

United States District Court,
M.D. Louisiana.

ALBEMARLE CORPORATION,
v.
CHEMTURA CORPORATION and.

Civil Action No. 05-1239-JJB-SCR

Jan. 24, 2008.

G. William Jarman, Louis Victor Gregoire, Jr., Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman, Baton Rouge, LA, Alan R. Silverstein, Brian Lemon, Daniel J. Harbison, Eric J. Evain, Helena C. Rychlicki, James Calve, Michael Curt Lambert, R. Eric Hutz, Rudolf E. Hutz, Connolly Bove Lodge & Hutz, LLP, Wilmington, DE, for Albemarle Corporation.

Brian A. Jackson, Dana M. Douglas, Katherine Seegers Roth, Liskow & Lewis, New Orleans, LA, Cameron M. Nelson, Jeffrey P. Dunning, Jeffrey G. Mote, Kevin J. O'Shea, Richard Daniel Harris, Greenberg Traurig, Richard P. Bender, Chicago, IL, Deepr R. Mukherjee, Greenbreg Traurig, LLP, New York, NY, Jonathan K. Waldrop, Greenburg Traurig, Atlanta, GA, for Chemtura Corporation and Great Lakes Chemical Corporation.

RULING ON CONSTRUCTION OF DISPUTED CLAIM TERMS

JAMES J. BRADY, District Judge.

This matter is before the court following a *Markman* hearing, which was held on December 3, 2007, to resolve the parties' dispute over the proper claim interpretation to be used in this patent infringement action. The parties have submitted numerous briefs and exhibits which the court has taken under advisement in reaching its decision. Because the interpretation of patent claims is a matter of law, the court must resolve interpretation decisions prior to a jury being given the case for decision. Thus, this ruling sets forth the definitions which will be used in the jury charges.

Law Applicable to Patent Claim Construction

Claim construction is a matter of law for the court to decide. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996). "A claim in a patent provides the metes and bounds of the right which the patent confers on the patentee to exclude others from making, using or selling the protected invention." *Burke, Inc. v. Bruno Independent Living Aids, Inc.*, 183 F.3d 1334, 1340 (Fed.Cir .1999). Thus, where a jury is to make the decision as to whether another has encroached on the "metes and bounds of the right which the patent" has conferred on the patentee, the court must provide the jury with the proper meaning of the claims in the patents.

In construing a claim, the court's goal is to determine the meaning of the claims as to a person of "ordinary skill in the art in question at the time of the invention." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed.Cir.2005). The person of "ordinary skill in the art" is a "hypothetical person who is presumed to be aware of all the pertinent prior art." *Endress Hauser, Inc. v. Hawk Measurement Sys. Pty. Ltd.*, 122 F.3d 1040, 1042 (Fed.Cir.1997), quoting *Custom Accessories, Inc. v. Jeffrey-Allan Indust., Inc.*, 807 F.2d 955, 963 (Fed.Cir.1986).

In determining the proper construction of a disputed claim or term, the court can consider both extrinsic and intrinsic evidence. However, the Federal Circuit Court has made it clear that extrinsic evidence such as dictionaries, learned treatises, and the testimony of experts and inventors is less significant than intrinsic evidence. *Phillips*, 415 F.3d at 1317. Thus, the court must focus on intrinsic evidence including: (1) the language of the claim; (2) the remaining portions of the patent, known as the "specification"; and (3) the communication between the applicant and the Patent Office, known as the "prosecution history." *Markman*, 52 F.3d at 979. Finally, the court can consult extrinsic evidence to determine what a person of "ordinary skill in the art" would have known at the time of the invention, but the court should limit its reliance on extrinsic evidence consistent with the *Phillips* opinion.

The court must start with the language of the asserted claim itself. *Comark Communs. v. Harris Corp.*, 156 F.3d 1182, 1186 (Fed.Cir.1998). In *Phillips*, the court reiterated that "the claims of a patent define the invention to which the patentee is entitled the right to exclude." *Phillips*, 415 F.3d at 1312 (quoting *Innova/Pure Water, Inc. v. Safari Water Filtration Systems, Inc.*, 381 F.3d 1111, 1115 (Fed.Cir.2004)). To that end, the words used in a claim "are generally given their ordinary and customary meaning." *Id.* at 1312. 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, *i.e.*, as of the effective filing date of the patent application." *Id.*

Claim terms are to be construed as part of a "fully integrated written instrument." *Markman*, 52 F.3d at 978. Thus, the primacy of claim terms notwithstanding, *Phillips* made clear that "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." *Phillips*, 415 F.3d at 1313. Therefore, a patent's claims must be read in light of the specification. *Id.*

By statute, the specification must describe the claimed invention in "full, clear, concise and exact terms." 35 U.S.C. s. 112. As the court explained in *Phillips*,

Ultimately, the interpretation to be given a term can only be determined and confirmed with a full understanding of what the inventors actually invented and intended to envelop with the claim. The construction that stays true to the claim language and most naturally aligns with the patent's description of the invention will be, in the end, the correct construction.

Id. at 1316 (quoting *Renishaw PLC v. Marposh Societa' per Azioni*, 158 F.3d 1243, 1250 (Fed.Cir.1998)). But while *Phillips* emphasized the important role the specification plays in the claim construction process, the courts have never strayed from the premise that it is the function of the claims, not the specification, to set forth the limits of the patentee's claims. Otherwise, there would be no need for claims. *SRI Intern. v. Matsushita Elec. Corp. of America*, 775 F.2d 1107, 1121 (Fed.Cir.1985). Similarly, although the specification may indicate that certain embodiments are preferred, particular embodiments appearing in the specification will not be read into the claims as limitations when the claim language is broader than the

embodiments. *Electro Medical Systems, S.A. v. Cooper Life Sciences, Inc.*, 34 F.3d 1048, 1054 (Fed.Cir.1994). As the court notes in *Phillips*, "there is sometimes a fine line between reading a claim in light of the specification, and reading a limitation into the claim from the specification." *Phillips*, 415 F.3d at 1323.

In addition to the claim and specification, the prosecution history also plays a key role in claim interpretation. The prosecution history includes evidence of how the U.S. Patent and Trademark Office (the "USPTO") and the inventor understood the patent. *See Phillips*, 415 F.3d at 1317. However, because the prosecution history "represents an ongoing negotiation between the PTO and the applicant," it may lack the clarity of the specification and thus be less useful in claim construction proceedings. *Id.* The main purpose of consulting the prosecution history is to exclude any interpretation that was disclaimed by the applicant during the prosecution of the patent. *Rhodia Chimie v. PPG Industries, Inc.*, 402 F.3d 1371, 1384 (Fed.Cir.2005). Specifically, if the patentee has "unequivocally disavowed a certain meaning to obtain his patent, the doctrine of prosecution disclaimer attaches and narrows the ordinary meaning of the claim congruent with the scope of the surrender." *Omega Eng'g., Inc. v. Raytek Corp.*, 334 F.3d 1314, 1324 (Fed.Cir.2003).

Claim construction issues are not resolved by any magic formula, and the *Phillips* court did not impose any particular sequence of steps for a court to follow in determining disputed claim language. *Phillips*, 415 F.3d at 1324. Rather, *Phillips* instructed courts to attach the appropriate weight to the intrinsic evidence in support of a proposed claim construction while maintaining the notion that claims measure the scope of the patent grant. The court now turns to a discussion of the claim construction disputes.

Summary of Dispute

Albemarle Corporation ("Albemarle") asserts that Chemtura Corporation and Great Lakes Chemical Corporation ("the Defendants") willfully infringed Albemarle's U.S. Patent No. 6,958,423 ("the '423 patent"). The '423 patent is directed at a "wet cake" prepared during the manufacture of a flame retardant material known as decabromodiphenylethane ("DBDPE"). In construing the patent, the court must determine: (1) whether the "wet cake" claim in the ' 423 patent covers the wet cake product or wet cake made by a particular process and (2) whether the term "wet" means containing water or containing any solvent.

Background Technology

A "wet cake" is an intermediate product produced during the manufacture of decabromodiphenylethane ("DBDPE"). DBDPE is a flame retardant added to plastics such as computer circuit boards, television housings, and wire coatings. DBDPE is prepared by reacting two raw materials: diphenylethane and bromine.

During the reaction phase, the DBDPE forms solid crystals, and some of the liquid bromine becomes trapped ("occluded") within those crystals. The '423 Patent refers to bromine trapped within the DBDPE crystal lattice as "occluded free bromine." After the reaction, the DBDPE is filtered and washed with water to produce a "wet cake." The wet cake is then dried and processed to make a commercial flame retardant product.

Analysis

The goal of claim construction is to determine the meaning of the claims to those of ordinary skill in the art at the time the patent application was filed. Phillips, 415 F.3d at 1313. In the instant case, the original patent application was filed in September of 1994. A person of ordinary skill in the art with respect to the '423 patent claims would have a bachelor's degree in chemistry and also have several years of experience in the industry. FN1

FN1. Albemarle's Opening Memorandum (doc. 193) at 13; Defendants' Opening Memorandum (doc. 194) at 10.

I. '423 Patent: Claim One

The '423 patent issued on October 25, 2005. Claim 1 is the only independent claim in the '423 patent being asserted against the Defendants. Claim 1 states:

A wet cake comprising water and solid brominated diphenylethane product, which product contains a predominate amount of decabromodiphenylethane, the wet cake having an occluded free bromine content of from about 500 ppm to about 2000 ppm.

The Defendants have admittedly produced a wet cake with the levels of occluded free bromine covered by claim 1 of the '423 patent, but the Defendants argue that claim 1 covers the *product-by-process* of creating such a wet cake and not the wet cake itself. Albemarle rejects the Defendants' construction and argues that the Defendants are attempting to read an unwritten limitation into the '423 patent in violation of federal patent law.

In properly construing claim 1 of the '423 patent, this court will examine the intrinsic evidence included in the (1) language of the claim; (2) the specification; and (3) the prosecution history. *Markman*, 52 F.3d at 979. Finally, the court will examine any relevant extrinsic evidence consistent with the limitations set forth in *Phillips*.

A. Language of the Claim

On its face, the term "wet cakes" makes no reference to a specific process limitation, and as stated above, claim 1 makes no reference to the specific process of producing wet cakes. Instead, claim 1 addresses the chemical components of the wet cake including water and solid brominated diphenylethane product. Claim 1 also defines the level of occluded free bromine content in each wet cake. The claim itself makes no reference to the "process" of making wet cakes, and it also does not include specific instructions for how the water and solid brominated diphenylethane product are to be combined. The plain language of the claim alone does not cover the process for making wet cakes. Therefore, if the '423 patent is directed at the process for making wet cakes as the Defendants claim, this limitation must come from the specification or the prosecution history.

B. The Specification

The Defendants argue that the proper construction of wet cake in claim 1 means:

a composition of undried solids which comprises water and a solid brominated diphenylethane product, which is obtained by first mixing bromine and diphenylethane, and then quickly feeding the resultant mix to

a stirrable reaction mass comprising bromine and bromination catalyst. FN2

FN2. Defendant's Opening Memorandum (doc. 194) at 10-11.

The Defendants take this language from elements of the '423 patent specification. The Defendants point to the title of the '423 patent, "Bromination Process," as proof that the '423 patent is directed to a process and not the wet cake product. However, the Federal Circuit has expressly rejected relying on the patent's title when constructing claims. *PitneyBowes, Inc. v. Hewlett-Packard Co.*, 182 F.3d 1298, 1312-13 (Fed.Cir.1999) (noting the "irrelevancy of the patent title to claim construction" and pointing out that the Federal Circuit has only mentioned the patent title in claim construction in one opinion and that reference was merely illustrative).

The Defendants also argue that the '423 Patent Abstract which refers to a "novel process" and the Background of Invention which refers to the "improved process for manufacturing DBDPE" is further evidence that claim 1 is directed to a process, not a product. However, these references ignore the fact that the '423 patent stemmed from the '468 patent which was directed to the process invention. FN3 The title, abstract, and background sections were identical in Albemarle's series of patent applications, and as a result, these sections do not address all of the novel inventions included in the '423 patent. Consistent with the principle of statutory interpretation that the specific controls the general, the patent specification is the most important source for the meaning of claim terms. *Phillips*, 415 F.3d at 1315 ("the best source for understanding a technical term is the specification from which it arose"). Thus, the failure to individually address each separate invention in the brief abstract should not be construed as a disavowal of claim scope. Instead the court should closely analyze the detailed descriptions and explanations of the inventions contained in the specification.

FN3. *See* U.S. Patent No. 6,518,468 (filed June 4, 1996) (issued Feb. 11, 2003); U.S. Patent No. 6,958,423 (filed June 22, 2001) (issued Oct. 25, 2005). The '468 patent was issued first and was directed at a process invention. The subsequent '423 patent contained the same language in the title, abstract, and background sections.

Despite the Defendants' repeated assertion that the specification limits the claimed wet cakes to those produced through the '423 process, the court does not find that Albemarle has specifically restricted its claim scope to wet cakes made through a particular process. Instead, the specification indicates that the wet cakes are "unique" because they possess "a relatively low occluded free bromine content, say from about 500 ppm to about 2000 ppm and most probably from about 900 ppm to about 1200 ppm." FN4 The "decabromodiphenylethane *product* of this invention may be used as a flame retardant." FN5 Thus, the unique element of the wet cakes is their level of occluded free bromine, not the process used to create these wet cakes. This conclusion is further supported by the language of claim 1 itself which refers only to the levels of occluded free bromine in the wet cakes and makes no reference to any particular process. FN6

FN4. U.S. Patent No. 6,958,423 (filed June 22, 2001) (issued Oct. 25, 2005) (JA-0530, Col. 8, lines 1-5).

FN5. *Id.* at Col. 8, lines 64-65 (emphasis added).

FN6. Id. at Col. 12, lines 17-21.

Furthermore, although the '423 patent provides a lengthy explanation of how the wet cakes can be produced, this court will not restrict the construction of the disputed claim to the embodiment described in the specification. 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." Phillips, 415 F.3d at 1323. Without a clear disavowal of claim scope, the preferred embodiment should not be used to restrict the claim scope. *Inverness Med. Switz. GmbH v. Warner Lambert Co.*, 309 F.3d 1373, 1379 (Fed.Cir.2002).

The '423 patent describes the "preferred" method for creating wet cakes, but the patent does not indicate that this is the *only* method for producing wet cakes with the desired levels of occluded free bromine. The '423 patent indicates that the mixture of liquid bromine and diphenylethane can be accomplished "by most any conventional technique for mixing two liquids," and among the various mixing techniques, the "common characteristic of these preferred mixers is that the mixing occurs quickly and thoroughly." FN7 It is also "preferred that the mixture be quickly fed to the reaction mass." FN8 It is also preferable to use a "highly diluted diphenylethane feed." As the specification explains, "Compare wet cakes having high, e.g., 3500 ppm, occluded free bromine content and which are produced by processes which do not use highly diluted diphenylethane feeds. These wet cakes have a high, e.g., 3500 ppm occluded free bromine content." FN9 Although the inventors clearly indicate that using highly diluted diphenylethane feeds is a preferred method for producing wet cakes, the specification does not restrict the claim to wet cakes produced using this process alone. The Federal Circuit has indicated that "product claims are not limited to the methods of manufacture disclosed in the specification and that the method of manufacture, *even when cited as advantageous*, does not of itself convert product claims into claims limited to a particular process." *Andersen*, 474 F.3d at 1375. Similarly, this court refrains from reading such a limitation into the '423 patent based the preferred embodiment described in the specification.

FN7. Id. at Col. 3, lines 46-59.

FN8. Id. at Col. 4, lines 35-36.

FN9. Id. at Col. 8, lines 5-9.

C. The Prosecution History

The prosecution history also supports a finding that the '423 patent inventors did not disclaim wet cakes made by other processes. The primary obstacle to the '423 patent issuance was the '423 patent's similarities to U.S. Patent No. 5,457,248 (the "Mack" patent). The Mack patent did not indicate the level of occluded free bromine in its wet cakes, and the inventors explained to the examiner that the '423 patent is directed at a wet cake with low occluded free bromine content which "is a feature of the invention." FN10 The prosecution history also indicates, "It is important to note that Mack et al does not mention the occluded free bromine content of the water wet cake or the desirability of such or how such would be obtained." FN11 In

additional communication with the USPTO, the inventors reiterated that the "key characteristic recited in applicants' claims, namely the amount of occluded free bromine in a wet cake comprising water and [DBDPE] product" was absent in the Mack patent.FN12

FN10. JA-0638.

FN11. Id.

FN12. JA-0666.

Albemarle's March 21, 2003, response to the USPTO also indicates that it is the amount of occluded free bromine which is unique to the '423 patent and not the process used to create the wet cake. In explaining why the low occluded free bromine level in the '423 patent was not obvious in the Mack patent, Albemarle unequivocally states, "(a) Mack is totally silent about the occluded free bromine content of his water/DBDPE wet cakes." FN13 To further distinguish the ' 423 patent from Mack, Albemarle notes that Mack takes no steps to reduce occluded free bromine in the Mack wet cakes .FN14 Although sections (b) through (d) clearly discuss steps of making wet cakes, these statements are included to demonstrate that Mack was unconcerned with the level of occluded free bromine in its resultant wet cakes. Because Mack took no steps to reduce the level of occluded free bromine, it is clear that Mack was unconcerned with these levels, and accordingly, had no intention of including the level of occluded free bromine within the scope of the Mack patent. Furthermore, the discussion of steps used to create wet cakes was important to demonstrate that not every wet cake would inherently possess the desired levels of occluded free bromine claimed by the ' 423 patent.

FN13. JA-0668.

FN14. JA-0668.

"(b) To obtain the objectives of his invention, Mack relies upon an entirely different (as compared with applicants) aspect of the preparation of improved DBDPE's, namely the use of high temperature treatment of recovered product with an aromatic solvent followed by recrystallation;

(c) According to Mack, he does not need to take any special precautions or employ careful steps upstream of the aromatic solvent treatment to produce his desired products. Consequently, there are no recited steps in Mack to reduce occluded free bromine at any point in the Mack procedure and according to Mack, there is no need for such steps;

(d) Mack does not teach any process having the step(s) recited by applicants to achieve a low occluded bromine content in the wet cake (especially the introduction of diphenylalkane reactant together with bromine."

The remainder of the March response also lacks the disavowal of claim scope asserted by the Defendants.

Albemarle re-emphasizes that the wet cake is unique because of its low level of occluded free bromine. According to Albemarle,

Thus, from the very beginning, applicants emphasized the novelty and importance of the wet cakes described and demonstrated that comparative wet cakes had higher occluded free bromine content. Applicants are entitled to claim their novel and unobvious wet cakes just as they would be entitled to claim any new and unobvious intermediate in a chemical process.FN15

FN15. JA-0671.

In initially denying the patent application, the examiner argued that "the skilled artisan would have the reasonable expectation that the wet cake of the prior art [in the Mack patent] would have similar occluded bromine content as those recited by the instant claims." FN16 However, the Board of Patent Appeals rejected this argument and reversed the examiner's June rejection. According to the Board, "Mack, however, is silent as to occluded free bromine content, and the examiner has not provided evidence that it was known in the art that occluded free bromine yellows or hinders the thermal stability of brominated diphenylethanes." FN17 The Board further rejected the argument because "the examiner has not shown that those of ordinary skill in the art knew that the color of a wet brominated diphenylalkane cake evidences its occluded free bromine content or that Mack's treatments are effective for reducing the occluded free bromine of such a cake to a value within the applicants' recited range." FN18 Clearly the Board of Patent Appeals understood the innovation of the '423 patent to be the low levels of occluded free bromine "within the applicants' recited range." In reversing the examiner's June application rejection, the Board did not focus on process limitations advanced by the Defendants. Instead, the distinction between the '423 and Mack patents was based on the range of occluded free bromine levels, and not the steps used to produce the wet cakes. Thus, the prosecution history indicates that the USPTO and Albemarle understood the '423 to be unique based on the low level of occluded free bromine, and the '423 patent issued as a result of this distinction between '423 and Mack.

FN16. JA-0724.

FN17. JA-0743.

FN18. JA-0745.

This conclusion is further supported by comparing the '423 patent to Albemarle's own '468 patent. In the '468 patent, the inventors clearly claim the process of producing DBDPE; whereas, the '423 patent claim is directed to the wet cake product itself.FN19 If the court were to import that process limitation into the '423 patent, there would be no distinction between the processes claimed in the '468 patent and the product claimed in the '423 patent. Simply put, the USPTO would not have issued the '423 patent if there was no difference from the claims in the '468 patent.

FN19. *See* U.S. Patent No. 6,518,468 (filed June 4, 1996) (issued Feb. 11, 2003). Claim 1 of the '468 patent states: "A process for the manufacture of a [DBDPE] product, which process comprises: feeding a

mixture ... to a stirrable reaction mass comprising bromine and a catalytic amount of a bromination catalyst, such reaction mass being at a temperature which is within the range of from about 30 to about 80 (deg.) C." Id. at JA-0009, Col. 11, lines 41-53.

In summary, neither the specification nor the prosecution history contains a clear disavowal of claim scope to wet cakes produced by a specific process, and this court will not read such a limitation into the '423 patent. Claim 1 of the '423 patent covers wet cake products "comprising water and solid brominated diphenylethane product, which product contains a predominate amount of decabromodiphenylethane, the wet cake having an occluded free bromine content of from about 500 ppm to about 2000 ppm."

II. '118 Patent Application

Finally, this court must construe the scope of Published Patent Application No.2001/0047118 A1 (hereinafter the "'118 publication"). Issued claims 1 through 3 of the '423 patent correspond with claims 1, 2, and 4 of the '118 publication. Albemarle alleges that before the '423 patent issued in October of 2005, the Defendants made a wet cake as described in one or more of these three product claims. Claim 1 is the only independent claim of the '118 publication being asserted, and it covers: "A wet cake containing a predominant amount of dcabromodiphenylethane and having an occluded free bromine content of from about 500 ppm to about 2000 ppm." FN20 Albemarle amended claim 1 to clarify that the claims pertain to wet cakes that are comprised of water and DBDPE, FN21 but Albemarle argues that a person of ordinary skill in the art would read the unamended claim as containing water and DBDPE. Albemarle asserts that the amendment merely clarified the understanding that wet cakes contain water and DBDPE, and Albemarle rejects the idea that it narrowed the scope of claim 1 with this amendment.

FN20. U.S. Patent Publication No.2001/0047118 A1 (published Nov. 29, 2001) (JA-0890).

FN21. JA-0637-38. The claim was changed from: "A wet cake having a predominant amount of decabromodiphenylethane and having an occluded free bromine content from about 500 ppm to about 2000 ppm." The amended version reads: "A wet cake comprising water and solid brominated diphenylethane product, the wet cake having an occluded free bromine content from about 500 ppm to about 2000 ppm." The key component of the amendment is the addition of the words "comprising water and solid brominated diphenylethane product."

The Defendants argue that the amendment to the '118 publication added a limitation to the claim which was not originally present, and as a result, the scope of the issued '423 patent claim 1 is narrower than the scope of the '118 publication claim 1. FN22 In other words, the Defendants are arguing that prior to the amendment, the wet cakes in claim 1 of the '118 publication could contain water or other solvents.

FN22. Defendants' Responsive Memorandum (doc. 194) at 18.

When faced with a rejection by the USPTO, the patent applicant can appeal the rejection, or in lieu of an appeal, the patentee can submit an amended claim. The submission of an amended claim is treated "as a concession that the invention as patented does not reach as far as the original claim." *Festo Corp. v.*

Shoketsu Kinzoku Kogyo Kabuskiki Co., 535 U.S. 722, 734 (2002). In this case, Albemarle argues that it merely clarified its initial position with the amendment of claim 1. However, some courts have rejected the possibility of "clarifying amendments." For example, the court in *TM Patents, LLP, v. International Business Machines Corp.*, notes that:

It is hard for this court to see how simply rewording a claim would overcome a patent examiner's obviousness or prior art objections. An amendment has to change something-otherwise, it is not an amendment. Indeed, it has been held that 'clarifying' amendments are narrowing, in that they constitute an admission that the claims as originally drafted did not limit the invention appropriately-otherwise, there would be no need for clarification.

136 F.Supp.2d 209, 217 (S.D.N.Y.2001) (internal citations and quotations omitted).

In this case, Albemarle argues that its amendment to the '118 publication was merely to "clarify" the scope of claim 1 by rewording the claim to include wet cakes "comprising water and solid brominated diphenylethane product." FN23 This court sees no need for such a "clarifying amendment" if those skilled in the art would already read claim 1 of the '118 publication to describe wet cakes containing water and DBDPE. If this definition was obvious from the plain language of the claim and specification, then amendment was unnecessary. Instead, this court finds that the amendment narrowed the scope of claim 1 from wet cakes containing predominant amounts of DBDPE and any other substance to those containing water and DBDPE. As such, the pre-amendment '118 publication covers wet cakes containing DBDPE and any other liquid; whereas the '423 patent covers wet cakes containing DBDPE and water only. The specification and prosecution history also support this construction. First, the specification never limits the definition of wet cakes to a composition of water and DBDPE. The specification teaches that wet cake is "not meant to be restricted by any particular manner of solids recovery and/or by ancillary treatments of the slurry or recovered solids, e.g., neutralization, washing and the like." FN24 Furthermore, the prior art contained in the prosecution history demonstrates that "wet cakes" can contain liquids other than water. The Mack patent teaches that wet cakes can be washed with water or other "organic solvents," FN25 and U.S. Patent No. 5,124,496 (which was cited during prosecution and is therefore part of the intrinsic evidence) teaches that wet cakes can be recovered through filtration techniques that utilize bromine instead of water.FN26

FN23. JA-0637.

FN24. JA-0530.

FN25. JA-0895, Col. 5, lines 31-37.

FN26. Defendant's Opening Memorandum, Exh. 2, Col. 5, lines 39-50.

Finally, the extrinsic evidence submitted by both parties illustrates why the *Phillips* court cautioned against relying on dictionary definitions during claim construction. Both parties have submitted dictionary definitions which support their definition of the word "wet" as containing water or containing any liquid. As

such, this court finds the extrinsic evidence ambiguous and unpersuasive.

Based on the amendment to the claim 1 and the intrinsic evidence in the record, the proper construction of wet cakes in the '118 publication includes those made of DBDPE and any liquid. The amendment of claim 1 narrowed the scope of the '423 patent, and the scope of wet cakes in the issued '423 patent includes wet cakes containing only water and DBDPE.

Accordingly, the claim construction explained above shall be used by both parties at trial. It is further ordered that the parties may not refer, directly or indirectly, to each other's claim construction positions in the presence of the jury; that they refrain from mentioning any portion of this opinion to the jury, other than the actual definitions adopted by court; and that any reference to claim construction proceedings be limited to informing the jury of the definitions adopted by the court.

M.D.La.,2008.

Albemarle Corp. v. Chemtura Corp.

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