

United States District Court,
S.D. Ohio.

THE OHIO WILLOW WOOD COMPANY,
Plaintiff.

v.

DAW INDUSTRIES, INC,
Defendant.

Feb. 22, 2006.

Jeffrey S. Standley, Standley & Gilcrest, Fred Michael Speed, Jr., Standley Law Group LLP, Dublin, OH,
for Plaintiff.

Eric O. Haugen, Haugen Law Firm PLLP, Minneapolis, MN, Richard Eric Gaum, Hahn Loeser & Parks
LLP, Akron, OH, for Defendant.

OPINION AND ORDER

FROST, Magistrate J.

This is a patent infringement case involving The Ohio Willow Wood Company ("OWW") and Daw Industries, Incorporated ("Daw"). As part of that litigation, the parties have requested that the Court construe various patent language pursuant to *Markman v. Westview Instruments, Incorporated*, 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996). This claims-construction decision serves that function.

I. Background

Given the procedural posture of this litigation, the Court need not and shall not describe the facts in great detail here. Of import is the fact that OWW is the owner of U.S. Patent No. 5,830,237 ("the '237 patent"). The company applied for the patent on March 5, 1996, and the patent issued on November 3, 1998. The '237 patent is titled "Gel and Cushioning Devices" and involves technology related to coverings for amputees employing a prosthesis. The relevant specification to the patent discloses a device that fits over a residuum, or an amputation stump, so as to provide a cushion between the stump and the artificial limb. Additionally, the device features an inside-the-liner foamed or non-foamed gel coating, preferably comprised of a block copolymer and mineral oil compound, intended to ease discomfort and undesirable noise effects.

On December 27, 2004, OWW filed suit against Daw, claiming that Daw has infringed on the '237 patent. The parties' dispute at this juncture focuses on language contained within several dependent claims set forth in the '237 patent, linked to the independent Claim 1: FN1

FN1. Claim 1 of the allowed patent was Claim 3 in the patent application. The remaining claims are dependent upon Claim 1.

A tube sock-shaped covering for enclosing an amputation stump, said covering having an open end for introduction of said stump and a closed end opposite said open end, said covering comprising fabric in the shape of a tube sock coated on only one side thereof with a foamed or non-foamed gel composition comprising a block copolymer and mineral oil.

(Doc. # 17, Ex. A, col. 13, lines 53-59.) OWW and Daw first disagree over the meaning of "tube sock-shaped," which describes the covering that constitutes the patented device. Second, the companies disagree over the meaning of "coated on only one side." Third, the parties disagree over the construction to be afforded block copolymers referenced in the patent language.

After briefing on these claim construction issues was completed, the Court conducted a November 7, 2005 *Markman* hearing in which the parties presented evidence and oral argument. During the hearing, Daw repeated its desire—also expressed in the briefing—to incorporate arguments contained in another patent case pending before the undersigned judge, *Ohio Willow Wood Company v. ALPS South Corporation*, Case No. 2:04-cv-1223.FN2 Daw in fact moved for a stay of the claim-construction decision in the instant case until the Court conducted a *Markman* hearing in the related case. The Court denied that request, however, with the caveat that as OWW suggested, the Court could revisit its claim construction in the instant case if the evidence and argument presented in Case No. 2:04-cv-1223 led this Court to disagree with its initial constructions.

FN2. Opting for argument-by-incorporation, Daw's briefing and oral argument in the instant case presents a dearth of direct substantive argument on the gel composition issue.

The Court's denial of Daw's stay request was ultimately of little effect, however. Given the time the Court has spent on the instant decision, the January 2006 *Markman* hearing in Case No. 2:04-cv-1223 occurred prior to finalization of this decision.FN3 Accordingly, the Court has written and reviewed its decisions in both cases in light of the parties' agreement that the arguments made in each case inform the other case. Having finalized the construction of the claims involved, the Court now issues its decision on the relevant claim language.

FN3. OWW requested during the second *Markman* hearing to incorporate the arguments it made in the first *Markman* hearing, thereby further linking the two proceedings. By agreement, the Court granted the request and has considered the evidence presented at both hearings.

II. Claim Construction

A. Standards Involved

The Federal Circuit has explained that "[i]t is a 'bedrock principle' of patent law that 'the claims of a patent define the invention to which the patentee is entitled the right to exclude.'" *Varco, L.P. v. Pason Systems USA Corp.*, No. 05-1136, 2006 WL 229926, at (Fed.Cir. Feb.1, 2006) (quoting *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed.Cir.2005) (en banc) (quoting *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1115 (Fed.Cir.2004))). Consequently, the meaning and scope of a patent's claims lie at the heart of any patent dispute.

The purpose of a *Markman* hearing is to ascertain the meaning of a patent's claims so that it is clear

precisely what has been patented and, by consequence, the protections the patent therefore affords the patent holder. *See* Phillips, 415 F.3d at 1312. *See also* Markman v. Westview Instruments, Inc., 52 F.3d 967, 978 (Fed.Cir.1995) ("When a court construes the claims of the patent ... the court is defining the federal legal rights created by the patent document"), *aff'd*, 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996). There is no "rigid algorithm for claim construction." Phillips, 415 F.3d at 1324. Rather, in construing the meaning of a patent's claims, the Court is guided by a set of principles that the Federal Circuit has described as follows:

The claim terms " 'are generally given their ordinary and customary meaning." ' *Id.* (quoting Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed.Cir.1996)). "The inquiry into how a person of ordinary skill in the art understands a claim term provides an objective baseline from which to begin claim interpretation." *Id.* "Importantly, the person of ordinary skill in the art is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification ." *Id.* "In examining the specification for proper context, however, this court will not at any time import limitations from the specification into the claims." CollegeNet, Inc. v. Apply Yourself, Inc., 418 F.3d 1225, 1231 (Fed.Cir.2005) (citing Teleflex, Inc. v. Ficosa N. Am. Corp., 299 F.3d 1313, 1326 (Fed.Cir.2002)).

Varco, L.P., 436 F.3d 1368, 2006 WL 229926, at *4. The starting point in claim construction therefore lies with the language of the claims themselves. Purdue Pharma L.P. v. Endo Pharmaceuticals, Inc., Nos. 04-1189, 04-1347, & 04-1357, 2006 WL 231480, at (Fed.Cir. Feb.1, 2006) (citing Phillips, 415 F.3d at 1312). In considering a patent's language, a court should apply the plain meaning rule, presumptively giving claim terms their ordinary, plain meaning. Teleflex, 299 F.3d at 1325. A court may, however, depart from a term's plain meaning if the patentee has acted as a lexicographer or otherwise limited the scope of the invention through a clear disclaimer in the specification or prosecution history. Phillips, 415 F.3d at 1316-17.

Of considerable import to claim construction, then, is the intrinsic evidence—the claim language, the specification, and the prosecution history as applicable. World Kitchen (GHC), LLC v. Zyliss Haushaltwaren AG, 151 Fed. Appx. 970, 972 (Fed.Cir.2005) (citing Interactive Gift Express, Inc. v. CompuServe, Inc., 256 F.3d 1323, 1331 (Fed.Cir.2001)); Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed.Cir.1996). When this intrinsic evidence provides an unambiguous description of the scope of the invention, reliance on extrinsic evidence is improper. Vitronics Corp., 90 F.3d at 1582.

But although less significant than intrinsic evidence, extrinsic evidence is still of value to claim construction when necessary. Phillips, 415 F.3d at 1317. This latter category encompasses such things as expert and inventor testimony, as well as texts such as treatises and dictionaries. *Id.* (quoting *Markman*, 52 F.3d 980). A court may entertain expert testimony for numerous purposes, such as

to provide background on the technology at issue, to explain how an invention works, to ensure that the court's understanding of the technical aspects of the patent is consistent with that of a person of skill in the art, or to establish that a particular term in the patent or the prior art has a particular meaning in the pertinent field.

Phillips, 415 F.3d at 1318. The value of expert testimony in regard to claim construction is qualified, however, as an expert cannot offer an opinion of any value that is at odds with the intrinsic evidence of a patent. *Id.* (quoting *Key Pharms. v. Hercon Labs. Corp.*, 161 F.3d 709, 716 (Fed.Cir.1998)); *Playtex Prods., Inc. v. Procter & Gamble Co.*, 400 F.3d 901, 908 n. 1 (Fed.Cir.2005).

Cognizant of these governing principles and having entertained argument, as well as having reviewed the scope of the prior art, the Court shall now address each claim-construction issue in turn.

B. "Tube sock-shaped"

The parties first dispute what the meaning of "tube sock-shaped" in the '237 patent.FN4 OWW proposes that this language means "a relatively long hollow shape, not form-fitted, for covering an amputation stump." (Doc. # 18, at 12, 14.) Daw in turn proposes that the language means "a cylinder with parallel sides, closed at one end and seamed, if at all, only at the closed end." (Doc. # 19, at 7.)

FN4. This language controls the meaning of "in the shape of a tube sock," which is also contained in Claim 1.

The plain language of the patent claim supports much of OWW's construction. A tube sock is a sock that lacks a shaped or contoured heel; it is not necessarily characterized by parallel sides. Thus, something in the shape of a tube sock is characterized by a generally tubular shape without a contoured "heel." This plain-language understanding is important, because the Federal Circuit has explained:

In the absence of an express intent to impart a novel meaning to claim terms, an inventor's claim terms take on their ordinary meaning. [There is] a "heavy presumption" that a claim term carries its ordinary and customary meaning. The ordinary meaning of a claim term may be determined by reviewing a variety of sources, including the claims themselves, other intrinsic evidence including the written description and the prosecution history, and dictionaries and treatises.

Teleflex, 299 F.3d at 1325 (citations omitted). Here, then, the plain meaning of the Claim 1 terms at issue compels a construction reflecting a generally tubular shape, but without requisite parallel sides.FN5

FN5. The Court notes that OWW's proposed construction also includes the clause "for covering an amputation stump." (Doc. # 18, at 12, 14.) The parties have asked the Court to construe the terms related to the shape of the covering and not the purpose of the covering. Thus, that portion of OWW's proposed construction targeting the purpose of the invention is unnecessary, although the Court recognizes that OWW's additional clause correctly represents the meaning of Claim 1's "[a] tube sock-shaped covering" language.

This construction is consistent with and supported by the specification. The specification describes a non-form fitting device that would cover residuums, which are in turn described as "generally hav[ing] a roughly conical or cubical shape" with recessed areas. (Doc. # 17, Ex. A, col. 2, lines 17-19.) Additionally, the file wrapper indicates that the patent's initial applicants specifically stated that their invention "are distinguished from the form-fitting socks of *Kania* [U.S. Pat. No. 5,603,122]" and that "[f]orm-fitting socks like those described in [122] ... are not presently claimed. Instead, Applicants have focused their attention in this application on tube-sock shaped coverings." (Doc. # 17, Ex. F, at 99.) The examiner specifically referenced a patent by ALPS president Aldo Laghi (U.S.Pat. No. 5,507,834), which neither has parallel sides nor is cylindrical in shape, as presenting a *tube-sock form*. The office action thus further reinforces OWW's construction, which permits tapered or unparallel sides.

In contrast, Daw's proposed construction is premised on the notion that a "tube sock shape" is *only* a tube with parallel sides and precise positioning of seams. What Daw overlooks is that, as OWW accurately notes, a "tube sock shape" is distinguishable from a "sock shape" by the absence of the heel and toe contours that give a regular sock its "characteristic 'Christmas stocking' shape." (Doc. # 23, at 4.) The purpose of the invention—a product that would fit typically oddly-shaped residuum without specific contouring—mitigates overreaching to adopt the overly restrictive characteristic of parallel sides. Parallel sides would prove problematic with the often conical shapes found in amputation stumps and contemplated by the patent language.

Additionally, because the ordinary meaning of the words does not implicate seams as Daw suggests, the Court can discern no linguistic basis for importing the restrictive seam requirement that Daw propounds. The proposed requirement of having any seams in but one location is simply not supported by the intrinsic evidence, despite the commonality of seam positioning in any preferred embodiment.

Daw relies on the drawing to define the specification, which in turn would consequently define the claim. A specification does include accompanying drawings. *Playtex Prods., Inc.*, 400 F.3d at 909 (citing *Vas-Cath, Inc. v. Mahurkaer*, 935 F.2d 1555, 1556 (Fed.Cir.1991)). And a court should not carelessly exclude a preferred embodiment in construing a claim. *Dow Chem. Co. v. Sumitomo Chem. Co.*, 257 F.3d 1364, 1378 (Fed.Cir.2001) (quoting *Vitronics*, 90 F.3d at 1583). But the Federal Circuit has also repeatedly cautioned against limiting a claim pursuant to a specification or preferred embodiment. *Playtex Prods., Inc.*, 400 F.3d at 907 (collecting cases). *See also Dow Chem. Co.*, 257 F.3d at 1378 (" '[c]laims, not the specification embodiments, define the scope of protection' ") (quoting *American Permahedge, Inc. v. Barcana, Inc.*, 105 F.3d 1441, 1444 (Fed.Cir.1997)); *Laitram Corp. v. Cambridge Wire Cloth Co.*, 863 F.2d 855, 865 (Fed.Cir.1988) ("it is well established that broad claims supported by the written description should not be limited in their interpretation to a preferred embodiment").

Thus, a preferred embodiment can only import a limitation into a claim when the patentee expressly declares the intent to do so. *Id.* (citing *Karlin Tech., Inc. v. Surgical Dynamics, Inc.*, 177 F.3d 968, 973 (Fed.Cir.1999)). There is no such express declaration of intent here. The proper construction of the Claim 1 language thus does not limit the shape of the patented device to parallel sides, despite the final art containing parallel sides; to import such a limitation would be to ignore the actual text of the claim and the context in which it was submitted, examined, and ultimately approved. By invoking a tube- *sock* shape, the patent here claims something *tubular* or *tubelike*, but not necessarily a parallel-shaped *tube*.FN6

FN6. The Court notes that in the second *Markman* hearing it has held on the '237 patent, counsel for ALP produced numerous tube socks in an attempt to demonstrate a requisite characteristic of parallel sides. Few if any of these socks were actually parallel, insofar as they generally increased in width from top to bottom. When a witness noted this characteristic, ALP's counsel explained that the narrow portion of the sock—the portion that would hold the sock up—should be excluded from consideration. But such self-serving, advantageous exclusion defines the shape of a tube sock by ignoring what constitutes essentially one-fourth to almost one-third of an average tube sock. There is no basis for assuming such an unduly restrictive approach, and the patent language does not purport to narrow "tube sock-shaped" to only a portion of a tube sock.

The Court also recognizes that considerable debate has occurred over whether a tube is cylindrical. To the extent that resort to a dictionary is appropriate, the Court notes that the plain meaning of "tube" is "a hollow

elongated [usually] cylindrical body." *Webster's Third New International Dictionary* 2459 (2002) (abbreviation "usu." changed to reflect full word). That meaning does not mandate a cylinder, but allows for permissible variations that conform to a cylindrical shape *generally*, such as contemplated in the '237 patent. The Court recognizes that OWW also asserts that the "Luxury Liner" displayed at the proceedings before examiner David Willse and referenced in the declaration of inventor Bruce Kania supports that "tube sock-shaped" does not mandate parallel sides. The Court discounts the value of this evidence, however, in light of the fact that there is uncertainty surrounding exactly what was presented to the examiner. Although by all accounts it appears that a tapered Luxury Liner was involved, the Court declines to consider the evidence as controlling or of notable weight and in fact finds the evidence to be of meager value in ultimately determining the meaning of the claim terms.FN7

FN7. It is unclear whether Daw intended its incorporation of ALPS' arguments to be prospective so that it included arguments ALPS was not making at the time of incorporation but would make later. Assuming that Daw indeed intended to adopt all arguments eventually made, the Court notes that ALPS has filed a motion to exclude evidence of what Kania and OWW presented to the patent examiner in the ALPS case. (Doc. # 42 in 2:04-cv-1223.) To the extent that motion can be said to apply in the instant case involving Daw, the Court finds the motion moot in light of the reasoning expressed above.

In a similar effort to support its construction, OWW also directs this Court to three other patents that describe tube socks, U.S. Pat. Nos. 4,589,267, 4,658,995, and 5,027,440. The Court recognizes that OWW seeks to present this extrinsic evidence to support its understanding of what an individual skilled in the art would understand. But these patents also carry little weight here because they are of course different patents containing different claims, using different descriptions, and carrying different prosecution histories. *See World Kitchen*, 151 Fed. Appx. at 973 n. 3 (rejecting applicability of case law based on foregoing distinguishable characteristics). To the extent that resort to such extrinsic evidence might be necessary, the Court finds meager value in the proffered trio of patents.

In light of the foregoing considerations, the Court construes "tube sock-shaped" as used in the '237 patent to mean "a relatively long, hollow shape that is not form-fitted, but that is greater in length than width and closed at one end."

C. "Coated on only one side"

The parties also disagree over the meaning of "coated on only one side" in the '237 patent. OWW asserts that this clause means "the presence of a layer of a substance on a surface of a fabric such that the substance is not substantially observable on the opposing surface of the fabric." (Doc. # 18, at 12, 15.) Incorporating ALPS' arguments, Daw counters with the proposed construction of "covered or spread with a layer of something on a single surface without impregnating the fabric." (Doc. # 19, at 21 (incorporating ALPS' arguments, *see, e.g.*, Doc. # 23, at 10, and Docs. # 28 and 34, at 9, in 2:04-cv-1223).)

Neither definition is wholly satisfactory. Taking the proposed constructions out of order, the Court recognizes that the core problem with Daw's construction is that it imputes to the patent language a restriction on the method of manufacturing-impregnating-without necessity. The company argues that any construction that accepts impregnation would read out of the clause the restrictive "only." But the Court neither reads the patent language nor finds evidence that the patent language was intended to convey that "only" is wholly preclusive of impregnation here. Rather, the term only targets where the coating lies, as

opposed to where portions of the gel might be present that are unobservable to the naked eye.FN8 In other words, "only" limits where the *coating* might be, but permits some of the substance *that does not constitute a complete coating* to be present elsewhere—such as into the fabric and imperceptibly to the other side of the fabric. Moreover, the '237 patent references impregnation as a method within its contemplation. (Doc. # 17, Ex. A, Col. 9, line 54.) Daw's proposed restriction thus ignores that the patent language targets a statement of the product's condition following manufacture. The Court declines to impose a process limitation on the patent claims. *See Cordis Corp. v. Medtronic Ave., Inc.*, 339 F.3d 1352, 1357 (Fed.Cir.2003) (citing *Vanguard Prods. Corp. v. Parker Hannifin Corp.*, 234 F.3d 1370, 1372 (Fed.Cir.2000) (holding that a product description does not "designate a specific manufacturing process" so that a referenced "method of manufacture, even when cited as advantageous, does not of itself convert product claims into claims limited to a particular process")). *See also Anheuser-Busch Cos. v. Crown Cork & Seal Techs. Corp.*, 121 Fed. Appx. 388, 393 (Fed.Cir.2004). A one-side only coating does not imply any particular method of manufacture. *Cf. AFG Industries, Inc. v. Cardinal IG Co., Inc.*, 375 F.3d 1367, 1372-73 (Fed.Cir.2004) ("Much like 'multiple embossed patterns' ... the term 'layer' in the '532 patent does not require any particular method of manufacture"). Daw's proposed construction is therefore at odds with the teachings of the record.

FN8. Daw, via ALPS, reads the patent reference impregnation *or* coated in the disjunctive, but fails to credit that impregnation could produce a coating on one side. In other words, the patent recognizes that there are two methods of production that can produce the same end result on one side: a coating.

The Court also does not find well taken, however, OWW's inclusion of "substantially" in its proposed construction. The parties (as well as ALPS in 2:04-cv-1223) dispute how to measure what amount of gel can be present on the opposing fabric surface. The debate is potentially confounding; "substantially" is a term of approximation that necessitates a difficult factual determination. *Playtex Prods., Inc.*, 400 F.3d at 908. But the debate is also a red herring that draws focus from the actual language and meaning of the patent to a term introduced by OWW without textual support or necessity. Of note is that the patent examiner stated that the device featured "a gel coat on one side but no observable penetration of the gel through the fabric and onto the opposite side ." FN9 (Doc. # 18, Ex. F, at 133-36.) This is the construction held by the examiner,FN10 this is the plain meaning that produced an approved patent, and it is this understanding that aids the Court in its claim construction. Introducing the additional qualifier "substantially" to the construction would only serve to introduce unnecessary and unwarranted ambiguity and debate.

FN9. The examiner also described the device as having a "lack of exterior gel," which distinguished it from the Silosheath, which has "polymeric material ... present on both the inside and outside" of its covering. (Doc. # 17, Ex. F, at 130.)

FN10. In making its impregnation argument, Daw (via ALPS) asserts that the examiner's reasons do not *necessarily* limit a claim. This contention is correct. *See Salazar v. Procter & Gamble Co.*, 414 F.3d 1342, 1345 (Fed.Cir.2005). But the Federal Circuit has also made clear that "[s]tatements about a claim term made by an examiner during prosecution of an application may be evidence of how one of skill in the art understood the term at the time the application was filed." *Id.* at 1347. Rather than amending the claim, the examiner's remarks here serve only to assist the Court in construing what one of ordinary skill in the art would understand the language at issue to mean. Thus, the impregnation issue is not controlling and the request for inclusion of "substantially" is unwarranted here.

Thus, the Court concludes that what was sought and what was approved in the '237 patent's use of the words "coated on only one side" is a clause meaning "the presence of a layer of a substance on a surface of a fabric, with no observable penetration of the substance onto the opposing surface of the fabric."

D. Chemical Definitions

The parties' final dispute over language contained within the '237 patent involves the construction to be given to three block copolymers referenced in the patent: (1) styrene isoprene/butadiene block copolymer, (2) styrene-ethylene/propylene block copolymer, and (3) styrene-ethylene/butadiene-styrene block copolymer.^{FN11} The patent does not express these claimed block copolymers in chemical formulas. Originally, the parties argued over the correct chemical formulas that were purportedly applicable; by the time of the second *Markman* hearing, OWW had also argued whether the expression of formulas was either necessary or appropriate.

FN11. The block copolymer issues arose and were briefed in the *ALPS* case and are of import here due to the parties' incorporation of the arguments made in that separate litigation.

The Federal Circuit has recognized that "patent documents are meant to be 'a concise statement for persons in the field.'" ¹ Phillips, 415 F.3d at 1313 (quoting *Verve, LLC v. Crane Cams, Inc.*, 311 F.3d 1116, 1119 (Fed.Cir.2002)). The testimony of ALPS' expert, Jerry L. Atwood-testimony that Daw has elected to incorporate-not only targets such concision, but in fact also demands a restrictive approach exceeding mere concision. Atwood's main premise is that although one of ordinary skill in the field would read the patent language to mean the dominant form of the block copolymers, there is nonetheless room for error in the expression of that form that use of formulas would remedy.

The approach Atwood advocates would read limitations into the claim terms, but a court should not read limitations into claim terms from the written description unless the patentee has expressly limited the terms to a special meaning within the written description. The Federal Circuit has explained that "[i]t is improper for a court to add 'extraneous' limitations to a claim, that is, limitations added 'wholly apart from any need to interpret what the patentee meant by particular words or phrases in the claim.'" ¹ *Hoganas AB v. Dresser Indus., Inc.*, 9 F.3d 948, 950 (Fed.Cir.1993) (quoting *E.I. Du Pont 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)).

In *Hoganas*, for example, the court therefore declined to add a *size* limitation to a claim that involved *shape*-and that neither included a size limitation nor required such a construction. Similarly, because the claim at issue here does not require or warrant a limitation on the form of compound involved, the Court should not read any specification limitation into the claim. *Specialty Composites v. Cabot Corp.*, 845 F.2d 981, 987 (Fed.Cir.1988). In other words, the patent claim covers the breadth of compounds satisfying the patent language; the compound can be in a variety of forms that include the dominant form and more uncommon forms.

The Court therefore agrees with OWW that it would be in error to introduce a precise chemical formula into a patent that already implicitly references *that* formula to one of ordinary skill in the art as well as encompassing *more* than that specific formula. As OWW asserts, Daw's "definitions for the block

copolymers are restrictive as they fail to account for known variations in chemical structure." (Doc. # 23, at 1.) The only thing referenced in the language of the patent are characteristics or components, not specific formulas.

Adopting such formula-driven definitions is therefore at best unnecessary and at worst unduly limiting. Contrary to Daw's contention (incorporated from ALPS' briefing), a jury can, relying upon each side's experts, determine whether infringement has occurred by using the definitions described below without encroaching on this Court's claim-construction role. For example, relying on the constructions set forth below, experts can testify to the jury whether a compound falls within or outside the acceptable scope of possibilities encompassed by the given definitions, *including* possible variations. In contrast, if the Court were to "define" the monomers-forming post-polymerization-polymers via chemical formulas, it would necessarily and impermissibly narrow the scope of the broader patent language to exclude variations.

Accordingly, the Court declines to construe the claim language as warranting a specific chemical formula, and instead finds that OWW's proposed constructions properly reflect the patent:

(1) "styrene isoprene/butadiene block copolymer" as used in Claim 6 of the '237 patent means "a block copolymer wherein the first block (A) is formed from styrene and the second block (B) is formed from a mixture of isoprene and butadiene."

(2) "styrene-ethylene/propylene block copolymer" as used in Claim 13 of the '237 patent means "a block copolymer wherein the first block (A) is formed from styrene and the second block (B) is formed from a mixture of ethylene and propylene."

(3) "styrene-ethylene/butadiene-styrene block copolymer" as used in Claim 14 of the '237 patent means "a block copolymer wherein the first and third blocks (A) are formed from styrene and the second block (B) is formed from a mixture of ethylene and butadiene."

III. Conclusion

The Court concludes that the foregoing claim constructions control. The parties shall therefore proceed in a manner consistent with the conclusions of this Opinion and Order.

IT IS SO ORDERED.

S.D. Ohio, 2006.

Ohio Willow Wood Co. v. Daw Industries, Inc.

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