

United States District Court,
N.D. California.

TERRA NOVO, INC,
Plaintiff.

v.

GOLDEN GATE PRODUCTS, INC,
Defendant.

No. C 03-2684 MMC

June 14, 2004.

Matthew A. Newboles, Stetina Brunda Garred & Brucker, Aliso Viejo, CA, for Plaintiff.

**ORDER CONSTRUING CLAIMS; VACATING HEARING AND STATUS CONFERENCE;
SETTING CASE MANAGEMENT CONFERENCE**

MAXINE M. CHESNEY, District Judge.

Before the Court is the parties' dispute regarding the proper construction of nine terms in U.S. Patent No. 6,562,882 ("882 Patent"). Plaintiff and defendant have submitted a Joint Claim Construction Statement and Supplemental Joint Claim Construction Statement, pursuant to Patent Local Rule 4-3, as well as briefs and evidence supporting their respective positions on the disputed terms. Having considered the papers submitted, the Court finds that the papers sufficiently set forth the views of the parties and that testimony is unnecessary to resolve the parties' dispute. Accordingly, the Court hereby VACATES the hearing set for June 21, 2004 and the status conference set for June 18, 2004, and construes the terms as follows.

LEGAL STANDARD

In construing disputed claims, a district court's primary source is the intrinsic evidence of the patent. *See Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582-83 (Fed.Cir.1996). FN1 Intrinsic evidence includes the abstract, the claims, the specification, and the prosecution history. *See Hill-Rom Co. v. Kinetic Concepts, Inc.*, 209 F.3d 1337, 1341 (Fed.Cir.2000); *Unique Concepts, Inc. v. Brown*, 939 F.2d 1558, 1561 (Fed.Cir.1991). Language used in the patent is given its ordinary meaning, unless it is clear from the patent and prosecution history that the inventor intended the terms to have a different meaning. *See Vitronics*, 90 F.3d at 1582. The patent specification "may act as a sort of dictionary, which explains the invention and may define terms used in the claims." *See Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 986 (Fed.Cir.1995). Although a district court looks to the specification to determine the meaning of a disputed claim, it is generally improper to limit the scope of the claim to the examples set forth in the specification. *See Electro Medical Systems v. Cooper Life Sciences*, 34 F.3d 1048, 1054 (Fed.Cir.1994). The claims of the patent, not the specification, "measure the invention." *See SRI Int'l v. Matsushita Elec. Corp. of America*, 775 F.2d 1107, 1122 (Fed.Cir.1985). Finally, the district court reviews the prosecution history, which is "often of critical significance in determining the meaning of the claims." *See Vitronics*, 90 F.3d at 1582.

FN1. A district court considers extrinsic evidence, such as expert testimony, only if the claims are ambiguous and not sufficiently defined by the intrinsic evidence. *See Bell & Howell Document Management Prods. Co. v. Altek Sys.*, 132 F.3d 701, 706 (Fed.Cir.1997) (holding that "[w]hen the intrinsic

evidence is unambiguous, it is improper for the Court to rely on extrinsic evidence"). A district court may, however, consider "trustworthy extrinsic evidence to ensure that the claim construction it is tending to from the patent file is not inconsistent with clearly expressed, plainly apposite, and widely held understandings in the pertinent technical field." *See Pitney Bowes, Inc. v. Hewlett-Packard Co.*, 182 F.3d 1298, 1309 (Fed.Cir.1999). "This is especially the case with respect to technical terms, as opposed to nontechnical terms in general usage or terms of art in the claim-drafting art, such as 'comprising.'" *Id.*

DISCUSSION

The Abstract in the '882 Patent describes the invention, generally, as "[c]ompositions and method for resisting soil erosion ." *See* '882 Patent, Abstract. The parties have requested the Court construe nine terms, each of which the Court considers in turn.

A. "A Copolymer of Linear Polyacrylamide and Sodium Acrylate"

The term "a copolymer of linear polyacrylamide and sodium acrylate" appears in Claim 1, as follows:

What is claimed is:

1. An admixture formed from a solid composition and water for subsequent application to soil to prevent soil erosion comprising:

a) a solid composition consisting essentially of an organic material and *a copolymer of linear polyacrylamide and sodium acrylate*, said polymer being present in an amount up to 1.25% by weight of said solid composition; and

b) wherein said solid composition is mixed with water at a ratio of from about 1 pound of solid composition per 1.5 gallons of water to about 1 pound of solid composition per 6 gallons of water.

See '882 Patent, col. 5, lines 57-col. 6, lines 2 (emphasis added).

Additionally, the term is found in Claim 6, which sets forth a method for reducing soil erosion, wherein one of the steps is "providing *a copolymer of linear polyacrylamide and sodium acrylate*." *See id.*, col. 6, lines 28-32 (emphasis added).

Plaintiff argues the subject term is properly construed as "a copolymer that is formed exclusively from linear polyacrylamide and sodium acrylate that expressly omits cross-linked polyacrylamide and is further not operative to absorb water," (*see* Pl.'s Proposed Order at 2:1-3); defendant argues the term should be construed as "a linear polyacrylamide polymer with sodium acrylate added, i.e., a mixture of polyacrylamide and sodium acrylate," (*see* Def.'s Claim Construction Brief at 16:15-18).

At the outset, the Court notes that defendant fails to advance any argument against the proposed construction actually proffered by plaintiff. Rather, defendant argues that (1) "the term 'a copolymer of linear polyacrylamide and sodium acrylate' cannot have the meaning attributed to it by [plaintiff], in other words, it cannot mean 'linear polyacrylamide,'" (*see* Def.'s Claim Construction Brief at 2:21-23), and that (2) "[plaintiff] asks the Court to construe [two] terms to mean the same thing," specifically the terms "a copolymer of linear polyacrylamide and sodium acrylate" and "a linear polyacrylamide polymer," FN2 (*see id.* at 8:21-24). Both contentions by defendant, however, are based on an incorrect premise. Plaintiff has not suggested that "a copolymer of linear polyacrylamide and sodium acrylate" be construed as "linear polyacrylamide" or "anionic linear polyacrylamide"; rather, plaintiff has offered the more detailed construction set forth above. Plaintiff has also offered different proposed constructions for the terms "a

copolymer of linear polyacrylamide and sodium acrylate" and "a linear polyacrylamide polymer." (Compare Pl.'s Proposed Order at 2:1-3, with Pl.'s Proposed Order at 3:1-3.) Accordingly, the Court does not consider defendant's arguments, to the extent they are based on the incorrect premises set forth above.FN3

FN2. The construction of the term "linear polyacrylamide polymer," contained in Claim 15, is discussed below.

FN3. Defendant, in its claims construction brief, has also included arguments pertaining to infringement, (see, e.g., Def.'s Claim Construction Brief at 4:15-18, 8:7-19), and its allegation that the inventor failed to disclose material prior art, (see, e.g., id. at 7:15-8:6). These contentions are premature and, thus, not further addressed by the Court.

As noted, language used in the patent is given its ordinary meaning, unless it is clear from the patent and prosecution history that the inventor intended the terms to have a different meaning. See *Vitronics*, 90 F.3d at 1582. The ordinary meaning of "copolymer" is that it is "a product of copolymerization." See Webster's Third New International Dictionary 502 (1986).FN4 To "copolymerize" is "to polymerize together-used [sic] of two or more polymerizing substances that together form complex molecules usu. of high molecular weight (as plastics and synthetic rubber)." See *id.* To "polymerize" is "to combine (small molecules) chemically into larger or esp. very large molecules." See *id.* at 1759. Here, the specification, in describing one of the preferred embodiments, teaches a copolymer that is a mixture of two different components, (see ' 882 Patent, col. 3, lines 44-46); neither party points to any language in the patent or the prosecution history suggesting the inventor intended the term "copolymer" to have a meaning different from the commonly understood meaning. Consequently, the Court agrees with plaintiff that the claimed copolymer is formed by a joining of two components. Those two components are identified in Claim 1 as "linear polyacrylamide" and "sodium acrylate."

FN4. Dictionary definitions are "an available resource of claim construction." See *Vanguard Products Corp. v. Parker Hannifan Corp.*, 234 F.3d 1370, 1372 (Fed.Cir.2001) (affirming district court's determination that dictionary definition of "integral" was properly used to construe term where specification and prosecution history did not show inventor used term in more limited or specialized manner).

The prosecution history indicates plaintiff sought to avoid rejection of Claim 1 and "more clearly define the subject matter" by limiting the components that form the claimed copolymer to "linear polyacrylamide" and "sodium acrylate." (See Ryan Decl. Ex. 9 at 12.) Consequently, the Court agrees with plaintiff that the claimed copolymer consists "exclusively" of the components "linear polyacrylamide" and "sodium acrylate." FN5 See *Phillips Petroleum Co. v. Huntsman Polymers Corp.*, 157 F.3d 866, 875-86 (Fed.Cir.1998) (holding claims properly limited by statements made during prosecution history).

FN5. To the extent defendant's expert may be suggesting it is not possible to form a copolymer from polyacrylamide and sodium acrylate, (see Wallace Decl. para. 18), any such argument, which does not pertain to claim construction, is premature.

As noted, plaintiff also contends that the claimed copolymer cannot include a "cross-linked polyacrylamide" and is "not operative to absorb water." (See Pl.'s Proposed Order at 2:1-3 .) In that respect, both parties have submitted expert declarations indicating it is commonly understood in the art that a "linear polyacrylamide" is distinct from a "cross-linked polyacrylamide" and that the former is water soluble. (See Svec Decl. para. 6, 8; Wallace Decl. para. 16.) Consequently, the Court will adopt such limitations in the construction of the subject term. See *Pitney Bowes*, 182 F.3d at 1309 (holding district court may

consider extrinsic evidence to ensure claim construction is not inconsistent with "widely held understandings in the pertinent technical field").

Accordingly, the Court construes "a copolymer of linear polyacrylamide and sodium acrylate" as "a copolymer that is formed exclusively from linear polyacrylamide and sodium acrylate that expressly omits cross-linked polyacrylamide and is further not operative to absorb water."

B. "A Copolymer Consisting of Linear Polyacrylamide Polymer and Sodium Acrylate"

The term "a copolymer consisting of linear polyacrylamide polymer and sodium acrylate" is contained in Claims 13 and 14, both of which set forth a method for reducing soil erosion, wherein one of the steps is "providing *a copolymer consisting of linear polyacrylamide polymer and sodium acrylate.*" See '882 Patent, col. 6, lines 59-62, col. 7, lines 16-18 (emphasis added).

Both parties submit the term should be construed in the same manner as "a copolymer of linear polyacrylamide and sodium acrylate ." (See Pl.'s Proposed Order at 2:1-7; Def.'s Claim Construction Brief at 16:15-18.) The Court agrees and, accordingly, construes "a copolymer consisting of linear polyacrylamide polymer and sodium acrylate" as "a copolymer that is formed exclusively from linear polyacrylamide and sodium acrylate that expressly omits cross-linked polyacrylamide and is further not operative to absorb water."

C. "Said Sodium Acrylate Component of Said Copolymer"

The term "said sodium acrylate component of said copolymer" is found in Claim 3, which claims the admixture set forth in Claim 1 wherein "*said sodium acrylate component of said copolymer* is present in an amount from 0.075% to 0.375% by weight of said solid composition." (See '882 Patent, col. 6, lines 19-22) (emphasis added).

Plaintiff argues that the term is properly construed as "the portion of the copolymer of linear polyacrylamide and sodium acrylate that consists of sodium acrylate," (see Pl.'s Proposed Order at 2:8-10); defendant argues that the term should be construed as "the amount of sodium acrylate in relation to acrylamide that are combined and polymerized to form the linear polyacrylamide component of the mixture of linear polyacrylamide polymer and sodium acrylate referred to in claims 1, 6, 13 and 14," (see Def.'s Claim Construction Brief, App. B at 24:13-17).

The Court finds plaintiff's proposed construction correctly, and concisely, sets forth the meaning of the subject term. Defendant advances no argument in support of its more lengthy proposed construction and, in particular, fails to explain why construction of a term found only in claim 3 would be relevant to Claims 1, 6, 13, and 14, none of which is dependent on claim 3.

Accordingly, the Court construes "said sodium acrylate component of said copolymer" as "the portion of the copolymer of linear polyacrylamide and sodium acrylate that consists of sodium acrylate."

D. "A Solid Composition"

The term "a solid composition" is found in Claim 1, specifically, in the description of one of the elements comprising the claimed admixture: "*a solid composition* consisting essentially of an organic material and a copolymer of linear polyacrylamide and sodium acrylate, said polymer being present in an amount up to 1.25% by weight of said solid composition." (See '882 Patent, col. 5, lines 61-65) (emphasis added). The term is also found in Claims 2 and 3, both of which are dependent on Claim 1.

Plaintiff argues the term is properly construed as "the exclusive combination of organic material and copolymer of linear polyacrylamide and sodium acrylate," (see Pl.'s Proposed Order at 2:11-12); defendant

argues the term should be construed as "the exclusive combination of the designated components each of which are in a non-liquid and nongaseous form," (*see* Def.'s Claim Construction Brief, App. B at 24:17-19). Thus, both parties agree that the claimed "solid composition" comprises two exclusive components. The parties, in their respective briefs, also agree that the composition, being "solid," is "non-acqueous." (*See* Pl.'s Opening Claim Construction Brief at 13:10-12; Def.'s Claim Construction Brief at 18:17-18.) Further, because the claimed composition is "solid," it cannot be a gas. *See* Webster's Third New International Dictionary 2169 (1986) (defining "solid" as "being neither gaseous nor liquid").

Accordingly, the Court construes the term "a solid composition" as "the exclusive combination of organic material and a copolymer of linear polyacrylamide and sodium acrylate, and which is in a non-liquid and non-gaseous form."

E. "Organic Material"

The term "organic material," found in Claims 1 and 2, refers to one of the two components of the "solid composition" comprising the admixture claimed in Claim 1. *See* '882 Patent, col. 5, lines 58-65; *see also* *id.*, col. 6, lines 17-19. The term is also found in Claims 6 and 12, both of which are method claims wherein one step of the claimed method for reducing soil erosion is "providing an organic material." *See id.*, col. 6, lines 28-30, 33; *id.*, col. 6, lines 57-59. Additionally, in Claim 4, dependent on Claim 1, the term is set forth as follows: "said organic material is selected from the group consisting of cellulose, mulch, and seed combined with mulch." *See id.*, col. 6, lines 22-24. In Claim 8, a method claim dependent on Claim 6, the term is set forth as follows: "said organic material is selected from the group consisting of cellulose and mulch." *See id.*, col. 6, lines 45-47. Finally, the term is found in Claims 13 and 14, both of which are method claims wherein one step of the claimed method for reducing soil erosion is "providing an organic material selected from a group consisting of paper mulch, wood fiber mulch, and cellulose." *See id.*, col. 6, lines 60-66; *id.*, col. 7, lines 16-17, 20-22.

Plaintiff argues that "organic material" is properly construed as "cellulose, including recycled paper mulch and/or wood fiber mulch, mulch, and/or seed and mulch, but expressly excludes inorganic fillers," (*see* Pl.'s Proposed Order at 2:13-15); defendant argues the term, as it appears in Claims 1, 2 and 6, should be construed as "any carbon-based material including fiber, mulch, wood, and/or seed and including any type of fiber, mulch and/or seed," (*see* Def.'s Claim Construction Brief, App. B at 20-22).

At the outset, the Court agrees with defendant's implicit argument that the term "organic material," as it appears in Claims 4, 8, 13, and 14, cannot have the broad definition proffered by plaintiff because, in each of those four claims, the inventor chose to define the term "organic material" to include only certain types of organic material as specified in the claim language. Consequently, with respect to the term "organic material" as it appears in Claims 4, 8, 13 and 14, the Court finds the inventor has specifically defined the term. Specifically, the Court finds (1) "organic material," as used in Claim 4, means "cellulose, mulch, and/or seed combined with mulch"; (2) "organic material," as used in Claim 8, means "cellulose and/or mulch"; and (3) "organic material," as used in Claims 13 and 14, means "paper mulch, wood fiber mulch, and/or cellulose." FN6

FN6. The term "organic material" is also found in Claim 15, *see id.*, col. 8, lines 10-16. Neither party, however, has requested that the Court construe "organic material" as it is used in Claim 15.

As to Claims 1, 2, 6, and 12, the inventor, by contrast, did not use any limiting language to indicate an intent to define "organic material" more narrowly than its ordinary meaning, which is "being, containing, or relating to carbon compounds, esp. in which hydrogen is attached to carbon, whether derived from living organisms or not-usu. distinguished from inorganic or mineral." *See* Webster's Third New International Dictionary 1590 (1986). The specification teaches that "organic material" includes "cellulose," the

combination of "seed and mulch," and "mulch," FN7 (*see* ' 882 Patent, col. 2, lines 11-14); no party argues that the patent or the prosecution history contains any language suggesting that only those carbon-based materials can constitute the claimed "organic material."

FN7. The claim language refers to various types of "mulch" as examples of "organic material." *See, e.g.*, '882 Patent, col. 6, lines 48-51 (referring to "paper mulch" and "wood fiber mulch").

Accordingly, the Court construes "organic material," as the term appears in Claims 1, 2 and 6, as "any carbon-based material, including, but not limited to, cellulose, mulch, and the combination of seed and mulch."

F. "In an Amount up to 1.25% by Weight of Said Solid Composition"

The term "in an amount up to 1.25% by weight of said solid composition" is found in Claim 1, which, as noted, claims an admixture comprising, *inter alia*, "a solid composition consisting essentially of an organic material and a copolymer of linear polyacrylamide and sodium acrylate, said polymer being present *in an amount up to 1.25% by weight of said solid composition.*" *See id.*, col. 5, lines 61-65 (emphasis added).

Plaintiff argues the term is properly construed as "the range defining the maximum limit of the percentage of the combined weight of the copolymer of linear polyacrylamide and sodium acrylate and organic material that is attributable to the copolymer," (*see* Pl.'s Proposed Order at 2:16-19); defendant argues the term should be construed as "from an effectual level of the linear polyacrylamide and sodium acrylate in an amount up to and including 1.25%," (*see* Def.'s Claim Construction Brief, App. B at 23-26).

The Court finds that plaintiff's proposed construction correctly sets forth the meaning of the term, namely the maximum percentage the copolymer of linear polyacrylamide and sodium acrylate can represent in the solid composition.

Accordingly, the Court construes the term "in an amount up to 1.25% by weight of said solid composition" as "the range defining the maximum limit of the percentage of the combined weight of the organic material and the copolymer of linear polyacrylamide and sodium acrylate that is attributable to the copolymer, specifically, up to and including 1.25%."

G. "In an Amount from 0.25% to 1.25% by Weight of Said Solid Composition"

The term "in an amount from 0.25% to 1.25% by weight of said solid composition" is found in Claim 2, which claims the admixture defined in Claim 1, wherein "said copolymer is present *in an amount from 0.25% to 1.25% by weight of said solid composition;* and said organic material is present in an amount between 98.75% to 99.75% by weight of said solid composition." *See* ' 882 Patent, col. 6, lines 14-18 (emphasis added).

Plaintiff argues the term is properly construed as "a range narrowing the percentage of the combined weight of the copolymer of linear polyacrylamide and sodium acrylate and organic material that is attributable to the copolymer," (*see* Pl.'s Proposed Order at 2:20-23); defendant argues the term should be construed as "the range of the percentage of the mixture of linear polyacrylamide and sodium acrylate, to the solid composition," (*see* Def.'s Claim Construction Brief, App. B at 24:27-25:3).

Although the parties' proposed constructions are similar, the Court finds that plaintiff's proposed construction more correctly sets forth the meaning of the term, namely the percentage range the copolymer of linear polyacrylamide and sodium acrylate can represent in the solid composition.

Accordingly, the Court construes the term "in an amount from 0.25% to 1.25% by weight of said solid composition" as "the range defining the percentage of the combined weight of the organic material and the copolymer of linear polyacrylamide and sodium acrylate that is attributable to the copolymer, specifically, from 0.25% to 1.25%."

H. "In an Amount from 0.075% to 0.375% by Weight of Said Solid Composition"

The term "in an amount from 0.075% to 0.375% by weight of said solid composition" is found in Claim 3, which claims the admixture defined in Claim 2, wherein "said sodium acrylate component of said copolymer is present *in an amount from 0.075% to 0.375% by weight of said solid composition.*" See '882 Patent, col. 6, lines 19-22 (emphasis added).

Plaintiff argues the term is properly construed as "the percentage of the overall combined weight of the organic material and copolymer of linear polyacrylamide and sodium acrylate that is attributable to the sodium acrylate portion of the copolymer, (see Pl.'s Proposed Order at 2:24-27); defendant argues the term should be construed as "the range of the percentage of the additional sodium acrylate (which is added to the linear polyacrylamide as provided in Claim 1) to the solid composition," (see Def.'s Claim Construction Brief, App. B at 25:3-6). The Court finds plaintiff's proposed construction correctly sets forth the meaning of the term.

Accordingly, the Court construes the term "in an amount from 0.075% to 0.375% by weight of said solid composition" as "the range defining the percentage of the combined weight of the organic material and the copolymer of linear polyacrylamide and sodium acrylate that is attributable to the sodium acrylate portion of the copolymer, specifically, from 0.075% to 0.375%."

I. "A Linear Polyacrylamide Polymer"

The term "a linear polyacrylamide polymer" is found in Claim 15, which claims a method for reducing soil erosion, wherein one step is "providing a linear polyacrylamide polymer." See '882 Patent, col. 8, lines 6-9.

Plaintiff argues the term is properly construed as "a polymer formed from acrylamide monomers that expressly omits cross-linked polyacrylamide and is further not operative to absorb water," (see Pl.'s Proposed Order at 3:1-3); defendant argues the term should be construed as "a copolymer of acrylamide and sodium acrylate, which are polymerized and form linear polyacrylamide," (see Def.'s Claim Construction Brief, App. B at 25:7-10).

As discussed above, a "copolymer" consists of two or more polymerizing substances, and the patent includes claims referencing a "copolymer" of two substances, specifically, linear polyacrylamide and sodium acrylate. See, e.g., '882 Patent, col. 5, lines 61-65. Claim 15, by contrast, refers only to a "polymer," and teaches that the claimed polymer consists of one substance, acrylamide. Indeed, the specification, in describing a preferred embodiment, refers to the "element," not elements, comprising the claimed "polymer," specifically, "polyacrylamide." See *id.*, col. 3, lines 35-36. Consequently, defendant's proposed construction, which refers to a "copolymer" of two substances, is contrary to the claim language.

Claim 15 states that acrylamide, when polymerized, forms a "linear polyacrylamide polymer." See *id.*, col. 6, line 9. As discussed above, both parties have submitted expert declarations indicating it is commonly understood in the art that a "linear polyacrylamide" is distinct from a "cross-linked polyacrylamide" and that the former is water soluble. (See Svec Decl. para. 6, 8; Wallace Decl. para. 16.) Consequently, in accordance with plaintiff's argument, the Court will adopt such limitations in its construction of the subject term.

Accordingly, the Court construes the term "a linear polyacrylamide polymer" as "a polymer formed from

acrylamide monomers that expressly omits cross-linked polyacrylamide and is further not operative to absorb water."

CONCLUSION

For the reasons expressed, U.S. Patent No. 6,562,882 is construed in the manner set forth above.

The parties shall appear at a Case Management Conference on October 1, 2004, at 10:30 a.m. A joint case management conference statement shall be filed no later than September 24, 2004.

IT IS SO ORDERED.

N.D.Cal., 2004.

Terra Novo, Inc. v. Golden Gate Products, Inc.

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