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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

MYTEE PRODUCTS, INC., a California corporation,  
  
Plaintiff,  
  
v.  
  
HARRIS RESEARCH, INC., a Utah corporation; and DOES 1 through 20,  
  
Defendants.

Civil No. 06cv1854-CAB

**ORDER DENYING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT OF NON-INFRINGEMENT OF THE ‘577 AND ‘892 PATENTS [Doc. No. 109.]**

and related cross actions.

**I. INTRODUCTION**

Harris Research (“Harris”) is the assignee of two patents for Device[s] for Enhancing Removal of Liquid from Fabric, U.S. Patent No. 6,298,577 (“the ‘577 patent”), and U.S. Patent No. 6,266,892 (“the ‘892 patent”). Mytee Products Inc. (“Mytee”) is a manufacturer and distributor of vacuum devices and accessories for the professional floor cleaning industry. Harris alleges that Mytee infringes both these patents with its manufacture and sale of a product called the Banana Glider, models H931, H933, H934, H964 and H965 (“the Accused Devices”). The Mytee Banana Glider is an attachment for wand and rotary extraction vacuum devices designed to “increase extraction of water and reduce fatigue on the operator.” [Mytee’s Motion for Non-Infringement and Invalidity, Doc. No. 109-1, at 2:11-19.] Mytee

1 moves for summary judgment of non-infringement contending its Accused Devices<sup>1</sup> do not infringe the  
2 asserted claims of the '577 patent or the '892 patent either literally or under the Doctrine of Equivalents.  
3 Harris filed an opposition [Doc. No. 127], and Mytee filed a reply, [Doc. No. 136]. The Court held  
4 argument on April 27, 2009. For the reasons set forth below, Mytee's motion is **DENIED**.

## 5 **II. LEGAL STANDARD FOR A MOTION FOR SUMMARY JUDGMENT**

6 "Summary judgment is appropriate when no genuine issue of material fact exists and the moving  
7 party is entitled to judgment as a matter of law." *IPXL Holdings, L.L.C. v. Amazon.com, Inc.*, 430 F.3d  
8 1377, 1380 (Fed. Cir. 2005). "A material issue of fact is one that affects the outcome of the litigation  
9 and requires a trial to resolve the parties' differing versions of the truth." *S.E.C. v. Seaboard Corp.*, 677  
10 F.2d 1301, 1306 (9th Cir. 1982).

11 The moving party has the initial burden of demonstrating that summary judgment is proper.  
12 *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). To meet this burden, the moving party must  
13 identify the pleadings, depositions, affidavits, or other evidence that it "believes demonstrates the  
14 absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the  
15 moving party satisfies this initial burden, then the burden shifts to the opposing party to show that  
16 summary judgment is not appropriate. *Id.* at 324. The opposing party's evidence is to be believed, and  
17 all justifiable inferences are to be drawn in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255  
18 (1986). However, to avoid summary judgment, the opposing party cannot rest solely on conclusory  
19 allegations. Instead, it must designate specific facts showing there is a genuine issue for trial. *Berg v.*  
20 *Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986). More than a "metaphysical doubt" is required to establish  
21 a genuine issue of material fact. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574,  
22 586 (1986).

## 23 **III. DISCUSSION**

24 A determination of patent infringement is a two-step process, "wherein the court first construes  
25 the claims and then determines whether every claim limitation, or its equivalent, is found in the accused  
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27 <sup>1</sup>Mytee asserts that the five models of the Banana Glider all operate in substantially the same  
28 manner, so the motion for non-infringement addresses them collectively. [Doc. No. 109-1 at 2:18-19.]  
Harris does not dispute this representation in its opposition, so the accused products will be presumed to  
be identical with regard to the patent infringement analysis.

1 device.” *Roche Palo Alto LLC v. Apotex, Inc.*, 531 F.3d 1372, 1377 (Fed. Cir. 2008). The first step is a  
2 question of law, and the second step is a question of fact. *Nystrom v. Trex Co.*, 424 F.3d 1136, 1141  
3 (Fed. Cir. 2005). The patentee has the burden of establishing infringement by a preponderance of  
4 evidence. Infringement will not be shown unless the patentee demonstrates the presence of every  
5 element or its substantial equivalent in the accused device. *Terlep v. Brinkmann Corp.*, 418 F.3d 1379,  
6 1384-85 (Fed. Cir. 2005).

7 **A. ‘577 Patent.**

8 The ‘577 Patent issued on October 9, 2001.<sup>2</sup> It is directed at a device for enhancing the removal  
9 of liquid from fabric utilizing mechanical and aerodynamic techniques. Harris alleges Mytee’s Accused  
10 Devices infringe claims 5, 10, 11, 13 and 28. Claim 5 is dependent on Claim 1 and therefore incorpo-  
11 rates all the elements of Claim 1 as well. Mytee moves for summary judgment asserting its Accused  
12 Devices do not infringe these claims either literally or under the doctrine of equivalents. [Doc. No. 109-  
13 1, at 8-11.]

14 **1. Claim language.**

15 Claim 5 (incorporating Claim 1) recites:

16 1. A device for enhancing removal of liquid from fabric which comprises:

17 a base plate having one or more apertures forming extraction nozzles; and  
18 means for forcing liquid in the fabric toward said apertures as said base  
19 plate is moved across the fabric, said means for forcing being attached to a  
20 bottom of said base plate.

21 5. A device in accordance with claim 1, wherein the means for forcing includes a barrier  
22 disposed behind the plurality of apertures.

23 Claim 1 requires a “means for forcing liquid in the fabric toward [the] apertures.” When an  
24 element of a claim is expressed as a means for performing a specified function without the recital of  
25 structure, the claim is construed to cover the corresponding structure described in the specification and  
26 equivalents thereof. 35 U.S.C. § 112. The “means for” forcing liquid are described in the specification  
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28 <sup>2</sup> A copy of the ‘577 Patent is attached as Exhibit A to Harris’ Answer and Counterclaim. [Doc. No. 5.]

1 as “barriers,” the portion of the baseplate that faces and contacts the fabric, oriented and shaped in any  
2 fashion that will force any liquid in the fabric toward the apertures. (‘577 Patent at 4:53-58.) The  
3 barriers are further described as constructed “such that each barrier has only a small surface area that will  
4 contact the fabric generally perpendicularly to the original orientations of such fabric.” (*Id.* at 5:4-7.)  
5 Claim 5 specifically requires the inclusion of a barrier structure as the “means for” forcing liquid toward  
6 the apertures and requires it be on the baseplate located behind a plurality of apertures.

7 Claim 10 recites:

- 8 10. A device configured to be attached to a machine for extracting a liquid from a fabric, the  
9 device comprising:
- 10 (a) a baseplate with a bottom configured to face and contact the fabric,
  - 11 (b) a plurality of apertures, formed in the bottom of the baseplate, forming  
12 extraction nozzles configured to withdraw fluid from the fabric there through; and
  - 13 (c) at least one barrier, disposed on the bottom of the baseplate, configured to force  
14 liquid in the fabric towards the plurality of apertures.

15 Claims 11 and 13 are dependent on Claim 10, and therefore incorporate all the elements of Claim  
16 10.

17 Claim 11 further recites:

- 18 11. A device in accordance with claim 10, where the [sic] at least one barrier has a straight  
19 elongated shape.

20 Claim 13 further recites:

- 21 13. A device in accordance with claim 10, where the [sic] at least one barrier is disposed  
22 behind the plurality of apertures.

23 Claims 28 recites:

- 24 28. A device configured to be attached to a machine for extracting a liquid from a fabric, the  
25 device comprising:
- 26 (a) a baseplate with a bottom configured to face and contact the fabric,
  - 27 (b) a plurality of apertures, formed in the bottom of the baseplate, forming  
28 extraction nozzles configured to withdraw liquid from the fabric therethrough; and

1 (c) a barrier, disposed on the bottom of the baseplate behind the plurality of apertures,  
2 configured to force liquid in the fabric towards the plurality of apertures.

3 On April 24, 2008, the Court issued an order construing certain claim terms of the '577 patent  
4 disputed by the parties. [Doc. No. 70.] The Court defined "aperture" to mean any holes, slots or  
5 openings that serve as liquid extraction nozzles; and "barrier" as a solid material attached to the bottom  
6 of the base plate that extends farther into the fabric than any other portion of the device.

7 **2. Mytee's Non-infringement Argument on the '577 Patent.**

8 Mytee argues its products do not have at least one element of each of the asserted claims and  
9 therefore cannot as a matter of law be found to infringe, either literally or under the Doctrine of  
10 Equivalents. The undisputed evidence, Mytee contends, demonstrates the Accused Devices do not meet  
11 the claim limitation of a barrier for forcing liquid in the fabric toward apertures, present in each asserted  
12 claim. Furthermore, Mytee contends the undisputed evidence demonstrates the Accused Devices do not  
13 meet the limitation of claims 10, 11, 13 and 28, of a plurality of apertures formed at the bottom of the  
14 baseplate, and therefore cannot be found to infringe those claims on this separate ground.

15 **a. The Accused Devices do not have Barriers.**

16 Mytee argues its Accused Devices do not have barriers for forcing liquid in the fabric toward the  
17 apertures, an element required by each of the asserted claims 5, 10, 11, 13 and 28. Therefore, as a matter  
18 of law, the Accused Devices cannot be found to infringe. In support of its motion, Mytee offers the  
19 following statements:

20 The Accused Devices are designed to glide across the surface of a carpet. [Doc. No. 109-3 at  
21 ¶16.]

22 The Accused Devices have a channel which runs across the middle of the device to allow for  
23 airflow. [*Id.* at ¶17.]

24 The channel creates space between the extraction nozzles and the targeted surface. [*Id.* at ¶18.]

25 There is no opportunity for the material created by the channel to act as a barrier for forcing  
26 liquid toward the nozzles. [*Id.* at ¶19.]

27 The portions of the Accused Devices which contact the targeted surface act as a buffer to allow  
28 for airflow and do not force liquid into the apertures. [*Id.* at ¶20.]

1 The contact portions [of the Accused Devices] do not penetrate the surface of the carpet. [*Id.* at  
2 ¶21.]

3 The Teflon coating on the Accused Devices reduces the friction caused by contact with a  
4 carpeted surface and allows for easier movement along the surface. [*Id.* at ¶22.]

5 The design and the material of the Accused Devices serve the devices' purpose, which is to  
6 reduce the exertion required to operate a vacuum device. [*Id.* at ¶23.]

7 If the Accused Devices had barriers which extended into the fabric, it would result in creating  
8 greater friction, thus defeating one of the primary goals of the devices. [*Id.* at ¶24.]

9 In support of these statements, Mytee refers the Court generally to three exhibits lodged in  
10 support of its motion: Deposition Excerpts of LaBarbera, [Doc. No. 112-1]; Deposition Excerpts of  
11 Thompson, [Doc. No. 112-2]; and the October 22, 2008 Expert Report of Fritz Thompson, [Doc.  
12 No.115-6]. [Doc No. 109-3 at 5-8.]<sup>3</sup> Based on the testimony of these witnesses, Mytee contends the  
13 evidence is undisputed that the portions of the Accused Devices that come into contact with the fabric do  
14 not act as barriers forcing liquid toward the apertures for extraction. The witnesses describe the structure  
15 and operation of the Accused Devices such that the contact portions (*i.e.*, the edges of the channel on the  
16 bottom of the glide) do not penetrate the fabric but act as buffers for airflow. Mytee therefore concludes  
17 the Accused Devices do not have the barrier element and cannot be found to infringe any of the asserted  
18 claims.

19 In opposition to Mytee's motion, Harris must designate specific facts showing there is a genuine  
20 issue for trial. *Berg*, 794 F.2d at 459. As the non-moving party, however, Harris' evidence is to be  
21 believed, and all justifiable inferences are to be drawn in its favor. *Anderson v. Liberty Lobby, Inc.*, 477  
22 U.S. 242, 255 (1986). Harris offers contradictory testimony from its expert Jonathan Richards, who  
23 opines that the Accused Devices have a barrier forcing liquid in fabric toward the apertures. [Doc. No.  
24 127-1 at 5, Doc. No. 127-2 at 10.] Mr. Richards describes the barriers as consisting of one or both of the  
25 two ridges on the bottom portion of the body of the Accused Device, extending along the length of the  
26 body in front of and behind the apertures. Further he states these ridges extend farther into a fabric than

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28 <sup>3</sup>Harris' motion to Strike, [Doc. No. 139], the "Amended Separate Statement of Facts,"[Doc. No. 135], submitted by Mytee as untimely and prejudicial is **GRANTED**. The Court considered only the "facts" initially submitted by Mytee in support of its motion. [Doc. 109-3.]

1 any other portion of the device when the Accused Devices are in use and compel the liquid toward the  
2 apertures. [Doc. No. 127-2 at 12-14.]

3 Harris also offers the testimony of Ed Durrant who stated that in his personal use of the Accused  
4 Devices, he observed the contact portions of Accused Devices to cause fluid to be pushed or collected in  
5 the apertures of the products. [Doc. No. 127-1 at 7, No. Doc.127-3.]

6 Mytee disagrees with the description of the Accused Devices and the analysis of their operation  
7 offered by Harris' experts and argues that the Court to disregard the testimony offered by Harris.  
8 Characterizing the evidence as the unsupported conclusions and "theories" of Harris' experts on how  
9 the Accused Devices might direct water toward apertures, Mytee contends it does not create a material  
10 dispute on the matter of infringement. [Doc. 136-1 at 15-17.] Mytee discredits the observations and  
11 conclusions of Harris' experts as unsupported by "quantitative analysis" and suggests they are inadmissi-  
12 ble.<sup>4</sup> [*Id.* at 16.] Whether the witnesses' opinions are supported by credible observations and whether  
13 objective tests or experiments were appropriate or necessary to support such opinions are determinations  
14 that will go to the weight given each opinion by the trier of fact for both parties' experts. There is a  
15 genuine dispute as to whether the structure of the Accused Devices meets the "barrier" claims limitation.  
16 This is a question of fact for the jury and precludes summary judgment of non-infringement of the  
17 asserted claims in the '577 Patent.

18 **b. The Accused Devices do not have a Plurality of Apertures Formed at the Bottom of**  
19 **the Baseplate.**

20 Mytee also argues its Accused Devices do not have a plurality of apertures formed at the bottom  
21 of the baseplate, an element of asserted claims 10, 11, 13 and 28. Therefore, as a matter of law, the  
22 Accused Devices cannot be found to infringe these claims. [Doc. No. 109-1 at 11.] In support of its  
23 motion, Mytee offers the following statement:

24 The Accused Devices do not include a plurality of apertures, formed in the bottom of the  
25 baseplate. The apertures of the Accused Products [sic] are disposed above the bottom of the baseplate,  
26 not in the bottom. [Doc. No. 109-3 at ¶28.]

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28 <sup>4</sup>It is noted that Mytee did not move to strike Harris' evidence as unreliable or have it excluded as  
inadmissible, or challenge the opinions of Harris' experts under *Daubert*.

1 In support of this conclusion, Mytee refers the Court generally to two exhibits lodged in support  
2 of its motion: Deposition Excerpts of Thompson, [Doc. No. 112-2];<sup>5</sup> and October 22, 2008 Expert  
3 Report of James Sakaguchi, [Doc. No.116-1]. [Doc No. 109-3 at 8.] Mytee's expert Mr. Sakaguchi  
4 opines that the apertures of the Accused Devices are not formed in the bottom of the baseplate, in that  
5 they are not in contact with the working surface, such as fabric. He describes the apertures in the  
6 Accused Devices are formed above the baseplate. Mytee therefore concludes the Accused Devices  
7 cannot be found to infringe asserted claims 10, 11, 12 and 28, all of which require that the apertures are  
8 formed in the bottom of the baseplate.

9 Again, in opposition, Harris must designate specific facts showing there is a genuine issue for  
10 trial, *Berg*, 794 F.2d at 459, and its evidence is to be believed, and all justifiable inferences are to be  
11 drawn in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Harris offers contradic-  
12 tory testimony from its expert Jonathan Richards, who opines the Accused Devices have multiple  
13 apertures or holes along the length of the body. Each aperture extends from a bottom, exterior surface,  
14 which contacts a flooring surface during use to an interior surface of the body portion. [Doc. No. 127-1  
15 at 8, Doc. No. 127-2 at 11-13.] Mr. Richards further opines there is no limitation that precludes the  
16 apertures from being located slightly above the extreme lower end of the barriers. [Doc. No. 127-1 at 9,  
17 Doc. No.127-5 at 8.]

18 The Court finds a genuine factual dispute as to the location of the apertures in relation to the  
19 bottom of the baseplate on the Accused Devices. Mytee's expert concludes they are not in the bottom of  
20 the baseplate because they are not in contact with the fabric and therefore do not meet the claim  
21 limitation. Figures 1 and 3 of the '577 Patent illustrate an embodiment of the patent that depicts the  
22 apertures and barriers formed on the bottom of the baseplate and the barriers extending farther from the  
23 baseplate than the apertures, such that the apertures would be raised above and not in contact with the  
24 fabric if no pressure was put on the device. Consequently, the conclusion that the apertures in the  
25 Accused Devices are not in contact with the fabric is not dispositive of whether they are formed in the

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27 <sup>5</sup>The Court's review of the pages of deposition excerpts of Mr. Thompson provided in this  
28 exhibit revealed no testimony on the location of apertures and provided no evidentiary support for  
Mytee's argument.



1 bottom of the baseplate. There is a dispute regarding whether the apertures of the Accused Device are in  
2 contact with the fabric in normal use, and whether the contact portion of the Accused Devices is the  
3 baseplate or a barrier on the baseplate.

4 The Court finds a genuine dispute as to whether the structure of the Accused Devices includes  
5 the limitation of apertures formed in the bottom of the baseplate. This is a question of fact for the jury  
6 and precludes summary adjudication of non-infringement of Claims 10, 11, 12 and 28 of the '577 Patent.

7 **B. '892 Patent.**

8 The '892 Patent issued on July 31, 2001.<sup>6</sup> It is directed at a device for enhancing the removal of  
9 liquid from fabric. Harris alleges Mytee's Accused Devices infringe claims 1, 9 and 17. Mytee moves  
10 for summary judgment asserting its Accused Devices do not infringe these claims either literally or  
11 under the doctrine of equivalents. [Doc. No. 109-1, at 12-13.]

12 **1. Claim language.**

13 Claim 1 recites:

- 14 1. A vacuum head device configured to withdraw a fluid from a carpeted surface, the device  
15 comprising:  
16 (a) an elongated base plate configured to be movably disposed on the carpeted surface,  
17 and having a tapering cross section with a wider upper end and a narrower lower end  
18 configured to penetrate into the carpeted surface; and  
19 (b) a plurality of apertures, formed in an array in the base plate, configured to withdraw  
20 the fluid under a vacuum force.

21 Claim 9 is dependent on Claim 8 and therefore incorporates all the elements of Claim 8.

22 Claim 9 (incorporating Claim 8) recites:

- 23 8. A vacuum head device configured to withdraw fluid from a carpeted surface, the device  
24 comprising:  
25 (a) an elongated base plate configured to be movably disposed on the carpeted surface;  
26 and

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28 <sup>6</sup>A copy of the '892 Patent is attached as Exhibit B to Harris' Answer and Counterclaim. [Doc. No. 5.]

1 (b) a plurality of apertures, formed in an array in the base plate, configured to withdraw  
2 the fluid under a vacuum force.

3 9. A device in accordance with claim 8, wherein the base plate has a tapering cross section  
4 with a wider upper end and a narrower lower end configured to penetrate into the  
5 carpeted service.

6 Claim 17 is dependent on Claim 16 and therefore incorporates all the elements of Claim 16.

7 Claim 17 (incorporating Claim 16) recites:

8 16. A vacuum head device configured to withdraw fluid from a carpeted surface, the device  
9 comprising:

10 (a) an elongated base plate configured to be movably disposed on the carpeted surface;  
11 and having a tapering cross section with a wider upper end and a narrower lower end  
12 configured to penetrate into the carpeted surface; and

13 (b) a plurality of apertures, formed in an array in the base plate, configured to withdraw  
14 the fluid under a vacuum force.

15 17. A device in accordance with claim 16, wherein the plurality of apertures are formed at the  
16 lower end.

17 On April 24, 2008, the Court issued an order construing certain claim terms of the '892 Patent  
18 disputed by the parties. [Doc. No. 70.] The Court defined "lower end" to mean the bottom portion of  
19 the base plate that comes into contact with the fabric.

20 **2. Mytee's Non-infringement Argument on the '892 Patent.**

21 Mytee argues its products do not have at least one element of each of the asserted claims and  
22 therefore cannot as a matter of law be found to infringe, either literally or under the Doctrine of  
23 Equivalents. The undisputed evidence, Mytee contends, demonstrates the Accused Devices do not meet  
24 the claim limitation of base plate with a tapering cross section present in each asserted claim 1, 9 and 17.  
25 Furthermore, Mytee contends the undisputed evidence demonstrates the Accused Devices do not meet  
26 the limitation of claim 17, of a plurality of apertures formed at the lower end of the baseplate, and  
27 therefore cannot be found to infringe that claim on this separate ground.

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1           **a.       The Accused Devices do not have a base plate with a tapering cross section.**

2           Mytee provides no evidentiary support for its contention that its Accused Devices do not include  
3 a base plate having a tapering cross section with a wider upper end and a narrower lower end, an element  
4 required by each of the asserted claims 1, 9 and 17. Counsel argues the “base plate of the Accused  
5 Devices have a rounded cross section such that the upper end is relatively narrow, and then the cross  
6 section actually increases toward the middle section, and then narrows toward the lower end which is in  
7 contact with the carpet or fabric.” [Doc. No. 109-1 at 12.] This description of the Accused Devices is  
8 presented without any citation to admissible testimony or other evidence. It is counsel’s argument for  
9 the conclusion that the Accused Devices do not, as a matter of law, literally infringe the ‘892 Patent.

10           Mytee further argues the base plate structure of the Accused Devices cannot function as  
11 equivalent to the claimed structure without ignoring the claims limitations. “A rounded device which  
12 comes into contact with the carpet, would not serve the same function as one which tapers and penetrates  
13 as required in each of the asserted claims.” [*Id.*] “To broaden a device which has a tapered lower end to  
14 one that has a rounded lower end will render the limitation of penetration into the carpeted surface  
15 meaningless.” [*Id.* at 13.] This is also argument without citation to admissible testimony or other  
16 evidence<sup>7</sup> supporting the conclusion that the Accused Devices do not, as a matter of law, infringe the  
17 ‘892 Patent under the Doctrine of Equivalents.

18           Although Mytee offered no evidentiary support for its argument despite its obligation to do so,  
19 *see Celotex*, 477 U.S. at 323 (stating the moving party must identify the pleadings, depositions,  
20 affidavits, or other evidence that it believes demonstrates the absence of a genuine issue of material fact),  
21 Harris responded with the testimony of its expert Mr. Richards, who described the structure of Accused  
22 Devices as having a tapering cross-section. “The [Accused Devices’] wider upper end is that portion of  
23 the body that is near the vertical center of the body and that is the widest portion of the body. The  
24 [Accused Devices’] narrower lower end is that portion of the body that is near the bottom portion of the  
25 body and that is narrower than the center portion of the body. The bottom portion of the body is that

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27           <sup>7</sup>Mytee states Harris’ own expert testified that a rounded surface would tend to glide across the  
28 top of the carpeted surface and not penetrate as much as a tapered one. However, the actual testimony  
was not cited to or provided to the Court.

1 portion that contacts the flooring surface when the [Accused Devices are] in use.” [Doc. No. 127-1 at 9-  
2 10; Doc. No. 127-2 at 15-17.]

3 Mytee responds that the Court should again disregard the testimony of Harris’ expert, arguing his  
4 description of the structure of the Accused Devices as a tapering cross-section “cannot be deemed as a  
5 tapering cross section as illustrated in the drawings for the ‘892 Patent.” [Doc. No. 136-1 at 19.]  
6 According to Mytee, the patent illustrations and a reading of the specification does not allow for Mr.  
7 Richards’ “expansive” construction of the terms “tapering cross-section” and “wider upper end and  
8 narrower lower end.” [*Id.* at 20.]

9 The scope of the patent, however, is not defined by the drawings in the specification and Mytee  
10 has not identified any portion of the specification in which the inventor stated the invention was limited  
11 to “the exemplary embodiments illustrated in the drawings.” [‘892 Patent, Col.2, ll.42-45.] The element  
12 of “base plate with a tapering cross section” as required by the asserted claims is not limited to the  
13 embodiment of that structure illustrated in the patent’s specification as Mytee suggests.

14 The Court finds a genuine dispute as to whether the structure of the Accused Devices includes  
15 the limitation of base plate with a tapering cross section as required by the asserted claims. This is a  
16 question of fact for the jury and precludes summary adjudication of non-infringement of Claims 1, 9 and  
17 17 of the ‘892 Patent.

18 **b. The Accused Devices do not contain a plurality of apertures formed in the lower**  
19 **end.**

20 Mytee provides no evidentiary support for its contention that its Accused Devices do not include  
21 a plurality of apertures formed in the lower end of the base plate, an element required by asserted claim  
22 17. Counsel argues that the “apertures of the [Accused Devices] are disposed above the bottom of the  
23 baseplate, not in the bottom, and thus do not contact with the working surface, such as carpet or fabric.”  
24 [Doc. No. 109-1 at 13.] The Court construed “lower end” to mean the bottom portion of the base plate  
25 that comes into contact with the fabric. [Doc. No. 70.]

26 For the reasons set forth above in Section A(2)(b), regarding whether the structure of the  
27 Accused Devices includes the limitation of apertures formed in the bottom of the baseplate with regard  
28 to the claims of the ‘577 Patent, the Court finds a genuine dispute as to whether the Accused Devices

1 meet this limitation of Claim 17 of the '892 Patent. This is a question of fact for the jury and precludes  
2 summary adjudication of non-infringement of Claim 17 of the '892 Patent.

3 **IV. CONCLUSION**

4 For the reasons set forth above, it his hereby ordered:

- 5 1. Mytee's Motion for Summary Judgment of Non-Infringement of the '577 Patent is  
6 **DENIED.**
- 7 2. Mytee's Motion for Summary Adjudication of Non-Infringement of Claims 10, 11, 13  
8 and 28 of the '577 Patent is **DENIED.**
- 9 3. Mytee's Motion for Summary Judgment of Non-Infringement of the '892 Patent is  
10 **DENIED.**
- 11 4. Mytee's Motion for Summary Adjudication of Non-Infringement of Claim 17 of the '892  
12 Patent is **DENIED.**

13 **IT IS SO ORDERED.**

14  
15 DATED: May 8, 2009

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18 **CATHY ANN BENCIVENGO**  
19 United States Magistrate Judge  
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