

United States District Court,
W.D. Texas, San Antonio Division.

RED ARROW PRODUCTS COMPANY LLC, A Limited Liability Company,
Plaintiff.

v.

**RESOURCE TRANSFORMS INTERNATIONAL, LTD., and Forest Flavors International Inc., A
Kentucky Corporation,**
Defendants.

No. SA-03-CA-751-H

Oct. 20, 2008.

Clifford R. Michel, Paul R. Gupta, Orrick, Herrington & Sutcliffe LLP, Gabriela M. Materassi, Mayer, Brown, Rowe & Maw LLP, New York, NY, Edward F. Valdespino, Strasburger & Price, LLP, San Antonio, TX, for Plaintiff.

Dean V. Fleming, Fulbright & Jaworski, San Antonio, TX, James Leroy Beebe, Paul E. Krieger, Morgan Lewis & Bockius, LLP, Houston, TX, for Defendants.

ORDER REGARDING CLAIM CONSTRUCTION

HARRY LEE HUDSPETH, Senior District Judge.

This is an order construing asserted patent claims in an allegation of patent infringement under 35 U.S.C. s. 100 et seq., 35 U.S.C. s.s. 271 and 281. Plaintiff Red Arrow Products Company LLC ("Red Arrow") asserts that Defendants Resource Transforms International and Forest Flavors International, infringe United States Patent Nos. 5,039,537 (the "'537 patent"); 5,135,770 (the "'770 patent"); 5,270,067 (the "'067 patent"); 5,292,541 (the "'541 patent"); and 5,397,582 (the "'582 patent").

I. The Technology

These patents concern methods for making liquid compositions that brown foodstuffs and the products of those methods.

II. Applicable Law

Claim construction is a matter of law. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 391, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996). "It is a 'bedrock principle' of patent law that 'the claims of a patent define the invention to which the patentee is entitled the rights to exclude.'" *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)).

The words of a claim are given their ordinary and customary meaning, which 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," as measured by the effective filing date of the application. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed.Cir.2005) (en banc) (citations omitted). The person of ordinary skill in the art is deemed to read the claim term in the context of the claim in which it appears and in the context of the entire patent, including the specification. *Id.* But it is improper to read limitations from the written description into a claim. *See Tate Access Floors, Inc. v. Maxcess Techs., Inc.*, 222 F.3d 958, 966 (citing *Kemco Sales, Inc. v. Control Papers Co.*, 208 F.3d 1352, 1362 (Fed.Cir.2000)). Elements of a preferred embodiment should not ordinarily be read into claim language that is broader than such embodiments. *Id.* at 966-67.

In claim construction, courts first examine the intrinsic evidence, which includes the claims, the specification, and the prosecution history, if in evidence. *See Tate Access Floors*, 222 F.3d at 965 (citing *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed.Cir.1996)). The specification "is always relevant to the claim construction analysis. Usually, it is dispositive; it is the single best guide to the meaning of a disputed term." *Phillips*, 415 F.3d at 1315 (quoting *Innova/Pure Water*, 90 F.3d at 1582). The abstract is part of the intrinsic evidence. *See Tate Access Floors*, 222 F.3d at 965 n. 2 (citing *Hill-Rom Co. Kinetic Concepts, Inc.*, 209 F.3d 1337, 1341 n. 1 (Fed.Cir.2000) (Where the Federal Circuit states that "we have frequently looked to the abstract to determine the scope of the invention, ... and we are aware of no legal principle that would require us to disregard that potentially helpful source of intrinsic evidence as to the meaning of claims." (citations omitted))).

The prosecution history is less useful than the specification and claims because it represents the ongoing negotiation between the PTO and the patentee. *Phillips*, 415 F.3d at 1317. The prosecution history, however, is helpful when it demonstrates how the inventor understood the invention or shows that the inventor limited the invention in the course of prosecution. *Id.*

Although the use of extrinsic evidence is not forbidden, it is generally less significant than the intrinsic record. *Nazomi Communs., Inc. v. Arm Holdings, PLC*, 266 Fed.Appx. 935, 939 (Fed.Cir.2008) (citation omitted). Inventor testimony is of little value for claim construction analysis because construction of the claims is based on the record established at the time the patent was granted. *See E-Pass Techs., Inc. v. 3Com Corp.*, 343 F.3d 1364, 1370 n. 5 (Fed.Cir.2003) (citation omitted); *see also Solomon v. Kimberly-Clark Corp.*, 216 F.3d 1372, 1379 (Fed.Cir.2000).

III. Construction of Claim Terms

The parties have stipulated to the construction of many terms originally in dispute. Since there is no controversy regarding those terms, the Court will not address them here. What follows is the Court's construction of those terms that remain in dispute.

A. "High Browning Flavorless Aqueous Composition"

The '541 and '582 patents contain the term "high browning flavorless aqueous composition" in claims 16 and 20, respectively. The Plaintiff proposed the construction "a composition capable of imparting a brown color to foodstuffs without imparting virtually any detectable flavor to foodstuffs (whether a composition is flavorless is determined by comparing treated foodstuffs to untreated foodstuffs by taste, not smell)." The Defendants proposed the construction "a virtually flavorless water containing composition or product capable of imparting a brown color to foodstuffs, considering smell as well as taste of the product (the product applied to the meat must have virtually no flavor)."

The disputes for this term center on (1) whether the composition must itself be virtually flavorless or impart virtually no flavor to the foodstuffs and (2) whether flavor is determined by smell as well as taste. Neither party disputes that this term means "capable of imparting a brown color to foodstuffs." Neither party argues that this term should have different meanings in the '541 and '582 patents for any reason. The Magistrate Judge adopted the Defendants' definition.

1. Is the composition flavorless?

Turning first to the claim language, the ordinary meaning of "flavorless aqueous composition" would be that the composition itself is flavorless. The adjective "flavorless" is modifying the noun "composition."

The Plaintiff argues that the patentees acted as their own lexicographers and redefined "flavorless" within the specification. In support, the Plaintiff points to examples 3-6 in the specification as redefining "flavorless" to refer to the effect on the foodstuffs rather than the composition's own flavor. A patentee acting as his own lexicographer must specifically define terms of a claim contrary to their ordinary meaning. *See* *Chef America v. Chef Am., Inc. v. Lamb-Weston, Inc.*, 358 F.3d 1371, 1374 (Fed.Cir.2004) (citation omitted).

The specification supports a construction that recognizes the composition itself is flavorless. The Court finds that examples 3-6 in the specification actually support the finding that "flavorless" refers to the composition. They do not redefine the term to refer to the effect on the foodstuffs. The specification states that "the flavorless browning solution browned the sausages without also contributing a detectable flavor to the sausages" ('541 patent, col. 12, lines 44-46) and "the diluted flavorless food browning solution was applied to the surface of [foodstuffs]." ('541 patent, col. 13, lines 55-57). Thus, the '541 patent makes clear that the composition is (1) flavorless and (2) it is applied to foodstuffs "without also contributing a detectable flavor to the [foodstuffs]." '541 patent, col. 13, lines 66-68. The term is used identically in examples 3-6 of the '582 patent. These passages make clear that the adjective "flavorless" is referring to the browning composition; it is not redefined to refer to the effect of not contributing a flavor to the foodstuffs themselves. Example seven also supports the construction because it talks about removing flavor components from the solution.

Although the specification recognizes that the browning liquid also did not contribute a detectable flavor to the foodstuffs, the *claim language* in dispute here does not encompass that term. The Federal Circuit "has repeatedly held that courts may not redraft claims to cure a drafting error made by the patentee, whether to make them operable or to sustain their validity." *See* *Lucent Techs., Inc. v. Gateway, Inc.*, 525 F.3d 1200, 1215 (Fed.Cir.2008) (citing *Chef Am., Inc. v. Lamb-Weston, Inc.*, 358 F.3d 1371, 1373 (Fed.Cir.2004) (additional citations omitted)). When the claims are susceptible to only one reasonable construction, the court may not construe the claim differently from its plain meaning in order to preserve its validity. *Id.* (citations omitted). Here, the claim language is unambiguous. The patentees claimed a flavorless composition with this disputed term, not the effect of that composition on a foodstuff.

Further, the doctrine of claim differentiation supports this conclusion. In claim 25 of the '582 patent, the patentees claimed a process to "remove flavoring materials and thereby produce a browning liquid product which has no detectable smoke flavoring ability by taste." *See also* '541 patent, claim 21. When the patentees claimed the ability to flavor something, the words "flavoring ability" were used. This is different from calling something a flavorless composition, and it recognizes that this disputed language discloses a

composition that is flavorless.

Finally, the Plaintiff contends that a construction that requires a flavorless composition is incorrect because the inventor submitted a declaration drafted after the filing of the lawsuit that states that the compositions had a detectable flavor and smell. Plaintiff argues that this declaration means that a construction requiring a flavorless composition excludes the embodiments in the patent. This is incorrect. As discussed above, the construction is in line with the patent itself; it is the new declaration from one of the inventors that is adding material not found in the intrinsic evidence for these patents. Inventor testimony is of little value for claim construction analysis because construction of the claims is based on the record established at the time the patent was granted. *See* E-Pass Techs., 343 F.3d at 1370 n. 5; *see also* Solomon, 216 F.3d at 1379. The patentees previously argued to the PTO that "the browning liquid resulting from the claimed process, i.e., pyrolysis, is flavorless." Docket No. 46, Exh. 3, RTI 0207; *see also* RTI 0235-0236 and RTI 0275. This inventor's testimony cannot be used to establish a characteristic of a preferred embodiment that is not only absent from the intrinsic record, but contradicts it without explanation.

2. Is the flavor of the composition determined with reference to smell?

These claims refer to a flavorless aqueous composition, but they do not define how to determine whether the composition is flavorless. Plaintiff argues that flavor is determined only by taste. Defendants argue that flavor is determined by taste and smell.

In support of an amendment to the claims to add the term "flavorless" to refer to the composition, the patentees argued that "examples further showed that the browning liquids, as claimed, are flavorless (Example 7)." RA 0889. Here the patentees provided their own definition of flavorless aqueous solution by pointing the examiner to Example 7 as support that "flavorless" was not new matter. Example 7 in both patents refers to an experiment where a taste test panel tastes the actual composition in various diluted forms. There is no mention of smell.

The patents also make numerous references to the determination of flavor of the flavor-causing ability, that is how to determine whether the foodstuffs are flavored by the composition that is itself flavorless. These references are contradictory. *See e.g.*, RTI Markman 0239; '541 patent, col. 3, lines; RTI Markman 0246; RA 0889-RA0890; and RTI Markman 0207. Although most instances suggest that flavor means taste in a manner distinct from aroma, the use of the term when referring to the flavor of the foodstuffs is not consistent. At least some of this confusion is due to the patentees' wording that "the flavorless browning solution browned the sausages without also contributing a detectable flavor" (e.g., Example 3 in both patents) and attempts by the patentees to define what is meant by detectable. *See* RA 0889-0891.

Reviewing the prosecution history, the patentees said that there is "substantially no detectable smoke flavoring ability by taste" in response to an examiner rejection that the term "detectable" was ambiguous. The patentees clarified that they meant detectable by taste and not analytical means. The Defendants' claim differentiation argument fails here because the differentiation would be of the word "detectable," which is not used with reference to the flavorlessness of the composition. Here the Defendants have fallen into the trap of conflating the flavorlessness of the composition with the flavoring ability of the composition-the very thing that they argue one must not do when arguing that the composition is flavorless.

The Magistrate Judge also points out that the examiner relied upon the technical work *Food Chemistry*, which states that flavor implies all of the senses. The examiner originally cited *Food Chemistry* in

combination with the Jandera reference to reject claims 6, 7, 10, and 11 under 35 U.S.C. s. 103. The examiner cited these references as teaching well known techniques for ion exchange to extract flavoring components (i.e. aldehydes) from solutions. The patentees responded that the ion exchange technique disclosed in that reference did not suggest using the technique to remove the particular constituents of the liquid smoke solution that the patentees disclosed. RTI Markman 0186. Here again, though, the examiner and the Applicants were both discussing the flavoring ability of the composition as applied to the foodstuffs. These references to the flavoring ability should not over-ride the clear statement by the Applicants that the flavorlessness of the composition is defined in Example 7, which describes only taste. Further, the *Food Chemistry* reference describes flavor as taking into account all senses, and the Defendants are certainly not arguing that flavor includes feeling, sight, or sound. It is clear, then, that no party is arguing *Food Chemistry* to be an appropriate source for a definition of "flavor" from extrinsic evidence; such a definition would not trump the definition provided in the intrinsic evidence for the flavorless composition any way.

Construction: A water containing composition that is capable of imparting a brown color to foodstuffs and is virtually flavorless, considering taste of the composition. (The composition that is applied to the foodstuff must have virtually no flavor.)

B. "Derived from a Vapor of Pyrolyzed Material"

This term is found in claim 16 of the '541 patent and claim 20 of the '582 patent. Plaintiff contends that this term does not need to be construed. Defendants contend that the term should be construed as "derived from a vapor of pyrolyzed sugar, starch and/or mixtures thereof by removing all remaining flavor-causing components from a liquid-condensate of the vapor." Neither party argues that this term should have different meanings in the '541 and '582 patents for any reason.

Each claim already specifies that the pyrolyzed material is selected from the group consisting of a sugar, starch, and mixtures thereof. Incorporating this language into the disputed claim term would only add redundancy and confusion to the claim. These two patents make clear that one aspect of the invention is the flavorlessness of the composition and another aspect is the virtual lack of flavor-causation to the foodstuffs to which the composition is applied. The term "flavorless," referring to the aqueous solution, is not redundant with the description in the specifications and prosecution histories of removing all remaining flavor-causing components from a liquid condensate of the vapor.

The patentees used "derived" to refer to all steps of the process. In prosecution, the patentees distinguished their claimed method from prior art references by saying that those references do not teach "removing the flavor components from a condensed vaporous pyrolysis product of sugar or starch." RTI Markman 0284; *see also* RTI Markman at 0285. The patentees also explicitly stated that "the claimed methods require pyrolysis of a sugar and/or starch to a *vaporous* pyrolysis product; condensation of the vaporous pyrolysis product; *and* subsequent treatment of the condensate to remove flavoring materials. Appellants do not rely *solely* upon solvent extraction or treatment with an ion exchange resin to remove flavoring materials for novelty, but rely upon a combination of all the process steps as set forth in the independent claims." RTI Markman 0286 (emphasis in original). The patentees used that argument as a reason why claim 20 itself was patentable over the examiner's objection. *See* RTI Markman 0288. Discussing claims 20-24, the patentees stated that the prior art references do not "pyrolyze a sugar and/or a starch into a vaporous pyrolysis product of simpler molecules, then condense and treat the vaporous pyrolysis product to provide a flavorless, high browning composition useful for browning foodstuffs." RTI Markman 0293-0294. Taken together, these references show that the patentees considered all of the steps in the process essential to distinguish over the

prior art. These steps are what the patentees and the examiner meant by "derived." *See also* RTI Markman at 0213, 0215, 0256, 0293-0294, 0382.

The examiner's statement of allowance recognized that the process for deriving the composition was important to the allowability of these claims and required that the term "derived" be included so that the product claim included the process. *See* RTI Markman 0301. Courts should construe claims by first looking to the intrinsic evidence—the claims, the specification, and the prosecution history. *See* Tate Access Floors, 222 F.3d at 965 (citing Vitronics Corp., 90 F.3d at 1582). The correct construction must recognize all steps of the process that the patentees used to distinguish his invention to give meaning to the term "derived."

There is no support, however, for the Defendants' position that *all* flavor causing components must be removed. In fact, the patents claim that treatment of the foodstuff with the product has little or no smoke flavor or aroma, which accounts for at least some flavor-causing components remaining in some circumstances. *See e.g.*, '541 patent, Col. 3, lines 1-2; '541 patent col. 3, lines 35-37; '582 patent, col. 3, lines 1-2; '582 patent, col. 4, lines 10-12. The passages the Defendants cite from the prosecution history (such as RTI Markman at 0256) do provide support for the process removing remaining flavor-causing components, but this Court will not add in the unsupported limitation that they must all be removed.

Construction: Derived by removing remaining flavor-causing components from a liquid condensate of the vapor of the material.

C. "A High Browning Liquid Smoke Composition"

This term is found in the preamble to claim 1 of the '537 patent. The '537 patent and the '770 patent have identical specifications. The parties argue this term and the preamble to claim 1 of the '770 patent together; however, since the preambles are not identical, this Court will examine the preamble language in each patent in turn.

Since this term appears in the preamble, the Court must first determine whether it is in fact a separate limitation. *See* Symantec Corp. v. Computer Assocs. Int'l, 522 F.3d 1279, 1288 (Fed.Cir.2008). A preamble is limiting "if it recites essential structure or steps, or if it is necessary to give life, meaning and vitality to the claim" *Id.* (internal quotation marks and citations omitted); *see also* Catalina Mktg. Int'l v. Coolsavings.com, Inc., 289 F.3d 801, 808-810 (Fed.Cir.2002) (reciting specific considerations for whether a preamble is limiting). A preamble is not limiting "where a patentee defines a structurally complete invention in the claim body and uses the preamble only to state a purpose or intended use for the invention." *Syantec*, 522 F.3d at 1288 (internal quotation marks and citations omitted).

The Defendants are mistaken when they argue that the claim in the '537 patent relies upon "liquid smoke composition" as the antecedent basis for "liquid composition." The claim language begins with "a liquid solution," which stands on its own as a distinct element. It is unnecessary, therefore, to find antecedent basis in the preamble. *See Manual of Patent Examining Procedure s. 2175(e)* (Eighth Ed. July 2008) (for explanation of antecedent basis).

The preamble does, however, provide an additional structural limitation that the specification points out as important. The Defendants contend that "smoke" in "a high browning liquid smoke composition" adds a limitation that should be construed to require a liquid composition made from pyrolyzed wood or cellulose. The Court finds that review of the entirety of the patent shows the preamble language stating that the liquid

composition is a smoke composition discloses a fundamental characteristic of the claimed invention that is properly construed as a limitation of the claim itself. A determination of whether a preamble is limiting is properly based upon a review of the entire patent to determine an understanding of what the inventors actually invented and intended to encompass by the claim. *See Poly-Am., L.P. v. GSE Lining Tech., Inc.*, 383 F.3d 1303, 1309-10 (Fed.Cir.2004) (citation omitted). The specification taken as a whole shows that the preamble gives life, meaning, and vitality to the claim. It adds a structural limitation. The liquid composition is not just any liquid composition-it is a liquid smoke composition. The specification says in multiple places that the "invention provides" or the "invention encompasses" "a high browning liquid smoke composition." *See e.g.*, '537 patent, column 4, line 16. The title of the invention is "High Browning Liquid Smoke Composition and Method of Making a High Browning Liquid Smoke Composition." Nowhere in the patent does the inventor claim that his invention has broader reach than for the area of liquid smoke compositions. Therefore, the structural limitation that the liquid composition be a liquid smoke composition is necessary.

The specification gives meaning to the liquid smoke limitation. The parties do not contend that the prosecution history is helpful in this determination. The patentees described pyrolysis as "a general term for the thermal decomposition of organic matter, such as wood, plants, or fossil fuels, which occurs either during combustion or in the absence of combustion." '537 patent, col. 1, lines 50-53. That section is describing the background of the invention, though, not the invention itself. It is a generic definition of pyrolysis, not of the feedstock that is acceptable in the patented product and process. When discussing the particular invention in this patent, the patentees stated:

the high browning liquid smoke composition of this invention is preferably made from the condensable products of the fast pyrolysis of wood or cellulose. In addition, other lining-cellulose sources are also acceptable for use as pyrolysis feedstock. The pyrolysis feedstock may be any suitable wood product, but is preferably hardwoods such as maple, hickory, birch, oak, beech, or poplar. '537 patent, col. 4, lines 55-62.

This passage indicates that the invention is limited to the particular type of pyrolysis that uses the condensable products from fast pyrolysis of wood or cellulose. While the inclusion of the "preferably" language initially appears to make this passage discuss a preferred embodiment, the passage taken as a whole shows that wood and cellulose feedstock are the only acceptable feedstock mentioned for the invention. No other feedstock are specifically mentioned, nor does the patent leave open that other sources of pyrolysis feedstock would be acceptable. It merely states that wood or cellulose feedstock are preferred, acceptable, and suitable.

Construction: A high browning liquid composition made from the condensable products of pyrolyzed wood or cellulose.

D. "A High Browning Liquid Composition Comprising"

Claim 1 of the '770 patent has different wording. That claim's preamble recites "a high browning liquid composition comprising ..." The parties and the Magistrate Judge have incorrectly treated this language as identical to the "high browning liquid smoke composition" language from the '537 patent. The omission of the smoke component is key to determining that this preamble does not limit the claim language. The "smoke" language provided a structural component in the '537 preamble that made it necessary to construe that preamble as a limitation. It added life and meaning to the claim. Here, however, the claim itself is structurally complete and the preamble adds nothing. Both the browning and the liquidity are accounted for

in the body of the claim, so the preamble is merely a summary of the invention and not a limitation upon it. The Court declines, therefore, to construe this term, since it non-limiting.

Since the parties have submitted this term including the transitional phrase "comprising," the Court will note that comprising has a generally accepted definition. The parties have not disputed that the common meaning of comprising in patent law does not apply here. For the sake of clarity, however, "comprising" as used in a preamble is an open term used to mean that the claimed invention must have the elements recited but may have additional elements as well and still form a construct within the bounds of the claim. *See* Genentech v. Chiron Corp., 112 F.3d 495, 501 (Fed.Cir.1997) (citation omitted).

Construction: This is a non-limiting preamble that does not need to be defined. The claim defines the invention, which may include more than the elements recited, but may not include less than the elements recited.

E. "A liquid smoke composition"

This term is found in the preamble of dependent claims 2, 3, 4, and 5 of the '537 patent. The full text of the claim language is "a liquid smoke composition of claim X" where X is 1, 3, or 4 in turn. This is classic dependent claiming. Claims in dependent form are construed to include all of the limitations of the claim incorporated by reference into the dependent claim. **37 C.F.R. s. 1.75(c) (2008)**. This language will not be construed separately from the independent claims as a whole, but means only that each of these dependent claims includes all of the limitations of the claim or claims from which it depends.

F. "a high browning liquid composition of claim 1"

This term is found in the preamble of claims 2 and 3 of the '770 patent. They are dependent claims. This terminology means that these dependent claims include all limitations of claim 1. This language will not be construed apart from claim 1 as a whole, but means that each of these dependent claims includes all of the limitations of claim 1.

G. "A high browning, low flavor liquid composition"

This term, used in the '067 patent's claims 1, 14, 18, and 21, revisits the disputes about whether the liquid itself must be low flavor and whether flavor is determined by taste as well as smell. Plaintiff contends that this term should be construed to mean "a liquid composition capable of imparting a brown color to foodstuffs without imparting a strong flavor to the foodstuffs." Defendants contends that this term should be construed as "a liquid solution with substantially no smoke flavor, considering smell as well as taste, derived from a condensate of the vapor of a fast pyrolysis process."

In this patent it is clear that the liquid itself is limited to low flavor by the disputed phrase. This is supported by the claim language itself since "low flavor" is the adjective modifying "liquid composition." It is also supported by the end of claim 1 which claims "wherein the composition imparts a satisfactory brown color to a food subsequently encased in the casing without adding undesired sensory properties to the food." It is clear from this phrasing that the patentees were aware of how to claim a property of the food as opposed to a property of the liquid.

The specification supports a construction that requires that the composition itself be low flavor. The summary of the invention states that it "includes contacting a casing with a high browning, low flavor liquid

composition ..." '067 patent, col. 3, lines 16-17. It also talks about "cellulosic casings impregnated with a high browning, low flavor liquid composition ..." Id. at col. 3, lines 48-49 and lines 53-54; *see also* col. 1, lines 17-24. These references all show that here, as in the '541 and '582 patents, the patentees did not intend merely for the composition to cause a low flavor on the foodstuffs, but also claimed that the actual composition had a low flavor.

The specification also supports a construction that the flavor is to be determined by taste and not smell. The Court notes that column 8, lines 65-66 distinguish between flavor and aroma when discussing removing flavoring components from the liquid solution. Resort to extrinsic evidence, is unnecessary in this situation. Further, the use of *Food Chemistry* as an extrinsic source would support a definition that flavor includes all sensory perceptions (as discussed above), which is a construction that no party urges. FN1

FN1. The Defendants also fail to cite any evidence for inclusion of "smoke" as the flavor in this claim. The claim does not specify that the composition is low in smoke flavor, so the Court will not add in this limitation.

CONSTRUCTION: a liquid composition that is capable of imparting a brown color to foodstuffs and is itself low in flavor, considering the taste of the composition. (The composition that is applied to the foodstuff must have low flavor.)

H. "Derived from feedstock"

This term is found in claims 1, 14, 18, and 21 of the '067 patent. The Plaintiff argues that this term needs no construction. The Defendants argue that the term means "derived from a condensate of the vapor of fast pyrolysis after removing flavor causing components."

In context, this term is part of the phrase "derived from a feedstock selected from the group consisting of a sugar, a starch, a monosaccharide, a disaccharide, a trisaccharide, a starch hydrolysate, cellobiose, hemicellulose and mixtures thereof ..." in all asserted claims. The patent's specification never explicitly defines what the term "derived from" means.

The Defendants urge the Court to adopt a construction that is based upon the overall interpretation of the invention rather than the words of the claim itself. Specifically, the Defendants argue that the critical feature of the invention is its browning ability without imparting too much flavor to the food. Defendants posit that the way that is accomplished is removing the flavoring materials from a liquid condensate of the vapor of pyrolyzed material. The Defendants, however, are the ones claiming that this is the critical feature of the invention-the patent specification rebuts this argument. The patent states that advantages of the preferred method are low acid content, high levels of browning carbonyls, and low levels of phenols. '067 patent, col. 5, lines 10-13.

The Defendants also failed to prove that the invention was distinguished on the grounds of the supposedly critical limitation in any argument made by the patentees during prosecution of the patent. The Defendants cite to a passage of the patentees arguments in a June 16, 1992 Amendment as proof that their construction is correct. That passage shows that the patentees distinguished their invention from a tar-depleted composition on the grounds that the fast pyrolysis method in the invention was compared with the tar-depleted method in Samples A-C in the patent's specification. The results are reported in Table 1 of the

patent and provide "new and unexpected advantages demonstrated by a peelable casing treated with a liquid composition prepared by a fast pyrolysis process compared to a casing treated with a prior art, tar-depleted liquid smoke composition." June 16, 1992 Amendment, pp. 9-11. This passage does not provide support for Defendants' construction but only shows that the patentees disclaimed the tar-depletion method as prior art; however, this does not appear to be a dispute between the parties. General statements are not necessarily interpreted as disclaiming every feature of every prior art device discussed. *See Ventana Med. Sys. v. Biogenex Labs., Inc.*, 473 F.3d 1173, 1181 (Fed.Cir.2006).

Further, Defendants' construction does not define the term "derived from" in any way, but merely restates it and adds the limitation of derivation "from a condensate of the vapor of a fast pyrolysis process after removing flavor causing components." This is particularly odd from a party arguing that "without giving definition to the term 'derived,' the claim has no meaning." Defendants' Reply to Plaintiff's Claim Construction at 6. The Defendants' proposed construction is a clear attempt to improperly add a limitation into the claim that is not there. The Court declines to do so.

Construction: This term does not require construction.

I. "Without adding undesired sensory properties to the food"

This term is found in claims 1 and 20 of the '067 patent. The Plaintiff contends that the claim language is clear and need not be construed. The Defendants contend that the term should be construed as "a composition or solution that imparts a satisfactory brown color without adding properties that are detected by sight, smell, taste, or touch (texture), such as degrading or interfering with the integrity and handling capability of cellulosic casings or having too much flavoring capability."

Turning to the Defendants' definition, the addition of the satisfactory brown color is unnecessary. The browning ability is defined elsewhere in the claim and it is not necessary to add that limitation ad nauseam into each limitation. The definition of sensory properties as sight, smell, taste, or touch is unsupported by intrinsic or extrinsic evidence. To the extent that the definition is supported by common sense, it is unnecessary to construe it.

Further, although Defendants cite two passages from the patent specification, those passages do not support their proposed construction. The first citation, column 3, lines 20-26, merely restates the disputed term. The second citation discusses undesired sensory properties in the prior art, but never states that the patent claims to have solved all or any of those problems. This evidence is insufficient to over-rule the unambiguous nature of this claim language. The language is clear and understandable to lay jurors. The Court declines to construe this language to include additional limitations.

Construction: This term does not need to be construed.

IV. CONCLUSION

The Court has now discharged its responsibility with respect to claim construction. The District Clerk will now contact counsel for all parties to ascertain their conflicts, if any, so that this case can be set for a trial on the merits without delay.

SIGNED AND ENTERED this *17th* day of October 2008.

W.D.Tex.,2008.

Red Arrow Products Co. LLC v. Resource Transforms Intern., Ltd.

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