United States District Court,
D. Oregon.

ACRYMED, INC., an Oregon corporation, and Medline Industries, Inc., an Illinois corporation,
Plaintiffs and Counterdefendants.
v.
CONVATEC, an unincorporated division of E.R. Squibb & Sons, LLC, a Delaware Limited Liability Company fka E.R. Squibb & Sons, Inc., and Bristol-Myers Squibb Company, a Delaware Corporation,
Defendants and Counterclaimants.

No. Civ.03-741-AS

May 17, 2004.

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Amber M. Rye, Kevin A. Hughey, Randall G. Block, Sigrid Owezarek, Steven D. Roland, Sedgwick, Detert, Moran & Arnold, LLP, San Francisco, CA, Elizabeth A. Schleuning, Schwabe Williamson Wyatt, PC, Portland, OR, Stevan J. Bosses, Thomas H. Beck, Fitzpatrick, Cella, Harper & Scinto, New York, NY, for Defendants.

OPINION AND ORDER

ASHMANSKAS**, Magistrate J.**

Before the court is the issue of claim construction of the language of United States Patent No. 6,605,751 (the "Patent"). The Patent discloses methods for making silver-containing compositions and devices.

The court conducted a *Markman* hearing on the issue of claim construction on May 14, 2004. After consideration of the filings and the materials and testimony presented, the court defines the terms as set forth below.

Background

The language at issue is found in independent claims 17 and 21 which read as follows:

17. A method for making a hydrophillic [sic] matrix having antimicrobial activity, comprising,

directly incorporating a metal colloid in a hydrophillic [sic] matrix by forming a metal colloid by adding to

the hydrophilic matrix, in no particular order, an organic solvent solution of a cation-donating compound, wherein the cations are metal ions, and an organic solvent solution of an anion-donating compound, wherein the anions are added in excess of the metal cations; such that the association of the metal cation and the anion of the anion-donating compound is favored.

* * *

21. A biocompatible hydrophilic polymeric antimicrobial matrix, comprising a hydrophilic cross-linked polymer network, and a metal colloid directly incorporated in the matrix, wherein the metal colloid is formed by the reaction of an anionic solution and a metal cationic solution, and wherein the anions of the anionic solution are in an excess concentration of the metal cations, such that association of the metal cation and the anion is favored.

Legal Standard

The analysis of an action for patent infringement involves two steps: (1) the proper construction of the asserted claim; and (2) a determination of whether the accused method or product infringes the claims as properly construed. *See* Markman v. Westview Instruments, Inc., 52 F.3d 967, 976 (Fed.Cir.1995) (en banc), *aff'd* 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996). "Construction of a patent, including the terms of art within its claims, is exclusively within the province of the court." *Markman,* 52 F.3d at 372. Whether the claims, properly construed, infringe a product or process is generally a question of fact for the jury. *Id.* at 390.

"In interpreting an asserted claim, the court should look first to the intrinsic evidence of record, i.e., the patent itself, including the claims, the specification and, if in evidence, the prosecution history." Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed.Cir.1996).

The court should first examine the words of the claims themselves in order to define the scope of the patented invention. *See* Dow Chemical Co. v. Sumimoto Chemical, 257 F.3d 1364, 1372 (Fed.Cir.2001); Vitronics, 90 F.3d at 1576. The claim language specifies " 'the subject matter which the applicant regards as his invention." ' Markman, 517 U.S. at 373 (quoting 35 U.S.C. s. 112). Claim language is given its "ordinary and accustomed meaning as understood by one of ordinary skill in the art." Dow Chemical, 257 F.3d at 1372. Courts cannot rewrite claims, but must "give effect to the terms chosen by the patentee." K-2 v. Corporation v.. Solomon S.A., 191 F.3d 1356, 1364 (Fed.Cir.1999).

The "ordinary and accustomed meaning" of a claim is presumed correct and any party seeking to convince a court that a term has some other meaning bears the burden of demonstrating why such an alteration is required. K-2 Corporation, 191 F.3d at 1362. This may be accomplished in two ways: (1) if a different meaning is "clearly and deliberately set forth" in the intrinsic materials of the patent; or (2) if use of the ordinary and accustomed meaning would "deprive the claim of clarity." *Id.* In making this assessment, the court should approach the issue using common sense and "the understanding of those of ordinary skill in the art" of the patent at issue. *Id.* at 1365.

After an examination of the claim itself, the court should review the patent specification "to determine whether the inventor has used any terms in a manner inconsistent with their ordinary meaning." Vitronics, 90 F.3d at 1582. The specification should describe the invention " 'in such full, clear, concise, and exact

terms as to enable any person skilled in the art ... to make and use the same." ' Markman, 517 U.S. at 373 (quoting 35 U.S.C. s. 112). "[T]he specification is always highly relevant to the claim construction analysis. Usually it is dispositive; it is the single best guide to the meaning of a disputed term." Vitronics, 90 F.3d at 1582. However, "[t]hat claims are interpreted in light of the specification does not mean that everything expressed in the specification must be read into all the claims." SRI Int'l v. Matsushita Elec. Corp., 775 F.2d 1107, 1121 (Fed.Cir.1985) (internal quotations omitted). *See also* Markman, 52 F.3d at 980 ("the written description does not delimit the right to exclude. That is the function and purpose of the claims."); Enercon GmbH v. Int'l Trade Comm., 151 F.3d 1376, 1384 (Fed.Cir.1998) ("This court has repeatedly stated that while claims are to be construed in light of the specification .... [g]enerally, particular limitations or embodiments appearing in the specification will not be read into the claims.") (citations omitted), *cert. denied,* 526 U.S. 1130, 119 S.Ct. 1803, 143 L.Ed.2d 1007 (1999). Specifications may aid in claim interpretation but may not be used to add limitations. E.I. DuPont de Nemours & Co. v. Phillips Petroleum Co., 849 F.2d 1430, 1433 (Fed.Cir.), *cert. denied,* 488 U.S. 986, 109 S.Ct. 542, 102 L.Ed.2d 572 (1988); *See also* Dow Chemical Co. v. Astro-Valcour, Inc., 47 F.Supp.2d 294 (N.D. New York 1999) (stated advantage in specification should not be read as a requirement of a claim), *case affirmed on other grounds,* 267 F.3d 1334 (Fed.Cir.2001).

Finally, the third type of intrinsic evidence that the court may consider is the prosecution history of the patent. The prosecution history includes the complete records of the proceedings before the Patent and Trademark Office, including any re-examination proceedings, and any representations made by the applicant about the scope of the claims. *See* Vitronics, 90 F.3d at 1582-83.

If analysis of the intrinsic evidence alone resolves any ambiguity in a disputed claim term, "it is improper to rely on extrinsic evidence other than that used to ascertain the ordinary meaning of the claim limitation." Dow Chemical, 257 F.3d at 1373, *citing* Vitronics, 90 F.3d at 1582 (citations omitted). FN1 As clarified by the Federal Circuit, this holding from *Vitronics* does not mean that a court may not consider extrinsic evidence in construing a patent claim; "[r]ather, *Vitronics* merely warned courts not to *rely* on extrinsic evidence in claim construction to contradict the meaning of claims discernable from ... the intrinsic evidence." Pitney Bowes, Inc. v. Hewlett-Packard Co., 182 F.3d 1298, 1307 (Fed.Cir.1999) (emphasis in original). "Extrinsic evidence is that evidence which is external to the patent and file history, such as testimony, inventory testimony, dictionaries, and technical treatises and articles." *Id.* at 1584. FN2 While dictionaries are also considered "extrinsic," they "hold a 'special place' and may sometimes be considered along with the intrinsic evidence when determining the ordinary meaning of claim terms." Dow Chemical Co. ., 257 F.3d at 1372.

FN1. This limitation is required so that competitors may rely on the public records to determine the scope of the patentee's claimed invention. Vitronics, 90 F.3d at 1582-83.

FN2. In construing the claims, the court may also consider the doctrine of claim differentiation. That doctrine allows that "[w]here some claims are broad and others narrow, the narrow claims limitations cannot be read into the broad whether to avoid invalidity or to escape infringement." United States v. Telectronics, Inc., 857 F.2d 778, 783 (Fed.Cir.1988), *cert. denied,* 490 U.S. 1046, 109 S.Ct. 1954, 104 L.Ed.2d 423 (1989).

Discussion

"Metal Colloid"

Plaintiffs AcryMed, Inc., and Medline Industries, Inc. (collectively "Plaintiffs"), assert that the term "metal colloid" should be defined as "a metal compound dispersed in a matrix." Defendants ConvaTec, E.R. Squibbs & Sons, L.L.C., and Bristol-Myers Squibb Company (collectively "Defendants") define the term "colloid" as "a system in which finely divided particles, which are approximately 10 to 10,000 angstroms in size, are dispersed within a continuous medium" and "metal" as "a metal salt formed by the sequential addition of an anion-donating solution and a cation-donating solution resulting in the association of the anion with the cation."

Plaintiffs have no objection to the terms "metal" and colloid" being defined in this matter. However, Plaintiffs take exception to Defendants' definition of "metal colloid" as:

a colloid composed of metal salt (e.g., silver chloride) particles which are at least 10 angstroms and not more than 10,000 angstroms in size, dispersed in a liquid, in which the metal salt is formed as the result of the sequential addition of an anion donating solution and a cation donating solution.

Plaintiffs argue that Defendants' definition of "metal colloid" improperly seeks to limit the size of the particles in the colloid to between 10 and 10,000 angstroms, rather than approximately 10 to 10,000 angstroms as found in Defendants' definition of "colloid." Additionally, Defendants' definition of "metal colloid" requires the particles to be "dispersed in a liquid" rather than the more general "dispersed in a continuous medium" contained in the definition of "colloid."

With regard to the size limitations of the particles suspended in the colloid, Defendants agree that there is some dispute about the size of colloidial particles. For example, the authorities cited by Defendants vary between requiring the size of the particles to be: 1) between 10 to 10,000 angstroms; and 2) too small to be visible in an ordinary optical microscope. FN3 Based on Defendants' own proffered definitions, it is evident that collodial particles are not universally restricted to a specific size. In the absence of such a limitation in the Patent, and specifically, in the claims at issue, the court will not adopt such a limitation.

FN3. The dictionary in the court's chambers defines "colloid" as "a suspension of finely divided particles in a continuous medium in which the particles are approximately 5 to 5,000 angstroms in size, do not settle out of the substance rapidly, and are not readily filtered." *The American Heritage Dictionary of the English Language,* Third Ed. (1996).

Defendants' proposed construction of the term requires that the colloid be formed independently of the matrix and that the colloid be in the form of a liquid or solution. The language of the claims at issue do not support this construction. Claim 17 describes the creation and incorporation of a metal colloid in a matrix by the addition of two solutions to the matrix: one a cation-donating compound and one an anion-donating compound. The colloid then forms within the structure of the matrix by the combining of the two solutions. There is no requirement that the colloid exist separate and apart from the matrix. On the other hand, the construction offered by Plaintiffs, "a metal compound dispersed within a matrix," succinctly describes the colloid formed in accordance with the method described in Claim 17. The colloid is formed within the matrix and becomes a part of the matrix.

Defendants assert that the patent examiner rejected the method resulting from the use of the term in this

manner. Specifically, the patent examiner rejected a number of claims which taught the incorporation of an active agent directly in the matrix, explaining that:

It would have been obvious to one having ordinary skill in the art at the time the invention was made to incorporate the active agent into the matrix and not within another delivery vehicle to prevent the negative effects of system-wide administration.

The patent examiner later rejected the claims teaching the addition of metals as an active agent, stating that:

It would have been obvious to one having ordinary skill in the art at the time the invention was made to incorporate an active agent consisting of metals, soluble silver chloride, a stabilizing agent, and copper chloride to deter the growth of microbes in the wound.

AcryMed amended the claims in a number of ways, including adding the term "colloid" to describe the form of the active agent incorporated into the matrix through the combination of two organic solutions. AcryMed then argued that the invention was novel because of its "two-step method of forming a metal colloid directly in the matrix by the addition of the cation of the colloid and the anion of the colloid, and by providing the cation and the anion solutions in an organic solvent." The Patent was then issued.

Plaintiffs' construction of colloid is consistent with the prosecution history. AcryMed altered objectionable language and described the creation of a colloid within the matrix through the addition of two organic solutions. This complies with the argument offered by AcryMed and accepted by the patent examiner.

Defendants also argue that the presence of a liquid colloid is supported by the Patent's prosecution history. The second provisional application filed by AcryMed described the invention as a "new silver-containing moist wound dressing." Defendants assert that this language describes a bandage where a solution is added to the bandage before use. The language could just as easily describe a dry dressing that is used on moist wounds.

The court rejects Defendants' construction of the term "metal colloid". Instead, it finds that "metal colloid," as used in the Patent, means a colloid composed of metal salt (e.g., silver chloride) particles which are approximately 10 to 10,000 angstroms in size, dispersed within a continuous medium, in which the metal salt is formed as the result of the sequential addition of an anion-donating solution and a cation-donating solution. This definition combines the definitions of "metal" and "colloid" agreed to by the parties without the additional limitations imposed by Defendants.

"Cross-Linked"

Claim 21 refers to a "hydrophilic cross-linked polymer network." The parties are at issue with regard to whether the term "cross-linked" requires a cross-linking agent.

The expert evidence establishes that polymers may be cross-linked in several ways. Defendants do not contest this but argue that the term "cross-linked" as used in the Patent is limited to a covalent cross-linking by means of a cross-linking agent based on the reference to a cross-linking agent in the specification. Defendants argue that because a cross-linking agent is referenced in one of the specifications, all cross-linked networks referred to in the Patent must be made with the use of a cross-linking agent. However, this language describes the method of creating a cross-linked network concurrently with the creation of the metal

colloid rather than incorporating the metal colloid in an existing product or network. Additionally, the court is cautioned not to read limitations into the claim based on the specifications.

Claim 21, and its dependent claims, describe the methods in which the metal colloid may be added to an existing cross-linked polymer network. The network referenced in the examples relevant to these claims identify AQUACEL(R) as the matrix used. Plaintiffs' expert describes AQUACEL(R) as a cellulose fiber that is held together by hydrogen bonding networks and, as a result, is cross-linked via hydrogen bonding. No cross-linking agent is used in the production of AQUACEL(R). To give effect to the designation of AQUACEL(R) as an appropriate "hydrophilic cross-linked polymer network" referred to in Claim 21, the court must construe "cross-linked" to include cross-linking via a cross-linking agent as well as via hydrogen bonding.

Matrix

Defendants also seek construction of the term "matrix" as used in the Patent. At oral argument, the parties agreed to define matrix as "a polymeric material which could be used for incorporation of an active agent."

Additional Terms

Defendants sought construction of the terms "network", "cross-linked polymer network", "comprising", "directly incorporating/directly incorporated", "anion-donating compound", "organic solvent solution of an anion donating compound", "anionic solution", "cation-donating compound", "organic solution of a cation donating compound", "metal cationic solution", "association" and "active agent". At oral argument, Defendants withdrew these terms from consideration by the court. Accordingly, the court will not address these additional terms.

Conclusion

The court construes the term "metal colloid" as a colloid composed of metal salt (e.g., silver chloride) particles which are approximately 10 to 10,000 angstroms in size, dispersed within a continuous medium, in which the metal salt is formed as the result of the sequential addition of an anion-donating solution and a cation-donating solution; the term "cross-linking" as encompassing hydrogen bonding as well as covalent bonding via a cross-linking agent; and the term "matrix" as a polymeric material which could be used for incorporation of an active agent. Accordingly, the court adopts, for the most part, the construction of the terms set forth by Plaintiffs in their claim construction brief (# 100) and declines to adopt the construction of the terms offered by Defendants in their claim construction brief (# 111), with the exception of the terms "metal" and "colloid."

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Acrymed, Inc. v. Convatec