

C&M Oilfield Rentals, LLC

v.

Ensign US Southern Drilling LLC

CIVIL ACTION NO. 4:22-CV-00965

Ensign's Markman Presentation on "Mounting Pole"

October 2, 2023

Judge Albright Rejected “elongated” and “where the length far exceeds the width”

Pat. 10,976,016 Term	C&M’s Proposal
“mounting pole” Claims 1, 17, 19, 22, 23	Plain and ordinary meaning: “elongated structure for mounting where the length of the structure far exceeds the width”

- Dkt. 50-8, Ex. H, p.6.

Judge Albright Rejected “elongated” and “where the length far exceeds the width”

The Court rejects C&M’s proposal for requiring that “the length of the structure far exceeds the width.” A pole can be cut shorter and still remain a pole, even if its length no longer far exceeds the width as proposed.

Dkt. 50-8, Ex. H, p.7.

“Mounting Pole” Construction

- C&M’s expert equated “elongated” and “far exceeds the width” (Dk. 51-1, p.26, p.85).
- This Court should reject the “elongated” and “far exceeds the width” concepts as Judge Albright did. Court should adopt construction that “mounting pole” in ‘626 and ‘016 patents means a:
“~~elongated~~ structure fixed at one end and for mounting where the length of the structure ~~far~~ exceeds the width”.

Claim Construction Principles

- The specification in the patent “is the single best guide to the meaning of a disputed term.” (C&M opening brief, p.2).
- As C&M states “there is no intrinsic evidence that warrants deviating from the term’s plain and ordinary meaning. It is undisputed that the patentees did not act as their own lexicographer to expressly define “mounting pole...” (C&M opening brief, p.9).
- Courts cannot rely on expert testimony to construe a claim term in a manner not contemplated by the intrinsic evidence. *Genuine Enabling Tech. LLC v. Nintendo Co., Ltd., et al.*, 29 F.4th 1365 (Fed. Cir. 2022).
- There are numerous independent reasons that the Court should not adopt C&M’s added limitations of “elongated” and “far exceeds the width”.

1. “Far exceeds the width” and “elongated” are indefinite and ambiguous

- Statute requires clear, concise, and exact terms to particularly point out and distinctly claim invention
- 35 U.S.C. 112 (a) IN GENERAL.—The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor or joint inventor of carrying out the invention.
- (b) CONCLUSION.—The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the inventor or a joint inventor regards as the invention.

1. “Far exceeds the width” and “elongated” are indefinite and ambiguous

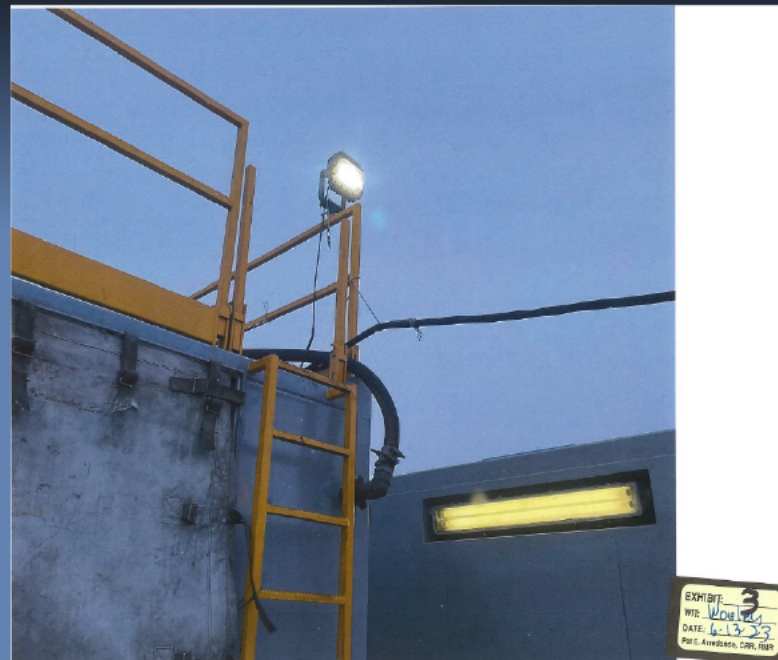
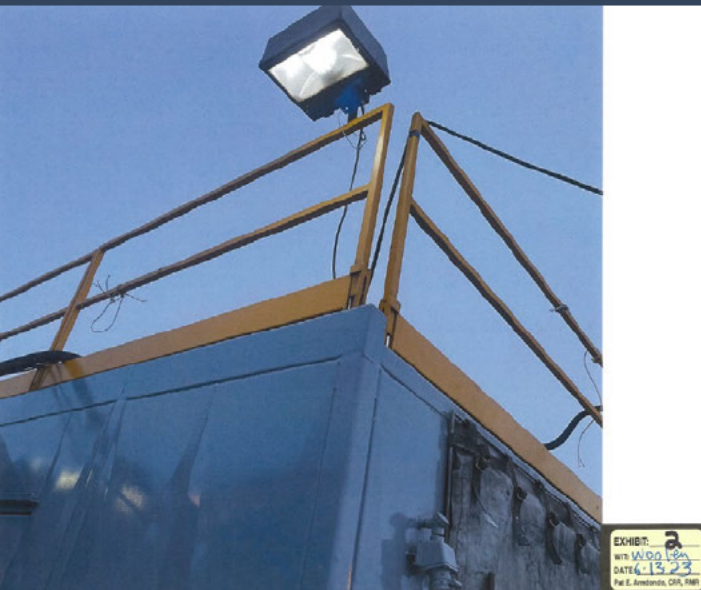
- “Far” has previously been deemed indefinite. *Skyhook Wireless, Inc. v. Google, Inc.*, 2014 WL 8985952014 (D.C. Mass. March 6, 2014) (holding claims indefinite because “far” is a word of degree and “[d]efiniteness problems often arise when words of degree are used in a claim.” *Seattle Box Co. v. Industrial Crating & Packing, Inc.*, 731 F.2d 818, 826 (Fed. Cir. 1984).
- Seattle Box Co. case above holds: “When a word of degree is used the district court must determine whether the patent’s specification provides some standard for measuring that degree.”
- The ‘016 and ‘626 Patents do not provide any standard for measuring degree of “elongated or “far exceeds the width”.

1. “Far exceeds the width” and “elongated” are indefinite and ambiguous

- When confronted with the indefinite aspect of how elongated or how much the length must “far exceed the width” C&M’s expert said: “You show me an application and I will let you know whether it appears to be a mounting pole to a person of ordinary skill in the art.” (Dkt. 51, Ex. 1, pp.26-27.).

1. “Far exceeds the width” and “elongated” are indefinite and ambiguous

- After a number improper speaking objections by C&M counsel, C&M expert could not say whether there was a mounting pole (Dkt. 51-1, pp.72-62) and refused to answer questions about any photos at the advice of C&M counsel. (*Id.*, p.76, lines 17-24).



2. C&M's expert's refusal to answer questions about his proposal justifies not relying on his declaration

Q. (By Mr. Porter) Does this particular photo have any mounting pole according to your proposed construction?

MS. FOWLER: Same objection. Outside the scope. He will not be applying any proposed construction to any picture you put in front of him that he has not seen before today.

A. I will follow the advice of the lawyer.

Q. (By Mr. Porter) And refuse to answer?

A. Yes. (Dkt. 51, Ex. 1, p.76). See FRCP30c(2) and (d)(2)

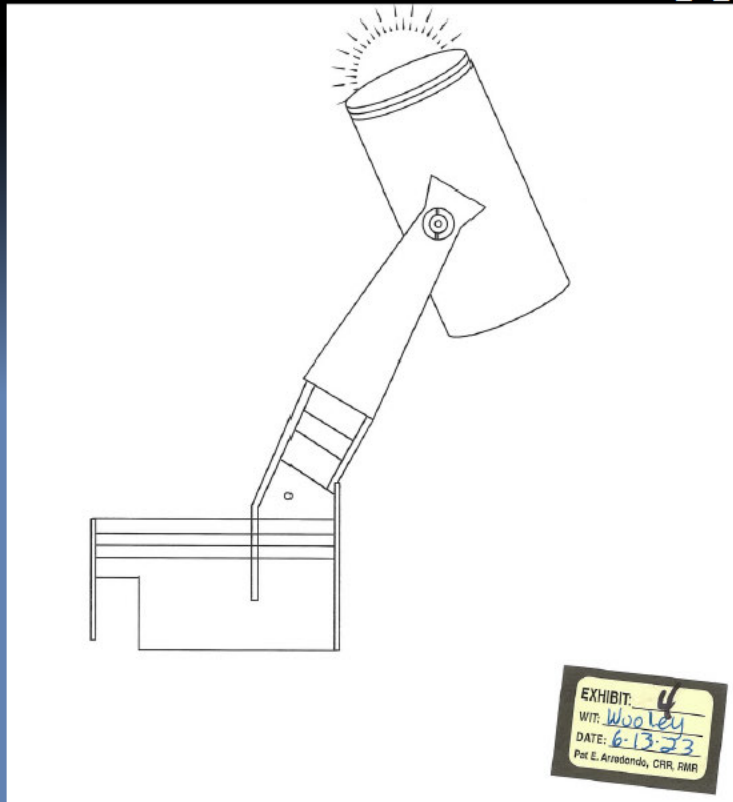
Petitioner Ensign

2. C&M's expert's refusal to answer questions about his proposal justifies not relying on his declaration

“A person may instruct a deponent not to answer *only* when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).” Fed.R.Civ.P. 30 (c)(2) (emphasis added).

1. “Far exceeds the width” and “elongated” are indefinite and ambiguous

- C&M’s expert also could not offer an opinion on “if Exhibit 4 has a mounting pole, according to your definition, or not?” (Dkt. 51, Ex. 1, pp.77-78).

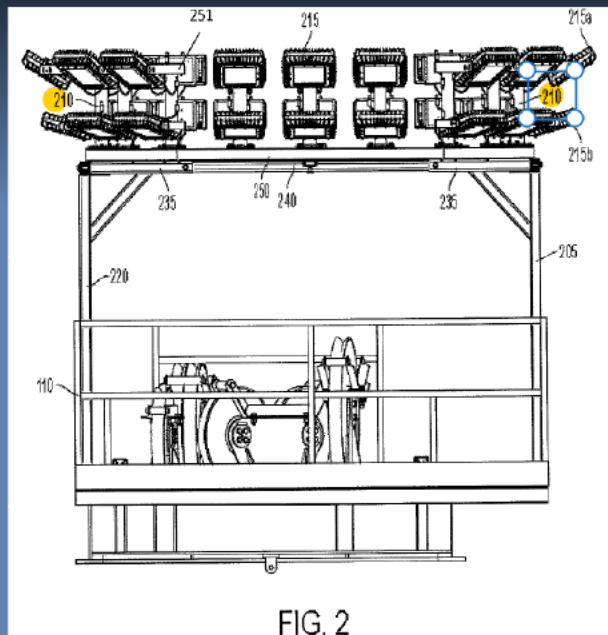


1. “Far exceeds the width” and “elongated” are indefinite and ambiguous

- The reason C&M expert could not describe whether there was a “mounting pole” in photos or drawings is because the C&M patent specifications do not describe any standard for numerically determining how “elongated” or how much the length must exceed the width to “far exceed”.
- C&M’s experts said, “I do not think you can pin it down to a specific number”. (Dkt. 51, Ex. 1, pp.26-28 stating at p.26).
- The patent specifications do not provide any standard for measuring the degree associated with the “elongated” or “far” words of degree.

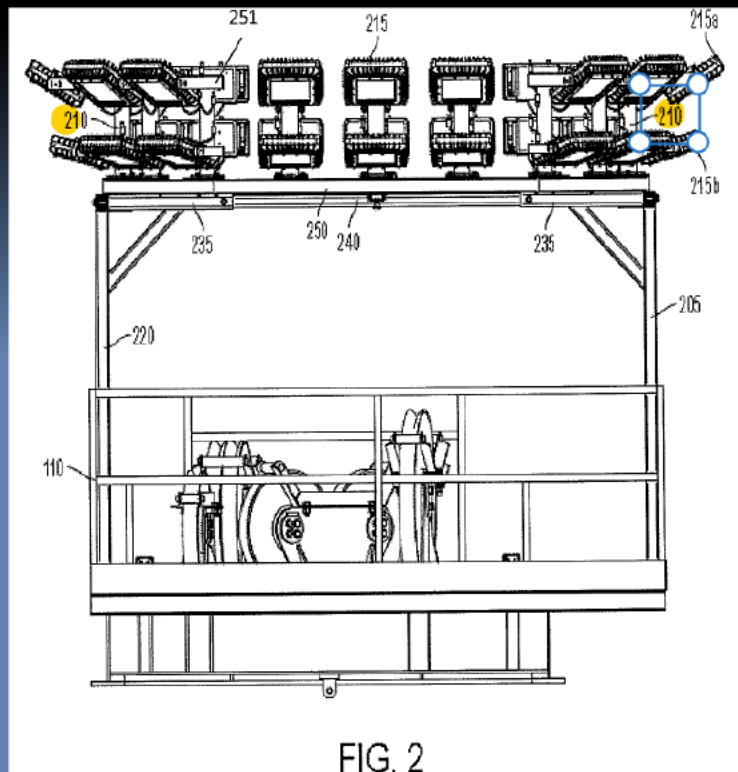
3. Intrinsic evidence does not support elongated” or length “far exceeds the width”

- Neither “elongated” nor “far exceeds the width” appear anywhere in either patent.
- USPTO examiner twice said short, wide pole 210 is “mounting pole” (Dkt. 51, p.8 and Exs. 2-4).



3. Intrinsic evidence does not support elongated” or length “far exceeds the width”

- No support offered for C&M’s reply statement that it “consistently rejected the Examiner’s characterization [that short, wide pole is mounting pole”. (Dkt. 52,pp.2-3).



3. Intrinsic evidence does not support elongated” or length “far exceeds the width”

- C&M’s reliance in its opening brief on Fig. 9A and 9B and its expert’s deposition testimony elicited by C&M is misplaced. (Dkt. 50, p.13).
- These figures are not even in the ‘626 Patent.
- Neither patent says these figures exclude mounting pole.
- Both patents say the “mounting pole” may be different than what is shown in the figures.

3. Intrinsic evidence does not support elongated” or length “far exceeds the width”

- The ‘016 Patent states:

“As one of skill in the art would understand from reading the foregoing description, it is not necessary that the light fixtures 248 be attached to the rig or other structure using mounting poles that have the particular configuration shown in FIGS. 2-8.” (‘016 Patent, col. 5, lines 44-48).

- The ‘626 Patent states:

“it is to be understood that the systems and methods described herein are not to be limited to the specific implementations disclosed and that modifications and other implementations are intended to be included within the scope of the appended claims.” (‘626 Patent, col. 5, lines 23-27).

4. C&M expert consistently ignores intrinsic evidence

- C&M's expert has no idea how many times courts have rejected his proposed claim constructions.
- At least two PTAB decisions at USPTO found “the intrinsic evidence is clearly at odds” with Dr. Wooley’s testimony. (Dkt. 51, pp.13-14 citing Dkt. 51, Exs. 5-6) and “we find Dr. Wooley’s testimony of little persuasive value with respect to the proper constructions....” (*Id.*)

Summary

C&M's Construction	Problems with "elongated" and "far"	Authority why the terms should be rejected
(1) — ~~elongated~~ structure (2) fixed at one end and (3) for mounting (4) — ~~where the length of the structure far exceeds the width~~	Not in the patents Ambiguous words "elongated" and "far" are indefinite terms of degree	No intrinsic evidence – neither word in the specification or file history No extrinsic evidence – other than saying the terms are "similar" (Wooley, 26, 15) C&M's expert did not explain and refused to answer questions "elongated" and "far" not allowed by 35 U.S.C. 112 (a) – they are not "clear, concise, and exact terms..." Words of degree create indefiniteness problems. Seattle Box Co. v. Industrial Crating & Packing, Inc., 731 F.2d 818, 826 (Fed. Cir. 1984).

Conclusion

- Court should reject the “far exceeds the width” concept as Judge Albright did. Court should adopt construction that “mounting pole” in ‘626 and ‘016 patents means a:

“~~elongated~~ structure fixed at one end and for mounting where the length of the structure ~~far~~ exceeds the width”.