

United States District Court,
N.D. Ohio, Eastern Division.

NESTLE USA, INC., et al,
Plaintiffs.

v.

SARA LEE BAKERY GROUP,
Defendant.

May 9, 2003.

David M. Maiorana, Kenneth R. Adamo, Robert L. Canala, Susan M. Gerber, Jones Day, Cleveland, OH,
for Plaintiffs.

David P. Utykanski, Dean W. Amburn, Robert J. Lenihan, II, Harness, Dickey & Pierce, Troy, MI, George
W. Rooney, Jr., Roetzel & Andress, Cleveland, OH, for Defendant.

***MEMORANDUM OF OPINION AND ORDER CONSTRUING UNITED STATES PATENT #
6,280,783, # 6,284,295, AND # 6,312,743***

LESLEY WELLS, District Judge.

On 9 May 2002, Plaintiffs Nestle USA, Inc. and NESTEC S.A. (collectively "Nestle") filed their Second Amended Complaint against Defendant Sara Lee Bakery Group ("Sara Lee"). (Docket # 25). The Second Amended Complaint alleges that NESTEC is the owner, by assignment, of all right, title, and interest in three patents: United States Patent Nos. 6,280,783 ("the '783 patent"), 6,284,295 ("the '295 patent"), and 6,312,743 ("the '743 patent"). According to the Second Amended Complaint, all three patents were licensed to Nestle USA, Inc. (then Nestle Food Company), effective 1 January 1992. Allegedly, the license agreement was renewed in 1997, 2000, and 2002. Nestle claims that Sara Lee is willfully and wantonly infringing the three patents, without authority or license, by making, using, offering to sell, selling, and manufacturing infringing goods. Sara Lee denies infringing the patents and contends that the patents are invalid and unenforceable.

The parties filed initial claim construction briefs on 20 December 2002 and response briefs on 13 January 2003. (Docket # 56, 57, 61, 62). A *Markman* hearing regarding claim construction was held on 8 April 2003. At the hearing, Nestle and Sara Lee presented oral argument but no testimony from witnesses.

I. Background and Claims

The three related patents at issue relate to break-and-bake cookie dough. The '295 patent provides a brief overview of existing cookie dough and of the inventions:

Ready made cookie dough already exist on the market. Typically, the dough is packaged either in a

cylindrical shape or packaged in a cup. During use, the consumer uses a spoon or a knife to form the cookie into a circular shape prior to baking. This particular cookie dough preparation requires extensive manipulation of the cookie dough prior to use. If the cookie dough is packaged in the form of a block, then a forming device is needed in order to give the cookie the desired circular form. This cookie dough manipulation, however, leaves remnants of cookie dough pieces which must then be recycled and reshaped if desired

The present invention is direct[ed] to a consumer ready-for-baking cookie dough which requires only a minimum amount of manipulation during use and which does not leave any dough pieces to be reshaped or recycled.

('295 patent at col. 1, ln 19-36).

Between the three patents, 38 claims FN1 are at issue, four of which are independent claims.FN2 Claim 1 of the ' 295 patent is representative of the independent claims:

FN1. A patent's "claims" are the words in the patent that define the limits of the patented invention and, therefore, the extent of the patent-holder's right to exclude others from making, using, and selling the invention.

FN2. The independent claims are Claim 1 of the '783 patent, Claim 1 of the '295 patent, and Claims 1 and 21 of the '743 patent.

A ready-for-use refrigerated cookie dough which is prepared from flour, sugar, baking powder and fat, wherein the baking powder is present in an amount of between 0.1 % and 1.5% by weight and the dough is provided in a form of a sheet or block having a thickness and a surface which includes thereon grooves, score lines, or a combination thereof to define pieces of the dough to be broken off and baked into cookies, wherein the grooves, score lines or combination thereof having a width of between about 0.5% to about 50% of the thickness of the dough sheet or block and a depth of about 3% to 95% of the thickness of the dough sheet or block.

('295 patent at col. 5, ln. 53-64). A few of the terms in dispute appear only in dependent claims, which will be referenced by the Court during its analysis.

II. Law Regarding Claim Construction

Courts have the "power and obligation to construe as a matter of law the meaning of language used in patent claims." *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed.Cir.1995). In construing a patent claim, a court must look first to the language of the claim itself, *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed.Cir.1996), because its words are "of paramount importance," *Electro Medical Sys. v. Cooper Life Sciences, Inc.*, 34 F.3d 1048, 1054 (Fed.Cir.1994). However, the claim cannot be considered in isolation. *See Bell Communications Research, Inc. v. Vitalink Communications Corp.*, 55 F.3d 615, 620 (Fed.Cir.1995). "It is equally fundamental that claims are to be construed in the light of the specifications and both are to be read with a view to ascertaining the invention." *Bell Communications*, 55 F.3d at 620 (internal quotes and citations omitted); *see also Markman*, 52 F.3d at 979.

The specification acts as a dictionary when it expressly defines terms used in the claims or when it defines

terms by implication. As we have repeatedly stated, "[c]laims must be read in view of the specification, of which they are a part." The specification contains a written description of the invention which must be clear and complete enough to enable those of ordinary skill in the art to make and use it. Thus, the specification is always highly relevant to the claim construction analysis. Usually, it is dispositive; it is the single best guide to the meaning of a disputed term.

Vitronics, 90 F.3d at 1582 (internal citations omitted). The court also may consider the prosecution history,^{FN3} including any express representations the patentee might have made regarding the scope of the claims and any changes to the claim the patentee might have made to distinguish her or his claim from the prior art. *Id.* "The prosecution history limits the interpretation of claim terms so as to exclude any interpretation that was disclaimed during prosecution." *Southwall Technologies, Inc. v. Cardinal IG Co.*, 54 F.3d 1570, 1576 (Fed.Cir.1995). Together, these three forms of intrinsic evidence comprise "the most significant source of the legally operative meaning of disputed claim language." *Id.*

^{FN3}. The prosecution history is the complete record of the proceedings before the Patent and Trademark Office.

When intrinsic evidence does not resolve an ambiguity, a court may consider extrinsic evidence- *i.e.*, all evidence external to the patent and to its prosecution history, including expert testimony, dictionaries, and treatises. *See Vitronics*, 90 F.3d at 1583. For instance, a "trial court, when construing a term of art, must define the term in a manner consistent with the scientific and technical context in which it is used in the patent." *AFG Industries, Inc. v. Cardinal IG Company, Inc.* 239 F.3d 1239, 1248 (Fed.Cir.2001). In doing so, "it is entirely appropriate, perhaps even preferable, for a court to consult trustworthy extrinsic evidence to ensure 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." *Id.* at 1249 (quoting *Pitney Bowes, Inc. v. Hewlett-Packard Co.*, 182 F.3d 1298, 1309 (Fed.Cir.1999)).

Throughout the process of claim construction, the court must take care not to focus on "the subjective intent of the parties to the patent contract when they used a particular term. Rather, the focus is on the objective test of what one of ordinary skill in the art at the time of the invention would have understood the term to mean." *Markman*, 52 F.3d at 986. Thus, there is a "heavy presumption" that claim terms have the ordinary meaning that would be attributed to those words by persons skilled in the relevant art. *Texas Digital Systems, Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1202 (Fed.Cir.2002).

"Dictionaries are always available to the court to aid in the task of determining meanings that would have been attributed by those of skill in the relevant art to any disputed terms used by the inventor in the claims." *Id.* However, "[b]ecause words often have multiple dictionary definitions, some having no relation to the claimed invention, the intrinsic record must always be consulted to identify which of the different possible dictionary meanings of the claim terms in issue is most consistent with the use of the words by the inventor." *Id.* at 1203. "[T]he presumption in favor of a dictionary definition will be overcome where the patentee, acting as his or her own lexicographer, has clearly set forth an explicit definition of the term different from its ordinary meaning." *Id.* at 1204.

There are additional relevant canons of claim construction. A term recited in multiple claims of one patent must be ascribed the same meaning in each claim. *Southwall Technologies*, 54 F.3d at 1579. Similarly, a term used in multiple, related patents should be construed in the same way unless there is evidence that a

different meaning was intended for a particular patent. *Jonsson v. Stanley Works*, 903 F.2d 812, 818 (Fed.Cir.1990). Also, a claim should not be construed in a manner that renders the claim language meaningless or superfluous. *Texas Instruments, Inc. v. United States ITC*, 988 F.2d 1165, 1171 (Fed.Cir.1993).

III. Claim Construction

The parties dispute the meanings of fourteen terms in the patents:

(1) "ready-for-use"; (2) "refrigerated"; (3) "imprint"; (4) "groove(s)"; (5) "score line(s)"; (6) "combination thereof" (of grooves and score lines); (7) "between about 0.5% to about 50%"; (8) "from about 0.5% to about 50%"; (9) "between about 3% to about 50%"; (10) "about 3% to about 95%"; (11) "about 3% to 95%"; (12) "baking powder"; (13) "texturing agent"; (14) "flavoring agent."

The parties agree on the meaning of the following terms: (1) "sweet dough"; (1) "leavening agent"; (3) "substantially equal"; (4) "the grooves and score lines intersect to define dough pieces there between"; (5) "parallel pi pedal"; (6) "cylindrical"; (7) "prismatic"; (8) "V-shaped"; (9) "U-shaped"; (10) "rounded"; (11) "rectangular"; (12) equilateral triangle"; (13) "circular"; (14) "polygon"; and (15) "polygonal."

After examining the terms as to which the parties have agreed constructions, the Court will construe the disputed terms.

A. Agreed Terms

The parties' fifteen agreed constructions are reasonable. The Court will construe each such term in turn.

1. "sweet dough"

The parties agree that "sweet dough" means "a dough that contains at least 0.5% by weight of sugar or an artificial sweetener such as saccharine or Nutrasweet." This agreed definition is explicitly set forth in the specification of the '783 patent. ('783 patent at col. 3, ln. 4-6). Therefore, the Court construes the term "sweet dough" as the parties have.

2. "leavening agent"

The parties' agreed definition of the term "leavening agent" is "an additive or additive system used to produce or stimulate production of a gas for the purpose of causing a dough to aerate and/or expand." As this construction comports with the dictionary definition and the language of the specification, it is accepted by the Court.

3. "substantially equal"

The term "substantially equal" is used in Claim 3 of the '743 patent. Claim 3 reads, "The cookie dough of claim 2 wherein the grooves or score lines define portions of the block that are of substantially equal size." ('743 patent at col. 6, ln. 65-67). The parties define the term as "approximately the same physical dimensions." This is a reasonable construction in light of the claim language and the dictionary definitions of the two words.

4. "the grooves and score lines intersect to define dough pieces there between"

This term appears in Claim 20 of the '743 patent. The parties agree that the term means "adjacent grooves or score lines form the physical boundaries of individual dough pieces that may ultimately be broken off from the dough block." This construction is in accordance with the ordinary and accustomed meaning of the term language and is appropriate.

5. Remaining agreed terms

The parties agree that the following terms should be given their ordinary and accustomed meanings: "parallel pi pedal," "cylindrical," "prismatic," "V-shaped," "U-shaped," "rounded," "rectangular," "equilateral triangle," "circular," "polygon," and "polygonal." Because there is nothing in the language of the claims or specifications or in the prosecution history to rebut the presumption that these terms should be given their ordinary and accustomed meanings, the agreement of the parties as to the meanings of these terms is accepted.

B. Disputed terms

The Court will examine and construe each of the 14 disputed claim terms in turn.

1. "ready-for-use"

The term "ready-for-use" appears in Claim 1 of each patent and Claim 21 of the '743 patent. Nestle proposes the following construction: "can be used without significant manipulation by the user, including thawing." Sara Lee argues that the term means "pre-prepared and ready for baking."

This term is a difficult one to construe. Its meaning is not plain from the claim language. The term is not explicitly defined in any of the specifications. The prosecution history sheds no light on the meaning. As there is no dictionary definition of the term or expert testimony as to its meaning, the ordinary and accustomed meaning of the term is unclear.

Thus, the Court must rely on the language of the specifications to discern the meaning of the term "ready-for-use." The '783 specification states, "The present invention relates to a consumer-friendly, ready-to-bake sweet dough which requires only a minimum amount of manipulation during use and which advantageously minimizes or eliminates dough pieces that need to be reshaped or recycled." ('783 patent at col. 1, ln. 64 to col. 2, ln. 1). The specification also notes, "The present invention relates to a new form of pre-mixed or pre-prepared bakery dough products which is ready for baking." ('783 patent at col. 2, ln. 66 to col. 3, ln. 1). The '743 specification includes similar language: "The present invention now provides the consumer with a ready-forbaking cookie dough which does not require any manipulation during use and which does not leave any dough pieces to be recycled or worked." ('743 patent at col. 1, ln. 25-28). The specification continues, "There is thus no waste due to forming and no manipulation, other than cutting or breaking, on the part of the consumer." ('743 patent at col. 2, ln. 20-22). The relevant language of the '295 specification is comparable: "The present invention is direct[ed] to a consumer ready-for-baking cookie dough which requires only a minimum amount of manipulation during use and which does not leave any dough pieces to be reshaped or recycled." ('295 patent at col. 1, ln. 33-36).

Although Nestle's proposed construction finds some support in the many specification references to minimal or no manipulation, Sara Lee's proposal more closely fits the specification language. Each specification

includes the words "manipulation during use." Based on this phrasing, it is clear that whatever manipulation is necessary (cutting or breaking) is part of the use of the inventions and occurs during use. Thus, "ready-for-use" must refer to being ready for whatever manipulation is required (cutting or breaking) followed by baking. A cookie dough is ready for this process once it has been mixed or prepared by the producer. Based on the specification language, then, the Court construes the term "ready-for-use" to mean "pre-mixed or pre-prepared, and ready for baking." This construction parallels the language of the '783 specification.

2. "refrigerated"

The term "refrigerated" also appears in all four independent claims. Nestle argues that the term means "to make or keep cold or cool at a temperature below room temperature, but not to the point of freezing." To support its proposed construction, Nestle points to a Webster's Dictionary definition, specification language, and the prosecution history. On the other hand, Sara Lee contends that "refrigerated" means "dough from which heat has been removed so as to inhibit or prevent microbial growth in the dough." Sara Lee relies on an online baking dictionary, specification language, and prosecution history.

Each proposed definition includes a cooling/heat removal component. However, while Nestle adds a "no freezing" element to its definition, Sara Lee offers a preservation component. An examination of specification language, prosecution history, and dictionaries demonstrates that both of these additional components are justified.

There is ample support for the proposition that the patents at issue distinguish between refrigeration and freezing. The '295 patent twice notes that the invention "can be preserved in the refrigerator or freezer." ('295 patent at col. 1 at ln. 14 and ln. 38-39). The specification also states, "the dough can be stored either in a refrigerator or a freezer. The shelf life of the dough in a refrigerator is typically of several months and of several months in a typical freezer." ('295 patent at col. 4, ln. 62-65). The '783 patent draws a distinction between refrigeration and freezing five times. ('783 patent at col. 1, ln. 31 ("refrigerator or freezer"), col. 2, ln. 6 ("refrigerator or freezer"), col. 3, ln. 7-8 ("refrigerated or frozen conditions"), col. 3, ln. 43 ("refrigerated or frozen, thawed dough") and col. 10, ln. 30 ("a refrigerator or a freezer")). The consistent use of the word "or" between the words "refrigerator/refrigerated" and "freezer/frozen" indicates that these terms have different meanings.

This distinction is reinforced by the prosecution history of the '783 patent. On 26 February 2001, the inventors specifically amended the title of the invention from "Ready to bake refrigerated or frozen sweet dough" to "Ready to bake refrigerated sweet dough." (Docket # 56 at 310). Claim 1 also was amended to reflect this change. (Docket # 56 at 310). The amendment noted, "The title was amended to more properly describe the invention." (Docket # 56 at 311). It also stated, "Applicants note that Riddle discloses a frozen dough and, thus, is clearly different from the refrigerated dough recited in claim 1, as amended." (Docket # 56 at 312). Finally, the amendment distinguished between refrigerated cookie dough and frozen pizza. (Docket # 56 at 313).

Based on the above specification language and prosecution history, it is clear that the following dictionary definition of "refrigerated" is accurate to the extent it excludes frozen as a component of "refrigerated": "to make or keep cold or cool." *Webster's Ninth New Collegiate Dictionary* at 990.

However, Sara Lee is correct that the term "refrigerated," as used in the patents, includes a preservation component. The above citations to the '295 specification each show that the cookie dough is placed in a

refrigerator to be preserved. ('295 patent at col. 1, ln. 14 and ln. 38, and col. 4, ln. 63-65). Similarly, the '783 patent notes the preservation purpose on three occasions ('783 patent at col. 1, ln. 31, col. 2, ln. 4-5, and col. 10, ln. 25-32), and the '743 patent points to the preservation purpose four times ('743 patent at col. 1, ln. 12 and ln. 30, col. 2, ln. 45-49, and col. 3, ln. 49-54). The '743 specification even states, "The resultant dough should have a good resistance during preservation in the refrigerator." ('743 patent at col. 2, ln. 45-49). Thus, the online baking dictionary definition's inclusion of a preservation component is consistent with the specification language of all three patents.

(<http://www.bakingbusiness.com/bakerdictionary>).

Based on the above analysis, the Court construes the term "refrigerated" to mean: "to make or keep cold or cool at a temperature below room temperature, but not to the point of freezing, for the purpose of preservation." Sara Lee's argument that the "point of freezing" is too vague is unpersuasive. The Patent and Trademark Office did not object to the use of this term or the term "frozen" during the prosecution of the patents. Many words and phrases contain some element of ambiguity. The "point of freezing" is sufficiently specific to be useful.

3. "imprint"

The term "imprint" is used in Claim 1 of the '783 patent in the following manner: "... a surface which includes an imprint of grooves, score lines, or combinations thereof, which imprint defines pieces of the dough to be broken off and baked ..." ('783 patent at col. 12, ln. 30-32). Nestle argues that the term means "an indelible or permanent mark comprised of grooves, score lines, or combinations thereof." Sara Lee contends that the term means "a mark or depression that is made by pressure." Essentially, the dispute is whether or not the term "imprint" limits how a mark is made. Nestle's view is that there is no such limit, while Sara Lee believes that the mark must be made by pressure and not by other methods, such as cutting.

The parties agree that the term "imprint" is used in Claim 1 as a noun and that the *Webster's Ninth New Collegiate Dictionary* is a proper source to consult. The dictionary defines "imprint" as "a mark or depression made by pressure." FN4 Id. at 606. There is a presumption that this is the ordinary and accustomed meaning of the term intended by the inventors.

FN4. The two alternate definitions clearly do not apply. One involves identifying names, the other an influence.

This presumption is reinforced by the specification language and prosecution history. The '783 specification distinguishes between an imprint and a precut by separating the terms with an "or." ('783 patent at col. 3, ln. 40-51). The specification also explains that either marker rolls, which apply pressure, or knives, which cut, can be used to make grooves and score lines. ('783 patent at col. 5, ln. 50-59). Nestle cites this portion of the specification to support its argument that an imprint can be made in a variety of ways. However, the passage merely reiterates the distinction between an imprint and a precut. The '743 patent and '295 patent also distinguish between an imprint and a precut. ('743 patent at col. 3, ln. 56-61 ("The choice therefore exists either to make only imprints or to make a complete notch or cut."), '295 patent at col. 2, ln. 4-16 ("a block of dough has either an imprint or a precut, to facilitate breaking the dough into small blocks.")). Similarly, prior patent applications filed by Nestle, which are part of the prosecution history of the '783 patent, draw a distinction between the two terms. (Docket # 57 at Ex. 8, 1-2; Docket # 62 at Ex. 13, 7).

Put simply, the specification language and prosecution history show that the inventors saw an "imprint" as something different than a "cut." This comports with the ordinary and accustomed meaning of the term "imprint" to one of ordinary skill in the art as a "mark or depression that is made by pressure" rather than by cutting. The '783 patent does not clearly and explicitly provide an alternative definition of the term. Accordingly, the Court adopts Sara Lee's proposed construction of the term, a "mark or depression that is made by pressure".

4. "groove(s)", "score line(s)", and "combination thereof"

The next three disputed terms will be considered together. The terms "grooves" and "score lines" appear in each of the four independent claims. The term "combination(s) thereof" (of grooves and score lines) appears only in Claim 1 of the '783 patent and '295 patent.

Nestle would construe the term "groove" to mean "a cut or penetration into a sheet or block of dough that does not extend all the way through the sheet or block." It defines "score line" as "a cut or penetration into a sheet or block of dough that does not extend all the way through the sheet or block, which may or may not be narrower than a groove." According to Nestle, a "combination thereof" is "a cut or penetration into a sheet or block of dough formed by combining a groove and a score line, or by using grooves and score lines separately in the same sheet or block of dough, that does not extend all the way through the sheet or block."

Sara Lee's proposed construction of the term "groove" is "long narrow channel in a surface that does not extend through the entire thickness of the dough." It offers the following definition of "score line": "shallow cut, scratch, indentation, or impression that is made into the surface of dough, which does not extend through the entire thickness of the dough." Sara Lee argues that a "combination thereof" is a "combination of a groove superimposed on a score line at the same location on the block of dough, which does not extend throughout the entire thickness of the dough."

Essentially, Nestle relies more on broad, non-limiting specification language, while Sara Lee focuses on the dictionary definitions of the terms. There is a substantial amount of agreement, however, as to the meaning of these terms. Both parties note specification language indicating that "grooves, score lines, or combinations thereof" serve to facilitate the breaking or cutting of the dough into smaller pieces that then are baked into individual cookies. ('743 patent at col. 2, ln. 13-20 and col. 3, ln. 16-27). They also recognize that "grooves, score lines, or combinations thereof" do not extend all the way through the sheet or block of dough. ('295 patent at col. 4, ln. 29-30; '783 patent at col. 6, ln. 36-38). Nestle and Sara Lee even agree that "score lines" are usually thinner than "grooves," but disagree as to whether they must always be thinner. ('783 patent at col. 6, ln. 6-15, 33-35).

The specifications reveal other details about "grooves, score lines, or combinations thereof." "Grooves" and "score lines" may be intersecting or non-intersecting, and may run the length or width of the block or sheet of dough. ('783 patent at col. 2, ln. 22-26 and col. 5, ln. 55-57). "Grooves" can be V-shaped, U-shaped, rounded, rectangular, or shaped in other ways. ('743 patent at col. 3, ln. 34-35). "Grooves, score lines, or combinations thereof" can have various depths and widths. ('783 patent at col. 6, ln. 3-36).

Two questions arise. First, are the drawings of "grooves, score lines, or combinations thereof" in the patents illustrative or definitive? Because the "grooves, score lines, or combinations thereof" in the drawings have very specific shapes, widths, and depths, they clearly are illustrative examples. As discussed above, the

specifications demonstrate that "grooves, score lines, or combinations thereof" may take different shapes and have various depths and widths.

Second, must "score lines" always be narrower than "grooves"? Nestle argues that they "may or may not be." However, under Nestle's proposed constructions, "grooves" and "score lines" may or may not be different terms at all. This does not comport with the language of the claims. The claims and specifications consistently refer to "grooves or score lines." If "score lines" were merely a subset of "grooves," then the inventors would simply have used the term "grooves." Moreover, the term "combinations thereof" is meaningless if "grooves" and "score lines" are the same. In short, Nestle's constructions render claim language redundant and meaningless.

Because "grooves" and "score lines" are different, the issue becomes how they are different. As noted above, there is specification language indicating that "score lines" usually are thinner than "grooves." Also, in a preliminary amendment to the '295 patent application, the applicant stated that "score lines are much thinner than the grooves." (Docket # 56 at 76-77). Thus, the difference between "grooves" and "score lines" is that "score lines" are narrower than "grooves." This distinction is consistent with the dictionary definitions offered by the parties.

The final issue is the meaning of the term "combination thereof." Sara Lee contends that a combination must be a "groove" on top of a "score line." Nestle disagrees. Despite the illustration showing a "groove" superimposed on a "score line" and some specification language that implies that this is one form of a "combination thereof," there is nothing solid on which to base such a limitation of the term "combination thereof." Nestle has the better interpretation of this term.

Accordingly, this Court construes the term "groove" to mean "a cut or penetration into a sheet or block of dough that does not extend all the way through the sheet or block." The term "score line" means "a cut or penetration into a sheet or block of dough that does not extend all the way through the sheet or block and which is narrower than a groove." A "combination thereof" is "cuts or penetrations into a sheet or block of dough, which do not extend all the way through the sheet or block, formed by combining a groove and a score line, or by using grooves and score lines separately in the same sheet or block of dough."

5. Ranges of Width and Depth

The following terms, involving the depths and widths of grooves, score lines, and combinations thereof, also are in dispute: "between about 0.5% to about 50%," "from about 0.5% to about 50%," "between about 3% to about 50%," "about 3% to about 95%," and "about 3% to 95%."

Focusing on the claim language and Federal Circuit precedent, Nestle argues that the word "about" means up to a 10% range of variation in the end point numbers. For instance, Nestle would construe "between about 0.5% to about 50%" to mean "from just greater than zero% up to 60% of the thickness of the dough."

On the other hand, Sara Lee emphasizes the word "between" and the remarks of the inventors in the prosecution of the '295 patent. It would construe the maximum and minimum numbers as precise limits.

"About" is the key word in each of the disputed terms. The Federal Circuit has examined the meaning of this term. In *Ecolab, Inc. v. Envirochem, Inc.*, 264 F.3d 1358, 1367 (Fed.Cir.2001), and *Pall Corporation v. Micron Separations, Inc.*, 66 F.3d 1211, 1217 (Fed.Cir.1995), the Federal Circuit explained that "use of the

word 'about' avoids a strict numerical boundary to the specified parameter." The Court of Appeals noted "that the word "about" does not have a universal meaning in patent claims, and that the meaning depends on the technological facts of the particular case." *Id.* One factor to consider in determining the meaning of "about" for a given patent is how important the parameter is. *Id.* Where a limit is not critical, the word "about" may mean a range of up to 10%. *Conopco, Inc. v. May Department Stores Company*, 46 F.3d 1556, 1561-1562 (Fed.Cir.1994).

Here, the patents at issue do not indicate any criticality to the specific numeric parameters of the depths and widths of grooves, score lines, and combinations thereof. The specifications make clear that the grooves, score lines, and combinations thereof need only be deep or wide enough to "be sufficient to allow the consumer to either break the blocks, as is known with typical chocolate bars, or to pull the blocks apart." ('783 patent at col. 5, ln. 66 to col. 6, ln. 1). In fact, the '783 specification explicitly states,

As the top surface of the extruded dough slab is not perfectly smooth, the depth and width of each groove and/or score line are not identical. Also, inclusions such as chocolate chips or nuts can affect the uniformity of the dimensions of the grooves or score lines. For these reasons, the values and ratios mentioned above are considered as averages.

('783 patent at col. 6, ln. 49-54). Moreover, the ranges of widths and depths are wide (and, therefore, not very precise) even without the word "about."

Sara Lee's arguments to the contrary are unavailing. Sara Lee's focus on the word "between" misses the point. Everyone agrees that there must be endpoints; the question is where those endpoints are. By implicitly construing the word "about" to mean "exactly," Sara Lee effectively ignores this claim language. Sara Lee's citation to the prosecution history of the '295 patent is unpersuasive. While the amendment passages quoted by Sara Lee do discuss maximum depth and width without using the word "about," other amendment passages retain the word. (Docket # 56 at 76-77). When viewed in light of the specification language discussed above and the claim language itself, this prosecution history is ambiguous at best.

Given the wide ranges involved and the lack of criticality of precise depths and widths of the grooves, score lines, and combinations thereof, the word "about" should be interpreted as "up to a 10% range of variation in the maximum and minimum depths and widths." Although the selection of any specific numeric range is inherently arbitrary, 10% is the outer limit supported by Federal Circuit precedent and is in accord with the general meaning of the claims and specifications before this Court.

Because some of the end point numbers are so low (0.5% or 3%) or so high (95%), a variation of 10% would lead to contact with 0% or 100%. However, these values could not exist. If a groove or score line did not have any depth or width, it would be non-existent. The specification language also makes clear that the grooves and score lines do not extend all the way through the sheet or block of dough. Therefore, to the extent that this 10% range would "bump up against" 0% or 100%, the range will be construed as ending just above or below those endpoints.

Accordingly, this Court construes the claim terms as follows:

! As used in Claim 1 of the '295 patent, "between about 0.5% to about 50%" means "from just greater than 0% up to 60%."

! As used in Claim 1 of the '783 patent, "from about 0.5% to about 50%" means "from just greater than 0% up to 60%."

! As used in Claims 1 and 21 of the '743 patent, "between about 3% to about 50%" means "from just greater than 0% up to 60%."

! As used in Claim 1 of the '783 patent, "about 3% to about 95%" means "from just greater than 0% up to, but not including, the point that the dough has been cut all the way through."

! As used in Claim 1 of the '295 patent, "about 3% to 95%" means "from just greater than 0% up to exactly 95%." FN5

FN5. This claim term is the only one of the group with an end point that is not preceded by the word "about." Without this word, the plain language of the claim indicates that, with respect to the maximum, no range of variation was intended. The inventors' frequent use of the word "about" in the three patents demonstrates that, had they intended such a range, they certainly knew how to articulate that intent.

6. "baking powder"

The term "baking powder" appears in Claim 1 of the '295 patent and Claim 1 of the '743 patent. Nestle's proposed construction of the term is "sodium bicarbonate alone, or a mixture of at least one bicarbonate or carbonate salt, at least one acidifying agent, and at least one separating agent." In other words, under Nestle's definition, "baking powder" could be baking soda (sodium bicarbonate) alone. Sara Lee contends that the term "baking powder" cannot be equated with baking soda.

The parties agree that, as a general matter, "baking powder" is easily defined. The *McGraw-Hill Dictionary of Scientific and Technical Terms* defines "baking powder" as "[a] yeast substitute of sodium bicarbonate plus potassium tartrate, tartaric acid, anhydrous sodium aluminum sulfate, monocalcium phosphate, or any combination of these acids so formulated as to release carbon dioxide from the sodium bicarbonate (baking soda) when moistened." 5th ed. at 180. Similarly, an online baking dictionary defines the term as "a dry powdery mixture of sodium bicarbonate[,] or baking soda[,] and an acid-reacting material, whose mutual reaction will generate carbon dioxide gas under appropriate baking conditions."

<http://www.bakingbusiness.com/bakerdictionary>. Thus, as the term is ordinarily defined and understood by those of ordinary skill in the art, "baking powder" includes baking soda as one of its components.

The area of disagreement between Nestle and Sara Lee centers around the following specification language, which appears in each patent:

As used herein, "baking powder" means a mixture of at least one bicarbonate or carbonate salt, at least one acidifying agent and at least one separating agent.... In a specific embodiment, sodium bicarbonate may be used alone in an amount of about 0.2 to 0.7%, preferably about 0.5% by weight.

('783 patent at col. 3, ln. 62 to col. 4, ln. 9; '295 patent at col. 2, ln. 17-31; '743 patent at col. 2, ln. 23-36). Nestle argues that the inventors have elected to act as their own lexicographer to give the term "baking powder" a meaning other than its ordinary and accustomed one. Sara Lee believes that the second sentence of this passage merely states that one embodiment of the cookie dough invention can use baking soda alone,

not that baking soda alone is "baking powder."

Examined alone, the specification language is ambiguous. Although the second sentence appears in a paragraph defining "baking powder," it seems to refer to one possible form of the cookie dough, rather than to a possible form of "baking powder." However, there is relevant claim language. Claim 18 of the '295 patent states, "The cookie dough according to claim 1, wherein the baking powder is bicarbonate, in an amount of at least 0.5% by weight." Nestle contends that this language proves that the inventors meant for the term "baking powder" to include baking soda alone. On the other hand, the claim language may only be distinguishing between "baking powder" with a bicarbonate salt and "baking powder" with a carbonate salt. Claim 17 of the '295 patent demonstrates that the former interpretation is correct. Claim 17 reads, "The cookie dough according to claim 1, wherein the baking powder is a mixture of at least one bicarbonate or carbonate salt, at least one acidifying agent, and at least one separating agent." Thus, the patent clearly claims cookie dough composed of each type of "baking powder": the ordinary type (in Claim 17) and the type, as defined by the inventors, in which "baking powder" is simply baking soda (in Claim 18).

Based on the above claim and specification language, the Court concludes that the inventors explicitly chose to depart from the ordinary meaning of the term "baking powder" and did so with reasonable clarity, deliberateness, and precision. Accordingly, the Court construes the term "baking powder" to mean "sodium bicarbonate alone, or a mixture of at least one bicarbonate or carbonate salt, at least one acidifying agent, and at least one separating agent."

7. "texturing agent"

The next term at issue is "texturing agent." The term appears in all three patents.FN6 Nestle proposes the following construction: "a material added to the dough to achieve a desired union of the particles or the constituent components of the dough." Sara Lee prefers the following definition: "a commonly known additive or ingredient that provides body and firmness to the structure of the baked product." At the *Markman* hearing, counsel for the parties agreed that there is no substantive difference between the two proposed constructions, only a difference in phrasing. (Tr. at 47).

FN6. In the '743 patent, the claim term used is "texturizing agent."

The dictionary definition of "texturing" is "to give a particular texture to." *Webster's Ninth New Collegiate Dictionary* at 1220. "Texture," in turn, is defined as "the disposition or manner of union of the particles of a body or substance." *Id.* The parties agree that there is nothing in the claim or specification language or in the prosecution history to suggest that the inventors intended to depart from this ordinary and accustomed meaning of the term. Therefore, the Court construes the term "texturing agent" to mean "a material added to the dough to provide body and firmness to the baked product." This construction conveys the ordinary meaning of the term without confusing or complicated language.

8. "flavoring agent"

The final term is "flavoring agent," which appears in Claim 9 of the '783 patent and Claim 13 of the '295 patent. Nestle's proposed construction is "a material added to the dough to evoke a desired taste sensation in the mouth of the consumer." Sara Lee proposes "a commonly known additive or ingredient in the cookie dough that is intended to add to or accentuate desirable flavors and tastes in the cookie." At the *Markman* hearing, counsel for the parties agreed that there is no substantive difference between the two proposed

constructions, but Nestle did note that its preferred construction does not use the word "flavors" to define "flavoring agent." (Tr. at 47-48).

The dictionary defines "flavoring" as "to give or add flavor to." *Id.* at 471. "Flavor" is defined as "the quality of something that affects the sense of taste" or "the blend of taste and smell sensations evoked by a substance in the mouth." *Id.* The parties agree that there is no indication from the intrinsic evidence that the inventors sought to depart from this definition. Accordingly, the Court construes the term "flavoring agent" to mean "a material added to the dough to evoke a desired taste sensation in the mouth of the consumer."

IV. Conclusion

For the reasons set forth above, the terms at issue in the '783, '743, and '295 patents are construed as follows:

! The term "sweet dough" means "a dough that contains at least 0.5% by weight of sugar or an artificial sweetener such as saccharine or Nutrasweet."

! The term "leavening agent" means "an additive or additive system used to produce or stimulate production of a gas for the purpose of causing a dough to aerate and/or expand."

! The term "substantially equal" means "approximately the same physical dimensions."

! The term "the grooves and score lines intersect to define dough pieces there between" means "adjacent grooves or score lines form the physical boundaries of individual dough pieces that may ultimately be broken off from the dough block."

! The following terms are to be given their ordinary and accustomed meanings: "parallelepipedal," "cylindrical," "prismatic," "V-shaped," "U-shaped," "rounded," "rectangular," "equilateral triangle," "circular," "polygon," and "polygonal."

! The term "ready-for-use" means "pre-mixed or pre-prepared, and ready for baking."

! The term "refrigerated" means "to make or keep cold or cool at a temperature below room temperature, but not to the point of freezing, for the purpose of preservation."

! The term "imprint" means "a mark or depression that is made by pressure."

! The term "groove" means "a cut or penetration into a sheet or block of dough that does not extend all the way through the sheet or block."

! The term "score line" means "a cut or penetration into a sheet or block of dough that does not extend all the way through the sheet or block and which is narrower than a groove."

! The term "combination thereof" means "cuts or penetrations into a sheet or block of dough, which do not extend all the way through the sheet or block, formed by combining a groove and a score line, or by using grooves and score lines separately in the same sheet or block of dough."

! As used in Claim 1 of the '295 patent, the term "between about 0.5% to about 50%" means "from just greater than 0% up to 60%."

! As used in Claim 1 of the '783 patent, the term "from about 0.5% to about 50%" means "from just greater than 0% up to 60%."

! As used in Claims 1 and 21 of the '743 patent, the term "between about 3% to about 50%" means "from just greater than 0% up to 60%."

! As used in Claim 1 of the '783 patent, the term "about 3% to about 95%" means "from just greater than 0% up to, but not including, the point that the dough has been cut all the way through."

! As used in Claim 1 of the '295 patent, the term "about 3% to 95%" means "from just greater than 0% up to exactly 95%."

! The term "baking powder" means "sodium bicarbonate alone, or a mixture of at least one bicarbonate or carbonate salt, at least one acidifying agent, and at least one separating agent."

! The term "texturing agent" means "a material added to the dough to provide body and firmness to the baked product."

! The term "flavoring agent" means "a material added to the dough to evoke a desired taste sensation in the mouth of the consumer."

IT IS SO ORDERED.

N.D.Ohio,2003.

Nestle USA, Inc. v. Sara Lee Bakery Group

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