

United States District Court,
C.D. California.

ALAN LEE DISTRIBUTORS, INC. d/b/a ADI Pet, Inc., et al,
Plaintiff.

v.

Van BROWN,
Defendant.

No. CV 05-0646 AHM (SGLx)

April 14, 2006.

Daniel M. Cislo, Donald M. Cislo, Kelly W. Cunningham, Mark D. Nielsen, Cislo and Thomas LLP, Santa Monica, CA, for Plaintiff.

Norbert Stahl, Stahl Law Firm, San Carlos, CA, for Defendant.

MARKMAN ORDER CONSTRUING DISPUTED CLAIM TERMS IN '496 PATENT

A. HOWARD MATZ, **District Judge.**

I. BACKGROUND

Defendant Van Brown ("Brown") is the named inventor and owner of U.S. Patent No. 6,886,496 ("the patent" or "the '496 patent"). After Brown threatened suit for infringement against Plaintiffs Alan Lee Distributors, Inc. d/b/a ADI Pet, Inc. and Christopher Weinberg (collectively, "ADI"), the latter brought this action for declaratory relief.

The title of the '496 patent accurately conveys what it claims, i.e., a type of "Pet Chew Toy." The first two claims (of the sixteen total) are representative:

1. A pet chew toy, comprising:

(a) a relatively hard and tough outer shell formed of multiple layers of dried and shaped pork skin; and

(b) a relatively soft flavored and scented *meat product* encapsulated within said outer shell, *and promoting* aggressive sustained chewing of said toy to exercise the jaws of the pet and clean its teeth and gums.

2. A pet chew according to claim 1, and comprising a *flavored coating* applied to said outer shell to enhance the taste of said toy.

U.S. Pat. No. 6,886,496, Claims 1-2 (emphasis added).

The parties dispute the underlined terms above: (1) "meat product," (2) "and promoting," and (3) "flavored coating." The merits of their proposed claim constructions are addressed below.

II. DISCUSSION

A. Legal Standard for Claim Construction

The court, not the jury, must construe the meaning and scope of patent terms. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed.Cir.1995) (en banc), *aff'd*, 517 U.S. 370 (1996). In construing disputed claim terms, the court should look first to intrinsic evidence. *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed.Cir.1996.). Intrinsic evidence includes the language of the claims, the specification, and the file history, if in evidence. *Id.* The claims themselves are of "primary importance, in the effort to ascertain precisely what it is that is patented." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed.Cir .2005). The "words of a claim 'are generally given their ordinary and customary meaning.'" *Id.* The "ordinary and customary meaning" of a claim term is judged from the perspective of a person of ordinary skill in the art. *Id.* at 1313. Such a person "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.*; *Vitronics*, 90 F.3d at 1582 (stating that the patent specification "is always highly relevant to the claim construction analysis"). "Consistent with that general principle, ... the specification may reveal a special definition given to a claim term by the patentee that differs from the meaning it would otherwise possess. In such cases, the inventor's lexicography governs." *Phillips*, 415 F.3d at 1316. "In other cases, the specification may reveal an intentional disclaimer, or disavowal, of claim scope by the inventor ." *Id.*

In most situations, analysis of the intrinsic evidence alone will resolve any ambiguity in a disputed claim term. *Vitronics*, 90 F .3d at 1583. However, extrinsic evidence "may be considered if the court deems it helpful in determining the 'true meaning of the language used in the patent claims.'" *Phillips*, 415 F.3d at 1318 (quoting *Markman*, 52 F.3d at 980). Extrinsic evidence refers to evidence that is external to the patent and its file history, such as expert testimony, inventor testimony, dictionaries, and technical treatises and articles. *Vitronics*, 90 F.3d at 1584. Although generally "less reliable than the patent and its prosecution history," the Federal Circuit has "noted the help that technical dictionaries may provide to a court 'to better understand the underlying technology' and the way in which one of skill in the art might use the claim terms." *Phillips*, 415 F.3d at 1318. Accordingly, courts may freely consult dictionaries and may rely on dictionary definitions when construing claims, to the extent the dictionary definition does not contradict a definition found in the patent documents. *Vitronics*, 90 F.3d at 1584 n. 6. Similarly, although "conclusory, unsupported assertions by experts as to the definition of a claim term are not useful to a court," such evidence is "useful ... for a variety of 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.

B. "Meat Product"

ADI	Brown
<i>Alternative A</i>	An edible product with a component(s) from an animal.

A product that contains Beef Tripe 25.0%, Chicken 16.3%, Beef Hearts 16.3%, Soy Grits 18.0%, Reg Sugar 8.0%, Molasses 5.0%, Dried Brewers Yeast 5.0%, Garlic Oil 0.3%, Potassium Sorbate 0.4%, Spice Pak 0.1%, Liquid Smoke 0.6%, Propylene Gylcol 2.0%, Salt 3.0%.

or

Alternative B

A product that contains ["meat," with "meat" meaning] the clean flesh derived from slaughtered mammals and is limited to that part of the striate muscle which is found in

the tongue, in the diaphragm, or in the esophagus; with or without accompanying and overlying fact and the portions of the skin, sinew, nerve, and blood vessels which normally accompany the flesh.

1. ADI's Proposed Constructions

a. Alternative A

The '496 patent *specification* states that "according to *one* embodiment [of the invention], the ... meat product includes" 25% beef tripe, 16.3% chicken, 16.3% beef hearts, etc. U.S. Pat. No. 6,886,496, col. 5, lines 1-24 (emphasis added). ADI's proposed Alternative A uses this language to define "meat product." ADI prefers this construction because its accused products do not contain that exact composition of ingredients.

The Federal Circuit has recently reiterated that courts should not "import" or read purported limitations from the specification into the claims: "[A]lthough the specification often describes very specific embodiments of the invention, we have repeatedly warned against confining the claims to those embodiments." Phillips, 415 F.3d at 1323. The Federal Circuit has "expressly rejected the contention that if a patent describes only a single embodiment, the claims of the patent must be construed as being limited to that embodiment." *Id.*; accord *Teleflex, Inc. v. Ficosa North America Corp.*, 299 F.3d 1313, 1327 (Fed.Cir.2002) ("[T]he number of embodiments disclosed in the specification is not determinative of the meaning of disputed claim terms.").

ADI may not construe "meat product" to mean the specific embodiment disclosed in the patent specification.

b. Alternative B

ADI's proposed Alternative B for "meat product" is "a product that contains meat (subject to [its proposed] definition of 'meat')." It then argues that the definition of "meat" should track that of the Association of American Feed Control Officials (AAFCO). ADI prefers AAFCO's definition for two reasons: (1) it limits meat to mammals and thus does not encompass chicken, which is in ADI's product, and (2) it limits meat to mostly the flesh or muscle of the animal (*i.e.*, it does not include bone meal or viscera, such as liver). Under this definition, ADI's products could not be found to infringe because they include only non-mammal and non-muscle components (*i.e.*, chicken liver and bone meal). ADI points out that Webster's New Universal Unabridged Dictionary (2003 ed.) defines "meat" as "the *flesh* of animals as used for food." (emphasis added). FN1

FN1. Because the broad term "animals" can include non-mammals, such as chickens, this definition does not entirely help ADI.

ADI also claims that "a point which cannot be understated [sic]" is the fact that ADI was previously in litigation in 2004 with another pet chew toy company called United Pet Group ("UPG"), in which UPG asserted its Sherrill patent against ADI. *See* U.S. Pat. No. 5,673,653. The Sherrill patent claimed an invention that had an "inner member comprised of a *meat product*" As part of the settlement for that case, ADI reformulated its Meat Blast Porkhide twists to include "chicken liver and poultry bone meal *instead of* beef and chicken skeletal muscle." (emphasis added). Since that settlement, ADI claims that UPG "has not taken issue with ADI's product." ADI contends that this is further proof that "meat" cannot mean "chicken"- *i.e.*, that if UPG had considered "meat" to include "chicken," it would have also taken issue with ADI's reformulated products. The inaction of a third-party pet toy competitor (*i.e.*, by not initiating further litigation) is extrinsic evidence and has virtually no probative value. This argument altogether lacks merit.

2. Brown's Proposed Construction

Brown would construe "meat product" as "[a]n edible product with a component(s) from an animal." The salient characteristics of this definition, in comparison to ADI's Alternative B, are that it would include products comprised of non-mammal and/or non-muscle components, such as chicken liver and bone meal. Brown makes a number arguments in support of this construction..

First, Brown claims that the "ordinary" meaning of "meat product" is an edible product that contains animal components. This may be a reasonable assertion.

Second, Brown argues that the *function* of the "meat product" is to attract pets; thus, it is not critical whether the "meat" is mammal meat or non-mammal meat. I find this argument unpersuasive. Brown cites no case law supporting his implicit contention that courts should look to the function of the invention when construing claims. Merely because the purpose of the "meat product" is to attract pets does not mean that "meat" should be defined to encompass anything that accomplishes that goal.

Third, Brown points out that the New York Department of Agriculture and Markets and the West Virginia Department of Agriculture support a construction of "meat product" that encompasses poultry and that encompasses compositions that are not pure, or even primarily, muscle or flesh. New York defines "meat product" as "any product which is made or derived wholly or in part from the body, carcass or portions thereof of animals or birds." s. 96-Y of Article 5-C ("Agriculture & Markets pertaining to Rendering Plants"). New York's definition of "meat food product" also encompasses meat from "any animal." s. 96-G of Article 5-B ("Sale of Meat"). Similarly, the West Virginia Agricultural Code does defines "meat product" as any "meat" or "meat food product," and defines "meat food product" as being derived from "any portion of any animal." s. 19-2B-2. These definitions, however, in contrast to those of AAFCO and California, FN2 are applicable to products for human, not animal consumption. ADI also points out that various other statutory and regulatory definitions (*e.g.*, those of Nevada, North Carolina, and the U.S. Department of Agriculture (USDA)) support its own proposed construction.

FN2. California Food & Agriculture Code s. 19210 ("Horsemeat and Pet Food") defines "meat" as "the uncooked muscle tissue of a cow, goat, sheep, swine, or poultry which is skeletal, with or without the accompanying and overlaying fat and the portion of sinews, nerves and blood vessels which normally accompany the muscle tissue and which are not separated from it in the process of dressing."

Fourth, Brown has submitted evidence that ADI's advertising and labeling material refers to its own chicken liver and bone meal products as containing "meat." Stahl Decl., Ex. M (advertising material showing the phrases "Meat Blast Brand," "Meat BLAST Center," and "Delicious Meaty Center"). ADI argues that it changed its packaging after two states specifically objected that the product did not contain "meat." Brown counters, however, that the other 48 states did *not* object to the fact that ADI's packaging said "meat" when the actual composition was chicken liver and bone meal.

Fifth, Brown points out that in response to his Interrogatory No. 10, which asked ADI to "[i]dentify and describe in detail the process for making [ADI's] Twists," ADI responded:

The process involves two concurrent or roughly parallel subprocess paths.

With respect to the filler, a rod of extruded, dried *meat product* ... is placed in the center of the chew during manufacturing.... In the inner filling preparation, the ingredients are as follows: ... *Chicken Liver* ..., *Chicken Bone Meal* [, etc.]

Stahl Decl., Ex. K at 32-33 (emphasis added). ADI claims this was inadvertent and is irrelevant since courts should not consider the accused product when construing claims. ADI misses the point, though. Its response is relevant and admissible to show that if ADI itself interpreted the term "meat" to include poultry and

viscera, so could people of ordinary skill in the art.

Sixth, Brown argues that under the doctrine of claim differentiation, "meat product" should not be restricted to meat from mammals. Here, Claim 1 of the ' 496 patent contains the term "meat product" standing alone. Claims 7 and 9, in contrast, limit the term "meat product" as "compris[ing] jerky" and that "said jerky comprises beef tripe." U.S. Pat. No. 6,886,496, Claims 7, 9. The doctrine of claim differentiation creates the presumption that "meat product" in Claim 1 may or may not include jerky and may or may not include beef tripe. Phillips, 415 F.3d at 1315 ("[T]he presence of a dependent claim that adds a particular limitation gives rise to a presumption that the limitation in question is not present in the independent claim.").

Finally, although Brown does not make this argument, the only embodiment for "meat product" specifically includes non-mammal ingredients, *i.e.*, chicken. U.S. Pat. No. 6,886,496, Col. 5, line 14. Under *Phillips*, "the ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention...." Phillips, 415 F.3d at 1313. "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.*; Vitronics, 90 F.3d at 1582 (Fed.Cir.1996) (the 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."). Here, it is unlikely that a person of ordinary skill in the art would read the specification-specifically, the only embodiment (which shows that "meat product" may include "chicken")-and conclude that proper construction of "meat product" may *not* include chicken.

3. Conclusion

It is clear that "meat product" need not be comprised purely of "meat." ADI has already acknowledged this principle, stating, "[t]he inclusion of the word 'product' implies that 'meat' *alone* is not what is encapsulated within the outer shell of pork skin, but that there are other fillers and spices included in the 'meat product.' " ADI's Opp'n to Brown's Mot. to Exclude para. 9 of the Decl. of David A. Dzanis at 8 (emphasis in original). Accordingly, a composition may be a "meat product" even though there are non-"meat" ingredients.

At the *Markman* hearing on April 13, 2006, the Court provided the parties with the following tentative construction for "meat product": "a product, edible by pets, that contains, in whole or in part, the skeletal muscle tissue of a cow, goat, sheep, swine, or poultry." That triggered an interesting and informative colloquy with which the parties are familiar. After the hearing, the Court further analyzed the regulatory and statutory definitions cited by the parties. The following chart summarizes those definitions on the two key points of contention: (1) whether "meat product" would include components obtained from poultry, but not from mammals; and (2) whether "meat product" would include components obtained from viscera, but not from flesh or muscle tissue.

<i>Statute / Regulation</i>	<i>Term</i>	<i>Applicable to pets?</i>	<i>Includes poultry?</i>	<i>Includes viscera?</i>
Cal. Food & Agric. s. 19210	"meat"	yes	yes	no
N.Y. Agric. & Mkts. s. 96-y(10)	"meat"	no	yes	yes
N.Y. Agric. & Mkts. s. 96-y(11)	"meat product"	no	yes	yes
N.Y. Agric. & Mkts. s. 96-g(8)	"meat food product"	no	yes	yes
W.Va.Code s. 19-2B-2(y)	"meat"	no	yes	no
W.Va.Code s. 19-2B-2(z)	"meat product"	no	yes	yes
AAFCO s. 9.2	"meat"	yes	no	no
USDA (9 C.F.R. 301.2)	"meat"	no	no	no

USDA (9 C.F.R. 301.2)	"meat food product"	no	no	yes
N.C. Gen. Statutes s. 106-549.14(14)	"meat food product"	no	no	yes
Nev. Rev. Statutes s. 583.345	"meat food product"	no	no	yes

The Court finds that those terms in the chart that include the word "food" should be given little weight because that word is largely superfluous. The chew toy in question indisputably provides food to its pet-users, given that they chew or work on the toy to get to the "jerky rod" encapsulated within the outer shell of pork skin, and thereupon ingest it. In other words, "food" is an essential aspect of "meat product" under both parties' definitions.

The Court further finds that the word "product," which on a stand-alone basis is not in dispute, is also superfluous, in the sense that both sides implicitly recognize that the "jerky rod" consists of a mixture of items—a product of various items.

Next, the Court finds that those entries that contain the term that is really at the core of the dispute—namely, "meat"—can be divided into two categories: those statutes and regulations that use the term in a context explicitly applicable to pets, and those that do not. Here, the former group is of greater application and value.

Based on the preceding criteria, then, the fundamental choice is between Cal. Food & Agric. Code s. 19210 and AAFCO s. 9.2. Given the indisputably popular view that "chicken" is "meat"—patrons of Kentucky Fried Chicken surely do not consider themselves vegetarians—and in light of the claim construction maxim that terms should be assigned their "ordinary and customary meaning," the Court again concludes that the most reliable definition of "meat" is that in Cal. Food & Agric. Code s. 19210. Accordingly, the Court construes "meat product" to mean: *"a product, edible by pets, that contains, in whole or in part, the skeletal muscle tissue of a cow, goat, sheep, swine, or poultry."*

C. "And Promoting"

The parties do not really propose competing definitions of this term, but instead argue about its proper classification or characterization.

ADI	Brown
<i>A separate claim limitation that is material to defining the scope of Claims 1 and 10.</i>	<i>The term does not constitute a method step.</i>

The Federal Circuit has held that a patent claim that recites both a system and a method for using that system is invalid as indefinite. *IPXL Holdings, L.L.C. v. Amazon.com, Inc.*, 430 F.3d 1377, 1384 (Fed.Cir.2005). *Brown* refers to such patents as having a "method step." The rationale behind this rule is that one skilled in the art would not know whether merely creating the system constitutes infringement, or whether one must also use the system in a particular way to be exposed to liability. *Id.*

Here, Claims 1 and 10 of the '496 patent read, in pertinent part:

a relatively soft flavored and scented meat product encapsulated within said outer shell, *and promoting* aggressive sustained chewing of said toy to exercise the jaws of the pet and clean its teeth and gums

U.S. Pat. No. 6,886,496, Claims 1 and 10. ADI contends that "and promoting aggressive chewing" is a method step that renders Claims 1 and 10 invalid under *IXPL Holdings*. It argues that one skilled in the art

"cannot tell ... whether one would infringe ... by constructing the dog bone ... or whether infringement would occur only when a customer uses the dog bone in the manner recited in the method step"- *i.e.*, in a manner "promoting aggressive sustained chewing."

I find this argument unpersuasive. The claim language "and promoting" refers to and modifies the term "meat product." That is, the "meat product" in the center promotes chewing by serving as an attraction for the pet, thereby inducing the pet to aggressively chew through the pork skin. The holding in *IPXL Holdings* is distinguishable. There, the claim language clearly referred to a particular "use" of the system: "The *system of claim 2* [including an input means] ..., and *the user uses the input means* to either change the predicted transaction information or accept the displayed transaction type and transaction parameters." *IPXL Holdings*, 430 F.3d at 1384 (quoting U.S. Pat. No. 6,149,055) (underline added). Here, the term "and promoting" does not refer to the way in which the pet or pet owner *uses* the chew toy.

Accordingly, the Court holds that "and promoting" does not render Claims 1 and 10 invalid.

D. "Flavored Coating"

ADI	Brown
A liquid solution containing elements that impart flavor to the pork skin.	<i>There should be no limitation that the "flavored coating" is a liquid solution.</i>

ADI contends that "flavored coating" should be construed to mean a "liquid solution" because the patent specification states that

[t]he coating can be applied to the outer shell as a hot spray, or a diluted cold dip Once dried, the coating has a high aesthetic sheen which generally appeals to the pet owner.

U.S. Pat. No. 6,886,496, Col. 6, lines 21-26 (emphasis added). ADI contends that the words "spray," "dip," and "dried" require that the flavored coating consist of (or at least started out as) a liquid solution. Also, the patent specification explicitly refers to a liquid solution in describing vacuum tumbling, which is an "alternative method [for] more rapidly absorb[ing] flavor into the pork skin." The specification states that the "dried skin and liquid flavor solution are added to the tumbler and a vacuum drawn on the vessel." *Id.*, Col. 4, lines 47-51 (emphasis added).

Nevertheless, I disagree with ADI's proposed construction. First, the ordinary meaning of "flavored coating" is not a "liquid solution." Indeed, the word "coating" is ordinarily defined in more generic terms such as a "layer" or "substance." Webster's Third New International Dictionary (1966) ("a *layer of any substance* used as cover, protection, decoration, or finish") (emphasis added); The American Heritage Dictionary (2000); Cambridge Dictionary of American English (2006). Second, the claim language does not contain the words "liquid" or "solution." Third, that the phrase "liquid flavor solution" appears in the patent *specification* as an alternative way to impart flavor does not serve to limit the *claims*. Phillips, 415 F.3d at 1323; *see* Part II.B.1.a *above* ("meat product" not limited by the preferred embodiment). Fourth, ADI's contention that a "coating" must be a "liquid solution" seems factually inaccurate given the existence of non-liquid coating techniques such as "powder" coatings. Fifth, although the words "spray," "dip," and "dried" may imply that the "flavored coating" has a least some "liquid" component, there is a significant difference between a coating that is, say, 1% liquid and a *solution* that might be 99% liquid. ADI's proposed construction fails to address this ambiguity.

Accordingly, the Court will not limit "flavored coating" to mean a "liquid solution containing elements that impart flavor to the pork skin."

III. CONCLUSION

For all of the foregoing reasons, and for good cause appearing therefor, the Court construes the disputed terms as described above.

This Order is not intended for publication.

IT IS SO ORDERED.

C.D.Cal.,2006.

Alan Lee Distributors, Inc. v. Brown

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