

United States District Court,
S.D. California.

NICHOLS INSTITUTE DIAGNOSTICS, INC,
Plaintiff.

v.

SCANTIBODIES CLINICAL LABORATORY, INC. and Scantibodies Laboratory,
Inc. Defendants.

CIV. No. 02CV0046-B(LAB)

March 10, 2003.

ORDER CONSTRUING PATENT CLAIMS AND TERMS FOR JURY TRIAL

RUDI M. BREWSTER, Senior District Judge.

This matter came on regularly for hearing on January 14-15, 2003 pursuant to *Markman v. Westview Instruments*, 52 F.3d 967 (Fed.Cir.1995). Plaintiff was represented by attorneys Douglas Olson, Vicki Norton and Julia Miller. Defendant was represented by attorneys David Doyle and Eric Acker.

The Court and parties conducted a *Markman* hearing in order to prepare jury instructions interpreting the pertinent claims of each of the four patents at issue. In addition, the Court and parties prepared a case glossary defining terms that were considered too technical for a jury of laymen to understand clearly without specific definition.

Defendants adamantly object to the Court's definition of the term "suitable carrier" on the ground that the Court's interpretation of those words is impermissibly based upon extrinsic expert witness evidence, as criticized by *Vitronics Corp. v. Conceptor, Inc.*, 90 F.3d 1576 (Fed.Cir.1996). The Court's interpretation is not based on any extrinsic expert witness evidence. The Court relies on the plain usage of the term in claim 17, column 26, lines 29-33, and in the specification at column 5, lines 19-23, and finds that it is not a unique term but rather a common concept in chemical science, known to persons of ordinary skill in the art. Its use in claim 17 is, to the Court, literally self-explanatory, and commonly consulted dictionaries confirm the apparent usage to which it is put in claim 17 of patent '790. Therefore, the Court rejects Defendants' urgings that the Court's interpretation violates the holding of *Vitronics*.

The resulting jury instructions for all claims at issue in the '790 patent are attached hereto as exhibit A. Attached here to as exhibit B is the aforementioned case glossary of pertinent technical terms.

IT IS SO ORDERED.

EXHIBIT A

Claim Chart for U.S. Patent No. 6,030,790

Claim #	Claim	Court's Interpretation [FN1]
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FN1. Claim language shown in bold has been further construed by the Court as set forth in brackets immediately following the claim language the first time it appears in each claim, and as set forth in the attached glossary.

1.	A kit for detecting active human parathyroid hormone (hPTH) comprising a container and a first group of antibodies or antibody fragments and a second group of antibodies or antibody fragments, wherein the first group selectively binds a peptide of hPTH selected from the group consisting of peptides having SEQ. ID. Nos. 1-6 and the second group selectively binds hPTH at an epitope contained within amino acids 24 to 37.	A kit for detecting active [<i>biologically active</i>] human parathyroid hormone (hPTH) comprising a container and a first group of antibodies [<i>proteins produced by blood plasma cells that bind specifically to a foreign substance</i>] or antibody fragments [<i>broken-off or detached pieces of an antibody</i>], and a second group of antibodies or antibody fragments , wherein the first group of antibodies selectively binds [<i>seeks out specifically and attaches to a specific arrangement of atoms or molecules on</i>] a peptide [<i>a molecule consisting from 2 to usually less than 100 amino acids bonded together in a particular sequence</i>] of hPTH selected from the group of peptides consisting of peptides having SEQ. ID. Nos. 1-6 and the second group selectively binds hPTH at an epitope [<i>a specific arrangement of amino acids located on a peptide or protein to which an antibody or antibody fragment binds</i>] on an hPTH peptide , contained within amino acids 24 to 37.
2.	The kit of claim 1, wherein the second group of antibodies or antibody fragments selectively binds a peptide of hPTH selected from the group consisting of peptides having SEQ. ID. Nos. 18-36.	The kit of claim 1, wherein the second group of antibodies [<i>proteins produced by blood plasma cells that bind specifically to a foreign substance</i>] or antibody fragments [<i>broken-off or detached pieces of an antibody</i>] selectively binds [<i>seeks out specifically and attaches to a specific arrangement of atoms or molecules on</i>] a peptide [<i>a molecule consisting of from 2 to usually less than 100 amino acids bonded together in a particular sequence</i>] of hPTH selected from the group of peptides consisting of peptides having SEQ. ID. Nos. 18-36.
3.	The kit of claim 1, wherein the first group of antibodies or antibody fragments selectively bind peptides of hPTH having SEQ. ID. No. 1.	The kit of claim 1, wherein the first group of antibodies [<i>proteins produced by blood plasma cells that bind specifically to a foreign substance</i>] or antibody fragments [<i>broken-off or detached pieces of an antibody</i>] selectively binds [<i>seeks out specifically and attaches to a specific arrangement of atoms or molecules on</i>] a peptide [<i>a molecule consisting of from 2 to usually less than 100 amino acids bonded together in a particular sequence</i>] of hPTH having SEQ. ID. No. 1.
4.	The kit of claim 1, wherein the first group of antibodies or antibody fragments selectively bind peptides of hPTH having SEQ. ID. No. 2.	The kit of claim 1, wherein the first group of antibodies [<i>proteins produced by blood plasma cells that bind specifically to a foreign substance</i>] or antibody fragments [<i>broken-off or detached pieces of an antibody</i>] selectively binds [<i>seeks out specifically and attaches to a specific arrangement of atoms or molecules on</i>]

		a peptide [<i>a molecule consisting of from 2 to usually less than 100 amino acids bonded together in a particular sequence</i>] of hPTH having SEQ. ID. No. 2.
5.	The kit of claim 1, wherein the first group of antibodies or antibody fragments selectively bind peptides of hPTH having SEQ. ID. No. 3.	The kit of claim 1, wherein the first group of antibodies [<i>proteins produced by blood plasma cells that bind specifically to a foreign substance</i>] or antibody fragments [<i>broken-off or detached pieces of an antibody</i>] selectively binds [<i>seeks out specifically and attaches to a specific arrangement of atoms or molecules on</i>] a peptide [<i>a molecule consisting of from 2 to usually less than 100 amino acids bonded together in a particular sequence</i>] of hPTH having SEQ. ID. No. 3.
6.	The kit of claim 1, wherein the first group of antibodies or antibody fragments selectively bind peptides of hPTH having SEQ. ID. No. 4.	The kit of claim 1, wherein the first group of antibodies [<i>proteins produced by blood plasma cells that bind specifically to a foreign substance</i>] or antibody fragments [<i>broken-off or detached pieces of an antibody</i>] selectively binds [<i>seeks out specifically and attaches to a specific arrangement of atoms or molecules on</i>] a peptide [<i>a molecule consisting of from 2 to usually less than 100 amino acids bonded together in a particular sequence</i>] of hPTH having SEQ. ID. No. 4.
7.	The kit of claim 1, wherein the first group of antibodies or antibody fragments selectively bind peptides of hPTH having SEQ. ID. No. 5.	The kit of claim 1, wherein the First group of antibodies [<i>proteins produced by blood plasma cells that bind specifically to a foreign substance</i>] or antibody fragments [<i>broken-off or detached pieces of an antibody</i>] selectively binds [<i>seeks out specifically and attaches to a specific arrangement of atoms or molecules on</i>] a peptide [<i>a molecule consisting of from 2 to usually less than 100 amino acids bonded together in a particular sequence</i>] of hPTH having SEQ. ID. No. 5.
8.	The kit of claim 1, wherein the first group of antibodies or antibody fragments selectively bind peptides of hPTH having SEQ. ID. No. 6.	The kit of claim 1, wherein the first group of antibodies [<i>proteins produced by blood plasma cells that bind specifically to a foreign substance</i>] or antibody fragments [<i>broken-off or detached pieces of an antibody</i>] selectively binds [<i>seeks out specifically and attaches to a specific arrangement of atoms or molecules on</i>] a peptide [<i>a molecule consisting of from 2 to usually less than 100 amino acids bonded together in a particular sequence</i>] of hPTH having SEQ. ID. No. 6.
9.	An immunological method of detecting active human parathyroid hormone (hPTH) in a sample comprising:	An immunological method of detecting active [<i>biologically active</i>] human parathyroid hormone (hPTH) in a sample of fluid comprising:
	contacting the sample with a first antibody or antibody fragment which selectively binds a peptide of hPTH selected from the group consisting of peptides having SEQ. ID. Nos. 1-6, wherein the first antibody or antibody fragment binds hPTH in the	contacting the sample of fluid with a first antibody [a <i>protein produced by blood plasma cells that binds specifically to a foreign substance</i>] or antibody fragment [<i>broken-off or detached piece of an antibody</i>] which selectively binds [<i>seeks out specifically and attaches to a specific arrangement of atoms or molecules on</i>] a peptide [<i>a molecule consisting of from 2 to usually less than 100 amino acids bonded together in a particular sequence</i>] of hPTH selected from the group consisting of peptides having SEQ.

	sample;	ID. Nos. 1-6, wherein the first antibody or antibody fragment binds hPTH in the sample;
	contacting the sample with a second antibody or antibody fragment which selectively binds hPTH at an epitope contained within amino acids 24-37; wherein the second antibody or antibody fragment binds to hPTH bound by the first antibody or antibody fragment; and detecting the binding of the first and second antibodies or antibody fragments wherein the binding of the first and second antibodies or antibody fragments indicates the presence of active hPTH in the sample.	contacting the sample of fluid with a second antibody or antibody fragment which selectively binds hPTH at an epitope [<i>a specific arrangement of amino acids located on a peptide or protein to which an antibody or antibody fragment binds</i>] on the hPTH peptide contained within amino acids 24 to 37; wherein the second antibody or antibody fragment binds to hPTH bound by the first antibody or antibody fragment ; and detecting the binding of the first and second antibodies or antibody fragments wherein the binding of the first and second antibodies or antibody fragments indicates the presence of active hPTH in the sample.
10.	The method of claim 9, wherein the second antibody or antibody fragment selectively binds a peptide of hPTH selected from the group consisting of peptides having SEQ. ID. Nos. 18-36.	The method of claim 9, wherein the second antibody [a <i>protein produced by blood plasma cells that binds specifically to a foreign substance</i>] or antibody fragment [<i>broken-off or detached piece of an antibody</i>] selectively binds [<i>seeks out specifically and attaches to a specific arrangement of atoms or molecules on</i>] a peptide [<i>a molecule consisting of from 2 to usually less than 100 amino acids bonded together in a particular sequence</i>] of hPTH selected from the group of peptides consisting of peptides having SEQ. ID. Nos. 18-36.
11.	The method of claim 9, wherein the first antibody or antibody fragment selectively binds peptides of hPTH having SEQ. ID. No. 1.	The method of claim 9, wherein the first antibody [<i>a protein produced by blood plasma cells that binds specifically to a foreign substance</i>] or antibody fragment [<i>broken-off or detached piece of an antibody</i>] selectively binds [<i>seeks out specifically and attaches to a specific arrangement of atoms or molecules on</i>] peptides [<i>molecules consisting of from 2 to usually less than 100 amino acids bonded together in a particular sequence</i>] of hPTH having SEQ. ID. No. 1.
12.	The method of claim 9, wherein the first antibody or antibody fragment selectively binds peptides of hPTH having SEQ. ID. No. 2.	The method of claim 9, wherein the first antibody [a <i>protein produced by blood plasma cells that binds specifically to a foreign substance</i>] or antibody fragment [<i>broken-off or detached piece of an antibody</i>] selectively binds [<i>seeks out specifically and attaches to a specific arrangement of atoms or molecules on</i>] peptides [<i>molecules consisting of from 2 to usually less than 100 amino acids bonded together in a particular sequence</i>] of hPTH having SEQ. ID. No. 2.
13.	The method of claim 9, wherein the first antibody or antibody fragment selectively binds peptides of hPTH having SEQ. ID. No. 3.	The method of claim 9, wherein the first antibody [a <i>protein produced by blood plasma cells that binds specifically to a foreign substance</i>] or antibody fragment [<i>broken-off or detached piece of an antibody</i>] selectively binds [<i>seeks out specifically and attaches to a specific arrangement of atoms or molecules on</i>]

		peptides [<i>molecules consisting of from 2 to usually less than 100 amino acids bonded together in a particular sequence</i>] of hPTH having SEQ. ID. No. 3.
14.	The method of claim 9 , wherein the first antibody or antibody fragment selectively binds peptides of hPTH having SEQ. ID. No. 4.	The method of claim 9 , wherein the first antibody [<i>a protein produced by blood plasma cells that binds specifically to a foreign substance</i>] or antibody fragment [<i>broken-off or detached piece of an antibody</i>] selectively binds [<i>seeks out specifically and attaches to a specific arrangement of atoms or molecules on</i>] peptides [<i>molecules consisting of from 2 to usually less than 100 amino acids bonded together in a particular sequence</i>] of hPTH having SEQ. ID. No. 4.
15.	The method of claim 9 , wherein the first antibody or antibody fragment selectively binds peptides of hPTH having SEQ. ID. No. 5.	The method of claim 9 , wherein the first antibody [<i>a protein produced by blood plasma cells that binds specifically to a foreign substance</i>] or antibody fragment [<i>broken-off or detached piece of an antibody</i>] selectively binds [<i>seeks out specifically and attaches to a specific arrangement of atoms or molecules on</i>] peptides [<i>molecules consisting of from 2 to usually less than 100 amino acids bonded together in a particular sequence</i>] of hPTH having SEQ. ID. No. 5.
16.	The method of claim 9 , wherein the first antibody or antibody fragment selectively binds peptides of hPTH having SEQ. ID. No. 6.	The method of claim 9 , wherein the first antibody [<i>a protein produced by blood plasma cells that binds specifically to a foreign substance</i>] or antibody fragment [<i>broken-off or detached piece of an antibody</i>] selectively binds [<i>seeks out specifically and attaches to a specific arrangement of atoms or molecules on</i>] peptides [<i>molecules consisting of from 2 to usually less than 100 amino acids bonded together in a particular sequence</i>] of hPTH having SEQ. ID. No. 6.
17.	A composition comprising an antibody or antibody fragment and a suitable carrier, wherein the antibody or antibody fragment selectively binds a peptide of human parathyroid hormone (hPTH) selected from the group consisting of peptides having SEQ. ID. Nos. 1-6.	A combination of material formed from two or more substances comprising an antibody [<i>a protein produced by blood plasma cells that binds specifically to a foreign substance</i>] or antibody fragment [<i>broken-off or detached piece of an antibody</i>] and a suitable carrier [<i>any substance that serves to facilitate the ability of an antibody to seize an antigen. Since antibodies and antigens vary greatly, a suitable carrier would be one or more substances which maximize the immunoassay process for the particular antibodies and antigens sought. A suitable carrier may be liquid or solid</i>], wherein the antibody or antibody fragment selectively binds a peptide [<i>a molecule consisting of from 2 to usually less than 100 amino acids bonded together in a particular sequence</i>] of human parathyroid hormone (hPTH) selected from the group of peptides consisting of peptides having SEQ. ID. Nos. 1-6.
18.	The composition of claim 17 , wherein the composition further comprises a second antibody or antibody fragment, wherein the second antibody or antibody	The composition of claim 17 , wherein the composition further comprises a second antibody [<i>a protein produced by blood plasma cells that binds specifically to a foreign substance</i>] or antibody fragment [<i>broken-off or detached piece of an antibody</i>], wherein the second antibody or antibody fragment selectively binds [

	fragment selectively binds hPTH at an epitope contained within amino acids 24-37.	<i>seeks out specifically and attaches to a specific arrangement of atoms or molecules on] hPTH at an epitope [a specific arrangement of amino acids located on a peptide or protein to which an antibody or antibody fragment binds] contained within amino acids 24-37.</i>
19.	The composition of claim 17, wherein the second antibody or antibody fragment selectively binds a peptide of hPTH selected from the group consisting of peptides having SEQ. ID. Nos. 18-36.	The composition of claim 18, wherein the second antibody [<i>a protein produced by blood plasma cells that binds specifically to a foreign substance</i>] or antibody fragment [<i>broken-off or detached piece of an antibody</i>] selectively binds [<i>seeks out specifically and attaches to a specific arrangement of atoms or molecules on</i>] a peptide [<i>a molecule consisting of from 2 to usually less than 100 amino acids bonded together in a particular sequence</i>] of hPTH selected from the group of peptides consisting of peptides having SEQ. ID. Nos. 18-36.
20.	The composition of claim 17, wherein the antibody or antibody fragment selectively binds peptides of hPTH having SEQ. ID. No. 1.	The composition of claim 17, wherein the antibody [<i>a protein produced by blood plasma cells that binds specifically to a foreign substance</i>] or antibody fragment [<i>broken-off or detached piece of an antibody</i>] selectively binds [<i>seeks out specifically and attaches to a specific arrangement of atoms or molecules on</i>] peptides [<i>molecules consisting of from 2 to usually less than 100 amino acids bonded together in a particular sequence</i>] of hPTH having SEQ. ID. No. 1.
21.	The composition of claim 17, wherein the antibody or antibody fragment selectively binds peptides of hPTH having SEQ. ID. No. 2.	The composition of claim 17, wherein the antibody [<i>a protein produced by blood plasma cells that binds specifically to a foreign substance</i>] or antibody fragment [<i>broken-off or detached piece of an antibody</i>] selectively binds [<i>seeks out specifically and attaches to a specific arrangement of atoms or molecules on</i>] peptides [<i>molecules consisting of from 2 to usually less than 100 amino acids bonded together in a particular sequence</i>] of hPTH having SEQ. ID. No. 2.
22.	The composition of claim 17, wherein the antibody or antibody fragment selectively binds peptides of hPTH having SEQ. ID. No. 3.	The composition of claim 17, wherein the antibody [<i>a protein produced by blood plasma cells that binds specifically to a foreign substance</i>] or antibody fragment [<i>broken-off or detached piece of an antibody</i>] selectively binds [<i>seeks out specifically and attaches to a specific arrangement of atoms or molecules on</i>] peptides [<i>molecules consisting of from 2 to usually less than 100 amino acids bonded together in a particular sequence</i>] of hPTH having SEQ. ID. No. 3.
23.	The composition of claim 17, wherein the antibody or antibody fragment selectively binds peptides of hPTH having SEQ. ID. No. 4.	The composition of claim 17, wherein the antibody [<i>a protein produced by blood plasma cells that binds specifically to a foreign substance</i>] or antibody fragment [<i>broken-off or detached piece of an antibody</i>] selectively binds [<i>seeks out specifically and attaches to a specific arrangement of atoms or molecules on</i>] peptides [<i>molecules consisting of from 2 to usually less than 100 amino acids bonded together in a particular sequence</i>] of hPTH having SEQ. ID. No. 4.
24.	The composition of claim 17,	The composition of claim 17, wherein the antibody [<i>a protein</i>

wherein the antibody or antibody fragment selectively binds peptides of hPTH having SEQ. ID. No. 5.

produced by blood plasma cells that binds specifically to a foreign substance] or antibody fragment [broken-off or detached piece of an antibody] selectively binds [seeks out specifically and attaches to a specific arrangement of atoms or molecules on] peptides [molecules consisting of from 2 to usually less than 100 amino acids bonded together in a particular sequence] of hPTH having SEQ. ID. No. 5

25. The composition of claim 17, wherein the antibody or antibody fragment selectively binds peptides of hPTH having SEQ. ID. No. 6.

The composition of claim 17, wherein the **antibody** [a *protein produced by blood plasma cells that binds specifically to a foreign substance] or antibody fragment [broken-off or detached piece of an antibody] selectively binds [seeks out specifically and attaches to a specific arrangement of atoms or molecules on] peptides [molecules consisting of from 2 to usually less than 100 amino acids bonded together in a particular sequence] of hPTH having SEQ. ID. No. 6.*

EXHIBIT B

Glossary for U.S. Patent No. 6,030,790

Claim Term	Claims	Definition
antibody	1, 9, 17 and dependent claims	An antibody is a protein produced by blood plasma cells that binds specifically to a foreign substance. Tr. 53:3-4.
antibody fragment	1, 9, 17 and dependent claims	Broken-off or detached piece of an antibody. Tr. 55:13-14
active	1, 9 and dependent claims	Biologically active.
binds	1, 9, 17 and dependent claims	Attaches to a specific arrangement of atoms or molecules. 57:4-5
epitope	1, 9, and dependent claims	A specific arrangement of amino acids located on a peptide or protein to which an antibody or antibody fragment binds. 65:12-14
selectively binds	1, 9, 17 and dependent claims	To seek out specifically and attach to a specific arrangement of atoms or molecules. 69:9-11; <i>see</i> 57:4-5.
suitable carrier	17	Any substance that serves to facilitate the ability of an antibody to seize an antigen. Since antibodies and antigens vary greatly, a suitable carrier would be one or more substances which maximize the immunoassay process for the particular antibodies and antigens sought. A suitable carrier may be liquid or solid.
peptide	1, 9, 17 and dependent claims	A molecule consisting of from 2 to usually less than 100 amino acids bonded together in particular sequence

protein 1, 9, 17 A molecule consisting of a string of amino acids, having secondary and tertiary
and structure, and usually having more amino acids than a peptide.
dependent
claims

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