is the meaning that

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25  
26 <sup>1</sup> Alliance also sued Smurfit-Stone Container Corporation for breach of contract. Compl. ¶¶  
22-23.

1 the term would have to a person of ordinary skill in the art in question at the time of the  
2 invention, i.e., as of the effective filing date of the patent application.” Id. at 1313.

3 Claims are also read in light of the patent specification, which includes the abstract,  
4 background of invention, summary of invention, and detailed description sections of the  
5 patent. See Signtech USA, Ltd. v. Vutek, Inc., 174 F.3d 1352, 1355 (Fed. Cir. 1999). At the  
6 same time, a court must avoid importing limitations from the specification into the claims.  
7 Phillips, 415 F.3d at 1323. The Federal Circuit has “cautioned against limiting the claimed  
8 invention to preferred embodiments or specific examples in the specification.” Teleflex, Inc.  
9 v. Ficosa N. Am. Corp., 299 F.3d 1313, 1328 (Fed. Cir. 2002) (citations omitted); see also  
10 Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc., 381 F.3d 1111, 1117 (Fed. Cir.  
11 2004) (stating that “particular embodiments appearing in the written description will not be  
12 used to limit claim language that has broader effect”).

13 In addition to consulting the specification, “a court should also consider a patent’s  
14 prosecution history, if it is in evidence.” Phillips, 415 F.3d at 1317 (quoting Markman, 52  
15 F.3d at 980). The prosecution history “consists of the complete record of the proceedings  
16 before the [United States Patent and Trademark Office] and includes the prior art cited  
17 during the examination of the patent.” Id. The prosecution history can demonstrate “how  
18 the inventor understood the invention and whether the inventor limited the invention in the  
19 course of prosecution, making the claim scope narrower than it would otherwise be.” Id.  
20 Although the prosecution history may provide an “interpretive context” for the claims,  
21 “courts may not read limitations into the claims.” Rambus Inc. v. Infineon Techs. AG, 318  
22 F.3d 1081, 1088 (Fed. Cir. 2003).

23 In addition to intrinsic evidence, a court may also consider extrinsic evidence, which  
24 “consists of all evidence external to the patent and prosecution history, including expert and  
25 inventor testimony, dictionaries, and learned treatises.” Phillips, 415 F.3d at 1317 (citations  
26 omitted). Extrinsic evidence is most useful to help a court understand the underlying

1 technology and the way in which one skilled in the art might use the claim terms. See id. at  
2 1318; Pitney Bowes, 182 F.3d at 1309. Extrinsic evidence, however, is less reliable than  
3 intrinsic evidence in determining “the legally operative meaning of claim language.”  
4 Phillips, 415 F.3d at 1317-19 (citations omitted). Courts may rely on extrinsic evidence to  
5 construe claim terms only if “the patent documents, taken as a whole, are insufficient to  
6 enable the court to construe disputed claim terms.” Pitney Bowes, 182 F.3d at 1308-09; see  
7 also Interactive Gift Express, Inc. v. Compuserve, Inc., 256 F.3d 1323, 1332 (Fed. Cir.  
8 2001).

### 9 **III. DISCUSSION**

#### 10 **A. “Lower Side”**

##### 11 **1. Claim Language**

12 Independent Claims 1 and 6 of the ‘287 Patent refer to a “lower side” of a spout.  
13 Claim 1 of the ‘287 Patent recites “a spout formed from a planar portion of the inner panel  
14 and comprising a *lower side* hingedly connected to the inner panel allowing the spout to  
15 pivot between a first closed position and a second extended position.” ‘287 Patent at col. 5,  
16 II. 46-49 (emphasis added); see also ‘287 Patent at col. 7, II. 26-30 (Claim 6).

##### 17 **2. Proposed Constructions**

18 Alliance asks the Court to construe “lower side” as follows:

19 “The side along the bottom of the spout that hingedly connects to the inner  
20 panel; in an embodiment containing a spout with a center panel and two  
wing panels, the lower side of the center panel.”

21 Joint Claim Chart, docket no. 41, at 1. Specifically, referring to Figure 3 of the ‘287 Patent,  
22 Alliance contends that a “lower side” comprises lower hinge segment 26 only. ‘287 Patent,  
23 Fig. 3. Alliance relies on the claims, on the specification, on some drawings within the  
24 specification, on the opinion of Alliance’s expert, Dr. Diana Twede, and on dictionary  
25 definitions.

1           Altivity asks the Court to construe “lower side” as follows:

2           “The entire bottom portion of the spout.”

3 Joint Claim Chart at 1. Specifically, referring to Figure 3 of the ‘287 Patent, Altivity  
4 contends that a “lower side” comprises lower hinge segment 26 *and* lower edge segments  
5 32a and 32b. Altivity relies on the claims, on the specification, on the drawings within the  
6 specification, on the opinion of Altivity’s expert, Dr. Albert V. Karvelis, and on dictionary  
7 definitions.

8                           **3.       Intrinsic Evidence Within the ‘287 Claim Language**

9           The Court rejects Altivity’s proposed construction for several reasons based on the  
10 Court’s examination of the claim language. First, Altivity’s proposed construction of “lower  
11 side,” i.e., “the *entire* bottom portion of the spout,” reads into the claim element a limitation,  
12 “entire,” that is not present in the claims or, for that matter, in the specification. The claims  
13 and the specification allow for a “lower side” to be defined as lower hinge segment 26 only.  
14 Thus, the “lower side” term should not be subject to an “entire” limitation that is not present  
15 in the intrinsic evidence.

16           Second, Claims 1 and 6 require “. . . *allowing the spout to pivot* between a first closed  
17 position and a second extended position.” ‘287 Patent, Claim 1, col. 5, line 48; ‘287 Patent,  
18 Claim 6, col. 7, II. 28-29 (emphasis added). Altivity has conceded that a spout hingedly  
19 connected to the inner panel across the entire bottom portion of the spout “cannot pivot  
20 between different positions as required by the claims.” Altivity’s Prehearing Statement,  
21 docket no. 43, at 7:1-2. Thus, by its own admission, Altivity’s proposed construction of a  
22 “lower side” is fundamentally inconsistent with the requirement stated in Claims 1 and 6 that  
23 the hinged connection allow the spout to pivot between two different positions. The Court  
24 must construe a “lower side” to allow the spout to pivot in order to be consistent with the  
25 other limitation in the claim.

1 Third, the Court rejects Altivity’s argument based on the doctrine of claim  
2 differentiation. The doctrine of claim differentiation gives rise to a presumption that there is  
3 “a difference in meaning and scope when different words or phrases are used in separate  
4 claims.” Tandon Corp. v. United States Int’l Trade Comm’n, 831 F.2d 1017, 1023 (Fed. Cir.  
5 1987). “To the extent that the absence of such a difference in meaning and scope would  
6 make a claim superfluous, the doctrine of claim differentiation states the presumption that  
7 the difference between claims is significant.” Id. Altivity invokes the doctrine of claim  
8 differentiation to argue that the use of the term “lower hinged segment” in independent  
9 method Claim 4, which directly corresponds to the “lower hinge segment 26” language used  
10 in the specification,<sup>2</sup> must carry a different meaning than the term “lower side” in  
11 independent product Claims 1 and 6. Independent method Claim 4 recites:

12 “ . . . forming a first fold line on a portion of the inner panel to form a *lower*  
13 *hinged segment* of the spout interposed between first and second lateral edge  
14 hinged segments of the spout . . . ”

15 ‘287 Patent, col. 6, II. 52-55. The doctrine of claim differentiation does not apply here  
16 because giving the term “lower hinged segment” the same meaning and scope as the term  
17 “lower side” does not make any claim superfluous. Claim 4 is an independent claim, not a  
18 dependent claim on Claims 1 and 6. Moreover, the Federal Circuit has recently stated that  
19 “claims may cover the same subject matter in different words.” Oatey Co. v. IPS Corp., ---  
20 F.3d ---, 2008 WL 239186, at \*5 (Fed. Cir. Jan. 30, 2008) (citing Tandon Corp., 831 F.3d at  
21 1023).

22 Fourth, the Court rejects Altivity’s argument that Claim 1 uses the word “side” to  
23 refer to a two-dimensional surface, and not a one-dimensional edge. Altivity observes that  
24

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25 <sup>2</sup> The Court notes that the specification does not use the term “lower side.” Thus, the  
26 intrinsic evidence, as a whole, does not preclude a construction of “lower side” that is  
synonymous with “lower hinge segment 26.”

1 Claim 1 recites: “. . . center panel having an upper *side* forming a dispensing portion of the  
2 spout . . . .” ‘287 Patent, col. 5, II. 51-52. Altivity argues that this “upper side” must be a  
3 two-dimensional surface in order to dispense content. Altivity then argues that a “lower  
4 side” must also be two-dimensional in order to be consistent with usage of the term “side” in  
5 Claim 1. Altivity asserts that a “lower side” defined by edges 26, 32a and 32b comprises a  
6 two-dimensional area.

7 The Court finds Altivity’s two-dimensional argument unconvincing. First, it is not  
8 clear that the “center panel having an upper side forming a dispensing portion of the spout”  
9 requires the “upper side” to be a two-dimensional surface. The term “upper side” may, in  
10 fact, be referring to recess edge 28, the upper concave edge of center panel 22, i.e., the edge  
11 that the contents of the box dispense over. See ‘287 Patent, Fig. 3. Second, a lower side  
12 defined by edges 26, 32a and 32b does not form a two-dimensional surface, but rather three  
13 sides that exist in two dimensions. Third, Altivity neglected to point out other uses of the  
14 word “side” in Claims 1 and 6 wherein the word “side” is used to refer to a one-dimensional  
15 edge. See, e.g., ‘287 Patent, col. 5, II. 63-64 (“the first tab having an upper side hingedly  
16 connected to the outer panel . . . .”); ‘287 Patent, col. 8, II. 8-9 (“the first tab having an upper  
17 side hingedly connected to the first panel . . . .”). These references to “upper side” in Claims  
18 1 and 6 appear to be referring to the one-dimensional upper hinge segment 54 of tab 52. See  
19 ‘287 Patent, Fig. 4. The Court concludes that the use of the term “side” in Claims 1 and 6  
20 indicates that a “side” could be a one-dimensional edge.

21 Lastly, Altivity’s proposed construction of a “lower side” as consisting of three sides  
22 is called into doubt by the claims’ use of the singular form of the noun “side” to refer to a  
23 single edge or segment, and the use of the plural form “sides” to refer to more than one edge  
24 or segment. Compare, e.g., Claim 1, ‘287 Patent, col. 5, line 47 (“a lower side”), line 51  
25 (“an upper side”), line 64 (“an upper side”), line 67 (“a curvilinear lower side”), col. 6, II. 7-  
26 8 (“a lower side”) with Claim 1, col. 5, line 54 (“two opposing lateral sides”).

1 The claim language of the '287 Patent supports a construction of "lower side" as  
2 meaning one edge or segment, not three edges or segments.

3 **4. Intrinsic Evidence Within the '287 Figures**

4 Altivity argues that the Court should construe a "lower side" to mean "[t]he entire  
5 bottom portion of the spout" because the three edges 26, 32a and 32b are depicted in the  
6 drawings of the three-panel embodiment as dashed "FOLD LINES." See '287 Patent, Figs.  
7 2, 3, 5, 9. Alliance contends that it made a mistake during the prosecution of the patent in  
8 labeling edges 32a and 32b as fold lines in the drawings associated with the three-panel  
9 embodiment, i.e., in Figures 2-9. Alliance's Opening Br., docket no. 47, at 15:10-12 ("When  
10 Figure 10 [depicting the two-panel embodiment] was revised to show fold lines 32a/b,  
11 however, segments 32a/b were incorrectly changed in the other Patent Figures as well.").  
12 This "mistake" is supported by the fact that Figure 9, which offers a perspective view of the  
13 interior of the three-panel embodiment, shows that edges 32a and 32b must be cut and not  
14 folded if the spout is to be able to pivot. Notwithstanding the perspective view in Figure 9,  
15 Alliance has failed to offer any admissible evidence of its "mistake." Accordingly, the Court  
16 must construe the claims in light of the drawings in the '287 Patent showing edges 32a and  
17 32b as fold lines.

18 Altivity argues that because the fold line extends across the entire bottom portion of  
19 the spout, the term "lower side" must include the bottom portion of the spout's left wing  
20 panel, center panel, and right wing panel.<sup>3</sup> The Court disagrees. Even if all three edges are  
21 folded, that does not compel a construction that all three edges comprise the "lower side" of  
22

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23 <sup>3</sup> In further support of its proposed construction, Altivity points out that the drawings use an  
24 arrow to identify spout 20 in Figures 3 and 5, and that the arrow points to spout wing portion  
25 30b and to edge 32b; from this, Altivity infers that edges 32a and 32b must be attached to the  
26 container by a hinge. No such inference can be drawn from the position of the arrow in  
Figures 3 and 5, especially in light of Figures 6, 7 and 9, in which the arrow used to identify  
spout 20 merely points in the spout's general direction. The Court finds Altivity's "arrow"  
argument unpersuasive.

1 the spout. Moreover, Altivity is asking the Court to import limitations from the specification  
2 into the claims and to confine the claims to the embodiments of the invention outlined in the  
3 specification, contrary to the rules governing claim construction. See Phillips, 415 F.3d at  
4 1323. In Phillips, the specification did not depict baffles at right angles. Id. at 1329.  
5 Nevertheless, the Federal Circuit held that the angles of the baffles depicted in the diagrams  
6 would not be imported as a limitation into the claims to preclude baffles at right angles. See  
7 id. at 1324-1327. Here, the Court will not import the fold lines limitation from the drawings  
8 in the Figures 2-9 into the claims to require that a “lower side” encompass all three lower  
9 edges.

10 **5. Intrinsic Evidence Within the ‘287 Written Description**

11 Using text from the specification, Alliance contends that only “lower hinge segment”  
12 26 of the spout’s central panel is hingedly connected to the inner panel:

13  
14 “Spout 20 is hingedly linked to panel 12a *at lower hinge segment 26.*”

15  
16 ‘287 Patent, col. 3, II. 40-41 (referring to Figures 2 and 3).

17  
18 “The spout remains contiguous with the first panel at a *lower hinge segment;*  
19 *otherwise, it is separate or separable from the first panel.*”

20 ‘287 Patent, col. 1, II. 46-48.

21  
22 “In addition, *spout 20 will pivot about lower hinge segment 26*, causing  
23 inward pivoting of the wings 30a/b about their respective lateral hinge  
24 segments 24a/b.”

25 ‘287 Patent, col. 4, II. 62-65 (referring to Figure 6). Alliance reasons that if edges 32a and  
26 32b were also meant to be hingedly connected to the inner panel, the specification would

1 have indicated so, just as it explicitly did for segment 26.<sup>4</sup> The Court agrees with Alliance’s  
2 position. The Court also emphasizes that the last excerpt above shows that the wing panels  
3 are hinged at segments 24a and 24b, not at segments 32a and 32b. See also ‘287 Patent, col.  
4 3, II. 27-29 (“To permit the required deflection of wings 30a and 30b, lateral hinge segments  
5 24a and 24b are provided . . .”).

6 Altivity attempts to support its proposed claim construction for a “lower side” using  
7 text from the specification. First, Altivity notes that the specification states that “[s]pout 20  
8 comprises central portion 22, and lateral wings 30a and 30b.” ‘287 Patent, col. 3, II. 26-27.  
9 Because the spout includes all three panels, Altivity infers that the spout’s “lower side” must  
10 include the lower side of all three panels. Altivity’s position that a “side” is three sides reads  
11 a limitation into the claims that is not consistent with the claim language. Second, Altivity  
12 notes that the specification states that there are “several Figures wherein *like numerals*  
13 *indicate like parts*.” ‘287 Patent, col. 3, II. 14-15 (emphasis added). This statement merely  
14 indicates that 32a and 32b are bottom sides of the wing panels in all the figures, but it does  
15 not mean that 32a and 32b must be hinged in the preferred embodiment (i.e., in Figures 2-9)  
16 just because they are hinged in the alternative embodiment (i.e., in Figure 10). Compare  
17 ‘287 Patent, col. 3, II. 48-49 (preferred embodiment describing 32a and 32b as “lower edge  
18 segments” without any reference to being hingedly connected to the inner panel) with ‘287  
19 Patent, col. 3, II. 63-65 (alternative embodiment stating that “wings 30a/b may be hingedly  
20 connected to the inner panel at . . . wing lower segments 32a/b”). A comparison of other  
21 parts shows that parts with the same number may have different characteristics in different  
22 embodiments. See, e.g., ‘287 Patent, Figs. 3 and 10 (showing that wings 30a/b have

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24 <sup>4</sup> Altivity asserts that “the specification provides . . . that each of the wings is attached to the  
25 container by hinged connection 32a and 32b.” Altivity’s Opening Br., docket no. 46, at  
26 8:19-22 (citing ‘287 Patent, col. 2, lines 26-27, 49-50). Even assuming that Altivity meant to  
cite to the ‘287 Patent at column 3, lines 26-27 and lines 49-50, the specification does not  
state what Altivity says it states.

1 different shapes in different embodiments). Altivity has failed to provide persuasive support  
2 for its proposed claim construction using text from the specification.

### 3           **6.     Intrinsic Evidence Within the Patent Prosecution History**

4           On January 16, 2004, Alliance filed U.S. Provisional Patent Application No.  
5 60/536,904. Joint Claim Chart, Ex. 2 (the “ ‘287 Patent Prosecution History’”) at 102. The  
6 provisional patent included preliminary drawings, showing edges 32a and 32b as cut lines,  
7 not fold lines. See, e.g., ‘287 Patent Prosecution History, at 115 (Fig. 3).

8           On August 23, 2004, Alliance filed a non-provisional Patent Application No.  
9 10/924,529, claiming priority to the provisional patent. ‘287 Patent Prosecution History at  
10 56. Again, the drawings showed edges 32a and 32b as cut lines, not fold lines. See, e.g.,  
11 ‘287 Patent Prosecution History at 84 (Fig. 3). The non-provisional patent application also  
12 contained a two-panel embodiment that had not been included in the provisional patent  
13 application. ‘287 Patent Prosecution History at 91 (Fig. 10).

14           On March 27, 2006, the patent examiner issued an Office Action, objecting, in  
15 pertinent part, to Figure 10, which was a drawing of the two-panel embodiment. ‘287 Patent  
16 Prosecution History at 40-43. Specifically, the examiner stated:

17           “2. The drawings are objected to under 37 CFR 1.83(a) because they fail to  
18 show a connection between the spout *in the embodiment of figure 10* and the  
19 panel 12a as described in the specification. It is not understood how the  
embodiment will operate nor how the spout is to be attached. *Figure 10 is*  
*showing cut lines separating the spout from the rest of the panel. . . .”*

20           ‘287 Patent Prosecution History, at 42-43, ¶ 2 (emphasis added).

21           On August 28, 2006, the patent attorney returned an Office Action Response. ‘287  
22 Patent Prosecution History, at 13-37. The attorney submitted substitute drawings for all the  
23 figures. In the response, the attorney wrote:

24           “The Examiner also states that drawings fail to show a connection between the  
25 spout in the embodiment of Figure 10 and panel 12a. However, *lines 32a and*  
26 *32b are hinged connections, not cut lines*, as described in the specification, in  
the paragraph beginning at page 6, line 7. *The Figures have been amended to*

1           *clarify this by indicating all fold lines on the container panels with dashed*  
2           *lines.”*

3           ‘287 Patent Prosecution History at 21 (emphasis added).

4           Notably, the paragraph referred to by the patent attorney, starting at page 6, line 7 of  
5 the application as filed, describes the two-panel embodiment. ‘287 Patent Prosecution  
6 History at 73. Regardless, the attorney modified Figures 2-9, which pertain to the three-  
7 panel embodiment, to depict edges 32a and 32b as fold lines, not cut lines; the substituted  
8 figures appear in the issued ‘287 Patent. ‘287 Patent, Figs. 2-10.

9           Altivity observes that: (1) Alliance’s prosecuting patent attorney explicitly stated that  
10 “lines 32a and 32b are hinged connections, not cut lines;” and (2) Alliance’s attorney  
11 substituted in folded lines during prosecution. ‘287 Patent Prosecution History at 21.  
12 Altivity asserts that, in light of this prosecution history, edges 32a and 32b must be  
13 considered a part of the lower side of the spout that is hingedly connected to the inner panel.

14           The prosecution history, like the patent itself, is ambiguous. On the one hand,  
15 original drawings were submitted with the provisional patent application, indicating that  
16 edges 32a and 32b were cut lines for the three-panel embodiment at issue, supporting  
17 Alliance’s position. ‘287 Patent Prosecution History at 115 (Fig. 3). Similarly, drawings  
18 submitted with the non-provisional patent application depicted edges 32a and 32b as cut  
19 lines for the three-panel embodiment, again supporting Alliance’s position. ‘287 Patent  
20 Prosecution History at 84 (Fig. 3). On the other hand, in the Office Action Response,  
21 Alliance modified the drawings and expressly depicted edges 32a and 32b as fold lines, and  
22 these drawings were subsequently incorporated into the issued patent. ‘287 Patent  
23 Prosecution History at 30 (Fig. 3); ‘287 Patent, Figs. 2-9.

24           Prosecution history estoppel arises when an applicant has “clearly and unambiguously  
25 disclaimed or disavowed any interpretation during prosecution in order to obtain claim  
26 allowance.” Middleton, Inc. v. Minnesota Mining and Mfg. Co., 311 F.3d 1384, 1388 (Fed.

1 Cir. 2002) (internal quotations and citations omitted). There are at least two ways that the  
2 doctrine of prosecution estoppel can be invoked. First, “a patentee’s decision to narrow his  
3 claims through amendment may be presumed to be a general disclaimer of the territory  
4 between the original claim and the amended claim.” Festo Corp. v. Shoketsu Kinzoku  
5 Kogyo Kabushiki Co., 535 U.S. 722, 740-41 (2002). Second, assertions made in support of  
6 patentability, whether or not required to secure allowance of the claim, may also give rise to  
7 estoppel. Texas Instruments, Inc. v. United States Int’l Trade Comm’n, 988 F.2d 1165,  
8 1174-75 (Fed. Cir. 1993).

9         Altivity argues that, by modifying the drawings of the three-panel embodiment to  
10 indicate edges 32a and 32b as fold lines, Alliance “expressly abandoned the only disclosure  
11 that supported its proposed claim construction.” Altivity’s Opening Br. at 12-13. However,  
12 the modification to the drawings was not in response to overcoming a citation to prior art or  
13 a specific objection of the Patent Examiner. Additionally, Altivity points out that Alliance  
14 modified the claims at issue in its Office Action Response. The record shows there was a  
15 massive set of amendments to claim text, and there is nothing to suggest that the term, “lower  
16 side,” was introduced to overcome prior art or to otherwise abandon a construction of “lower  
17 side” as being one edge or segment. ‘287 Patent File History at 2-7. For these reasons, the  
18 Court does not apply the doctrine of prosecution estoppel to preclude Alliance’s proposed  
19 construction of “lower side.”

## 20                 7.         Extrinsic Evidence for Construction of a “Lower Side”

21         Courts may rely on extrinsic evidence to construe claim terms if “the patent  
22 documents, taken as a whole, are insufficient to enable the court to construe disputed claim  
23 terms.” Pitney Bowes, 182 F.3d at 1308-9. “Such instances will rarely, if ever, occur.” Id.  
24 Although both parties cite dictionary definitions and refer to expert reports to support their  
25 proposed constructions, both parties claim that the intrinsic evidence alone is sufficient to  
26 justify their proposed constructions. Altivity’s Opening Br. at 14:4-5 (“[T]he Court need not

1 look to or rely upon extrinsic evidence.”); Alliance’s Resp. Br., docket no. 51, at 15:3-4  
2 (“[T]he intrinsic evidence on all of the disputed terms is so clear and compelling that no  
3 expert testimony is required to construe them.”). The Court does not consider the submitted  
4 extrinsic evidence because the intrinsic evidence, as a whole, is sufficient to enable the Court  
5 to construe “lower side.”

6 **8. Conclusion Re: “Lower Side”**

7 For the reasons outlined above, the intrinsic evidence favors Alliance’s proposed  
8 construction. Moreover, to the extent the claim is still ambiguous after applying all the tools  
9 of claim construction, the Court acknowledges the maxim that “claims should be construed  
10 to preserve their validity.” Phillips, 415 F.3d at 1327. Here, the spout would be inoperative  
11 if edges 32a and 32b are construed as part of a “lower side” hingedly connected to the inner  
12 panel. Accordingly, the Court adopts Alliance’s proposed construction, and construes the  
13 term “lower side” as follows:

14 “A side along the bottom of the spout that hingedly connects to the inner panel;  
15 in an embodiment containing a spout with a center panel and two wing panels,  
16 the lower edge of the center panel.”

17 **B. “Acute Angle”**

18 **1. Claim Language**

19 Independent Claims 1 and 6 of the ‘287 Patent refer to an “acute angle” formed  
20 between an inner surface of each wing panel and the inner panel of the container. Claim 1  
21 recites:

22 “. . . an inner surface of each wing panel forming an obtuse angle with an inner  
23 surface of the center panel and an *acute angle* with the inner panel when the  
24 spout is in the second position . . .”

25 ‘287 Patent, col. 5, II. 55-59.

26 Similarly, Claim 6 recites:

1 “ . . . an inner surface of each wing panel forming an obtuse angle with an inner  
2 surface of the center panel and an *acute angle* with the second panel when the  
3 container is formed and the spout is in the second position . . . ”

4 ‘287 Patent, Claim 6, col. 7, line 36 - col. 8, line 4.

5 **2. Proposed Constructions**

6 Alliance asks the Court to construe “acute angle” as follows:

7 “The angle between the inner surface of each wing panel and the inner panel  
8 when the spout is in the second (open) position.”

9 Joint Claim Chart at 3.

10 Activity asks the Court to construe “acute angle” as follows:

11 “The angle that is measured between the inner (i.e., interior facing) surface of  
12 the fully deployed wing panel and the second (i.e., interior facing) panel.”

13 Joint Claim Chart at 3-4.

14 **3. “Acute Angle” Term Not in Dispute**

15 Both parties agree that an acute angle means an angle less than ninety degrees.

16 Activity’s Opening Br. at 15 n.6 (“There should be no dispute that an acute angle must be  
17 less than 90° . . .”); Alliance’s Opening Br. at 19:10-14 (discussing the creation of the acute  
18 angle as getting components “within 90 degrees of one another”). The Court accordingly  
19 construes “acute angle” as “an angle that measures less than ninety degrees.”

20 **4. Clause Regarding the Measurement of Acute Angle in Dispute**

21 The parties’ dispute is not based on different constructions of “acute angle” per se but  
22 rather different views of how that acute angle is measured. More specifically, the parties’  
23 dispute is focused on the clause regarding the measurement of the acute angle in Claims 1  
24 and 6: “. . . *an inner surface of each wing panel forming . . . an acute angle with the*  
25

1 *inner/second panel. . .*<sup>5</sup> The “inner panel” in Claim 1 is the “second panel” in Claim 6.

2 Both terms refer to the inside panel of the two overlapping sidewall panels.

3 Although Alliance’s proposed construction mirrors the claim language almost word-  
4 for-word, and therefore is not particularly helpful, Alliance’s discussion of its proposed  
5 construction indicates that Alliance would measure the acute angle as being formed between  
6 the inner surface of each wing panel and the *plane* of the inner/second panel. Alliance’s  
7 Resp. Br. at 10:18-11:9; Joint Claim Chart, Ex. 5 (Alliance’s Expert, Dr. Diana Twede’s  
8 Report) at 5-6. In contrast, Altivity’s proposed construction adds the words “interior facing”  
9 to the term inner/second panel, and Altivity would measure the acute angle as being formed  
10 between the inner surface of each wing panel and the inner surface of the inner/second panel.  
11 Joint Claim Chart, Ex. 3 (Karvelis Decl.) ¶¶ 19-23.

## 12 **5. Intrinsic Evidence**

13 Altivity’s proposed construction effectively reads an “inner surface” limitation into  
14 the reference to inner panel that is not present in the claims. Altivity’s proposed construction  
15 is also inconsistent with the specification because the only way to form an acute angle  
16 between the inner surface of each wing panel and the inner surface of the inner panel of the  
17 container would be to have a spout that was pointed into the container. Such a result is  
18 inconsistent with Figures 6, 7 and 9 of the ‘287 Patent and is also inconsistent with the  
19 description of the spout “as outward pivoting.” ‘287 Patent, col. 4, line 65, col. 5 lines 5, 23.

20  
21  
22  
23 <sup>5</sup> Claims 1 and 6 both provide that the acute angle is measured when “the spout is in the  
24 second position.” Alliance’s proposed construction interprets the “second position” language  
25 to mean that the spout is in the “second (open) position,” and Altivity’s proposed  
26 construction interprets this language to mean that the wing panel is “fully deployed.” These  
are two different ways of saying the same thing because the wing panels are fully deployed  
when the spout is open. The Court concludes there is no dispute with regard to the “second  
position” term in Claims 1 and 6.

1 Although Alliance’s proposed construction effectively reads a “plane” limitation into  
2 the reference to the inner panel, such a limitation is consistent with the specification, which,  
3 as noted above, requires the spout to be outward pivoting.

4 **6. Conclusion Re: Clause Measuring Acute Angle**

5 The Court adopts Alliance’s proposed construction, with a modification, and  
6 construes the clause “. . . an inner surface of each wing panel forming . . . an acute angle  
7 with the inner/second panel . . . ,” as follows:

8 “. . . an inner surface of each wing panel forming . . . an angle that measures  
9 less than ninety degrees with the plane of the inner/second panel . . . .”

10 **C. “Cover the Concavity”**

11 **1. Claim Language**

12 Independent Claims 1 and 6 of the ‘287 Patent refer to a first tab that is configured to  
13 “cover the concavity.” Specifically, Claim 1 of the ‘287 Patent recites:

14 “. . . the first tab . . . configured to *cover the concavity* of the upper side of the  
15 center panel of the spout when the first tab is in the first position and provide  
16 access to the spout when in the second position . . . .”

17 ‘287 Patent, col. 5, line 63 - col. 6, line 3; see also ‘287 Patent, col. 8, II. 8-17 (Claim 6).

18 **2. Proposed Constructions**

19 Alliance asks the Court to construe “cover the concavity” as follows: “To overlay or  
20 match the cavity or hollow defined by the curvilinear portion of the top of the spout.”

21 Joint Claim Chart at 4. Alitivity asks the Court to construe “cover”<sup>6</sup> as follows: “exact  
22 overlay” or “exact match.” Id.

23  
24  
25  
26 <sup>6</sup> As discussed in more detail below, Alitivity only asks the Court to construe “cover,” not  
“cover the concavity.”

1                                   **3.    Agreed Portions of Proposed Claim Constructions**

2           Both parties agree that “cover” means “overlay or match.” The parties disagree as to  
3 whether the word “exact” should be read into the construction of cover. That issue is  
4 addressed below.

5           Altivity asserts that Alliance did not identify the term “concavity” as a disputed term  
6 until November 27, 2007. Joint Claim Chart at 6. Altivity’s opening brief reserves the right  
7 to dispute Alliance’s proposed construction for “concavity,” and also reserves the right to put  
8 forth a further construction for the term concavity and the term “curvilinear lower side.”  
9 Altivity’s Opening Br. at 19 n.8. Because Altivity, in its responsive brief, did not dispute  
10 Alliance’s proposed construction of “concavity,”<sup>7</sup> the Court adopts Alliance’s proposed  
11 construction for the term “concavity,” and construes “concavity” to mean “the cavity or  
12 hollow defined by the curvilinear portion of the top of the spout.”

13                                   **4.    “Exact” Limitation**

14           While the parties agree that “cover” means to “overlay or match,” the remaining  
15 dispute concerns whether the tab must exactly cover the concavity. Altivity asks the Court to  
16 construe “cover” to mean “exact overlay” or “exact match,” whereas Alliance disputes any  
17 “exactness” requirement.

18           The claims do not require or otherwise suggest an exact fit, and claim construction  
19 principles prohibit adding modifiers to broad claim terms. See Johnson Worldwide Assocs.  
20 v. Zebco Corp., 175 F.3d 985, 989 (Fed. Cir. 1999) (citing Federal Circuit cases in which the  
21 unmodified terms “reciprocating” and “associating” were not limited to “linear  
22 reciprocation” and “explicit association,” respectively).

23           Balanced against this, Altivity invokes the doctrine of claim differentiation, and notes

24 \_\_\_\_\_  
25 <sup>7</sup> Altivity, in its responsive brief, proposed a new lengthy construction of “cover,” but did not  
26 propose any construction of “concavity.” The Court declines to consider Altivity’s new  
proposed construction of “cover” because Alliance did not have an adequate opportunity to  
respond to it.

1 that Claim 4 recites a method for forming a spout “having a concavity having a lateral  
2 centerline substantially aligned with a lateral centerline of the spout.” ‘287 Patent, Claim 4,  
3 col. 6, II. 63-65. The doctrine of claim differentiation does not apply here because Claim 4  
4 is an independent claim, not a dependent claim on Claims 1 and 6, and the difference in the  
5 language between the claims does not make any claim superfluous.

6         Altivity also relies on Figure 5 in the specification to contrast the lack of a gap  
7 between segment 28, the concave edge of the spout, and segment 58, the concave edge of tab  
8 “A,” (i.e, the “first” tab), with the slight gap between segment 26, the lower edge of the  
9 center panel of the spout, and segment 62, the lower edge of tab “B” ‘287 Patent, Fig. 5; see  
10 also Joint Claim Chart, Ex. 3 (Karvelis Decl.) ¶¶ 26-28 (opining on Figure 5). Altivity infers  
11 that the specification teaches an exact match between segments 28 and 58. This limitation in  
12 Figure 5 is ambiguous and will not be imported into the claims.

13         Altivity also relies on the written description’s statement that, “Because inward  
14 pivoting of *tab “A” 52 is unrestricted by spout 20 . . .* both tab “B” 60 and spout 20 are now  
15 accessible . . .” ‘287 Patent, col. 4, II. 50-54 (emphasis added). Altivity offers expert  
16 opinion that this statement shows that the claims require an exact match. Joint Claim Chart,  
17 Ex. 3 (Karvelis Decl.) ¶ 25. However, the specification makes numerous statements  
18 indicating that the spout is not exact about its lower edge. ‘287 Patent, col. 2, II. 4-8, col. 4,  
19 II. 38-44. Because the container is formed from a single material, any displacement of lower  
20 hinge segment 26 relative to lower hinge segment 62 would correspondingly mean a  
21 displacement of concave edge 28 of the spout relative to concave edge 58 of tab “A.” As a  
22 result, although the specification states that tab A is unrestricted by the spout, there is  
23 significant support in the specification to suggest that slight displacements are tolerated.

24         “A sound claim construction need not always purge every shred of ambiguity.”  
25 Acumed LLC v. Stryker Corp., 483 F.3d 800, 806 (Fed. Cir. 2007). In Acumed, the court  
26 was asked to construe “sharp;” in doing so, the court refused to incorporate a numerical

1 angular limit required for “sharpness” into the term construction. *Id.* at 806. In the present  
2 case, Altivity asks the Court to construe or limit the degree of precision with which the tab  
3 “cover[s] the concavity.” Just as engineering tolerances did not need to be woven into a  
4 definition in *Acumed*, this Court declines to inject an “exact” limitation into the construction  
5 of the claim term “cover.”

6 **5. Alliance’s Concession that Tab Not Overlap**

7 In briefs submitted to the Court, Alliance clarified that even under its proposed  
8 construction, the first tab does not overlap the concave edge of the spout:

9  
10 According to Alliance’s construction, the tab covers the concave-shaped  
11 concavity at the top of the spout and ***does not overlap the concave edge of the  
12 spout itself.***

11 \* \* \*

12 [T]he tab must be able to swing into the container when pushed, unrestricted by the  
13 top of the spout. . . . Accordingly, ***what the tab ‘overlays’ or ‘matches’*** is the cavity  
14 created by the curved shape of the top of the spout, ***not the edge of the spout itself.***

15 Alliance’s Opening Br. at 7:6-7, 23:1-5 (emphasis added).

16 Alliance’s responsive brief further stated:

17 The ‘287 Patent merely ***requires that the tab overlay the whole of the concavity, as  
18 opposed to just some portion of it or going beyond it to overlap the edge of the  
19 spout.*** It requires no more exactitude than that . . . The specification merely requires  
20 that ***the bottom of the tab not overlap the top of the spout.***”

21 Alliance’s Resp. Br. at 13:22-14:5 (emphasis added).

22 Alliance’s description was partially based on its own expert’s opinion:

23 The inward pivoting of tab A is unrestricted by spout 20 because tab A  
24 overlays or matches the concavity formed by the upper side of spout 20  
25 ***without overlapping the upper side of the center panel of the spout.***

26 Joint Claim Chart, Ex. 5 (Twede Expert Report) at 7 (emphasis added).

Altivity asks the Court to construe “cover the concavity” to incorporate the  
representation by Alliance that “the tab . . . does not overlap the concave edge of the spout

1 itself.” Alitivity’s Resp. Br. at 21:14-19, 22:1-3. The Court accepts the repeated averments  
2 by Alliance that the tab does not overlap the concave edge of the spout itself, and  
3 incorporates this phrase into the claim construction of “cover the concavity.”

4 **6. Conclusion Re: “Cover the Concavity”**

5 The Court adopts Alliance’s proposed construction, with a modification, and  
6 construes “cover the concavity” as follows:

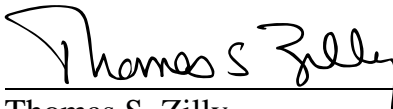
7 “overlay or match the cavity or hollow defined by the curvilinear portion of the  
8 top of the spout; the tab does not overlap the concave edge of the spout itself.”

9 **IV. CONCLUSION**

10 The Court construes the three claim terms, “lower side,” “acute angle,” and “cover the  
11 concavity,” as set forth above.

12 IT IS SO ORDERED.

13 DATED this 7th day of March, 2008.

14   
15 \_\_\_\_\_  
16 Thomas S. Zilly  
17 United States District Judge  
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