

United States District Court,
C.D. California.

KAL KAN FOODS, INC,

v.

H.J. HEINZ COMPANY, L.P. and.

No. CV01-10961 RGK(JTLx)

Feb. 5, 2003.

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Order RE: Claim Construction

R. GARY KLAUSNER, **District Judge.**

I. INTRODUCTION

This is a patent infringement case wherein Plaintiff Kal Kan Foods, Inc. ("Plaintiff") alleges that Defendants H.J. Heinz Co. L.P. and Heinz Management Co. ("Defendants") are infringing upon Plaintiff's U.S. Patent No. 6,312,746 ("746 Patent"). The '746 Patent describes a particular type of dual-textured animal food product composed of a soft inner component surrounded by a harder cereal-based outer shell that is formed using a co-extrusion process. Plaintiff specifically alleges that the infringing products are Defendants' POUNCE Purr-fections cat treat, Meaty Bone Savory Bite's dog treat, and Nature's Recipe dog treats.

In the current action, Plaintiff asserts five independent (i.e. they stand alone without reference to other claims) claims-claims 1, 17, 25, 78, and 89. In contention are four claim terms or phrases found in the asserted claims:

I. "containing a mixture of lipid and solid ingredients" (Claims 1, 17, 25, 78 and 89);

II. "co-extrusion ... within, or co-extruding ... within" (Claims 1, 17, 25, 78 and 89);

III. "cream-textured matrix" (Claims 17, 25, 78 and 89); and

IV. "lipid-based component" (Claim 78).

II. Legal Standard

Interpretation of patent claims is a matter of law reserved for the court. *See* *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996). "It is well-settled that, in interpreting an asserted claim, the court should look first to the intrinsic evidence of record, i.e., the patent itself, including the claims, the specification, and, if in evidence, the prosecution history." *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed.Cir.1996). "In most situations, an analysis of the intrinsic evidence alone will resolve any ambiguity in a disputed claim term. In such situations, it is improper to rely on extrinsic evidence." *Id.* at 1583.

At its discretion, and if necessary, a court may turn to extrinsic evidence such as "expert and inventor testimony, dictionaries, and learned treatises." *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 980 (Fed.Cir.1995). Such extrinsic evidence, however, "is to be used for the court's understanding of the patent, not for the purpose of varying or contradicting the terms of the claims." *Id.* at 981.

In constructing claim terms, the Court makes decisions that may affect a host of other issues including invalidity; however, the claim construction process itself does not actually resolve such questions. At the proper time, the parties may submit separate motions on those issues.

III. Analysis

A. "*Containing a Mixture of Lipid and Solid Ingredients*" (Claims 1, 17, 25, 78, and 89)

Plaintiff argues that this phrase means a composition that includes lipids and solids. That is, the composition must contain a mixture of lipids and solids, but the composition can also contain additional ingredients. Defendants argue that the phrase is not open-ended, and means a composition wholly of lipid and solid ingredients, in varying proportions, that retain their own properties. FN1

FN1. Defendants also contend that Plaintiff expressly disclaimed any such mixture that has added water, an aqueous phase, water-added ingredients, or moisture control ingredients. However, it is unclear whether Defendants seek to incorporate this assertion into their proposed construction of the claim term.

Whether the phrase "containing a mixture of lipid and solid ingredients" is exclusive or inclusive of ingredients other than lipids and solids turns on the definition of the term "containing." The ordinary meaning of the term, as articulated by *Webster's Dictionary*, is "comprising, including." *See Webster's Ninth New Collegiate Dictionary* 282 (9th ed.1990); *see also* *Bell Atlantic Network Servs., Inc. v. Covad Comm. Group Inc.*, 262 F.3d 1258, 1267 (Fed.Cir.2001) (dictionaries, while technically extrinsic evidence, may be considered along with the intrinsic evidence when determining the ordinary meaning of claim terms). This definition may be interpreted as either open-ended or closed-ended.

However, a review of the claim language indicates that the term is meant to be closed-ended, and exclusive of ingredients other than lipids and solids. First, the claim language shows that, where Plaintiff meant to write an open-ended limitation, it did so. For example, in each of the asserted claims of the patent-in-suit, Plaintiff uses the term "containing" twice. Claim 1, which uses the language that is representative of all the claims at issue, states:

1. A dual texture pet or animal food product comprising:

a soft inner component of a dual texture ... *containing a mixture of lipid and solid ingredients* ...

a cereal based shell component ... *containing at least one ingredient comprising a carbohydrate* ...

See Joint Appendix to Opening Briefs ("Jt.App."), Exhibit A, at col. 18, lines 12-22. Plaintiff's failure to use a qualifier, such as "at least," when referring to the soft inner component, yet including such a qualifier when referring to the cereal based shell component, indicates that Plaintiff meant for the inner component to be exclusive of ingredients other than lipids and solids.

Second, the patent specification describes the embodiment of the soft inner component as being a mixture that may vary in its percentage of lipids and solids, but in all cases, should not exceed 100 wt%.

Furthermore, the written description states that the most preferred embodiment comprises "about 60 wt% solids and 40 wt% lipids." Jt.App., Exhibit A, col. 6, lines 4-13. This statement provides further evidence that Plaintiffs intended the claim term to comprise only lipids and solids.

In support of its position to the contrary, Plaintiff cites to the patent wherein the claim states: "a soft inner component ... containing a mixture of lipid and solid ingredients, the first component having a water activity, a_w , less than about 0.65 and a total moisture content less than about 15 wt%." Jt. App., Exhibit A, col. 18, lines 13-17. Plaintiff asserts that the express claim language above shows that the soft, or first, component is composed of ingredients other than just lipids and solids because of the defined amounts of water that are also included in the component. However, the Court does not read the claim language in the same manner. Based on the Court's interpretation of the claim, the term "first component" (which has a water activity less than ...) is referring to the lipid ingredient. Therefore, the claim language indicates that any amount of water activity or moisture content found within the soft inner component would be present by virtue of the lipid content.

The written specification supports this Court's interpretation. In the "Summary of the Invention" section, Plaintiff writes, "[t]he inner component *is* a mixture of lipids and solids which forms a soft cream-like matrix. Since this soft matrix is formed without needing any added water, it has minimal water content and very low water activity levels." Jt.App., Exhibit A, col. 3, lines 31-35 (emphasis added).

Plaintiff also asserts that the specification expressly teaches that additional ingredients, such as nutritive or non-nutritive compounds, can be included in the inner component. See Jt.App., Exhibit A col. 5, lines 38-40. However, there is no indication that these additional ingredients are neither lipids or solids. Additionally, Plaintiff states that such ingredients as anti-inflammatory agents and natural colorants are not necessarily solids, and are available in liquid form. However, this statement is not convincing or instructive, as the fact that the ingredients are available in liquid form does not preclude its availability and use in solid form.

As to Defendants, in addition to arguing that the phrase "mixture of lipid and solid ingredients" is close-ended, they also argue that Plaintiff expressly disclaimed any such mixture that has added water, an aqueous phase, water-added ingredients, or moisture-control ingredients. In support of their contention, Defendants assert that (1) the written specification clearly describes what the inner component does not contain, which are water-added ingredients and moisture-control ingredients, and (2) that the specification is replete with representations that added water, water-added ingredients, and moisture-control ingredients are undesirable and to be avoided. However, Defendants' arguments are not well-taken by this Court. While the aformentioned statements and representations in the specification may serve as further limitations on the

patent, they do not operate to redefine, deviate or limit the meaning of the claim term.

Based on the forgoing analysis, it is clear from the intrinsic evidence that the term "containing" is meant as an exclusive term. The other terms within the phrase, as used in the relevant claims of the patent, are terms that are commonly understood by those of ordinary skill in the art, and require no further elaboration by this Court. As such, the claim limitation, "containing a mixture of lipid and solid ingredients" means "a composition wholly of lipids and solid ingredients."

B. "Co-extrusion ... within, or co-extruding ... within" (Claims 1, 17, 25, 78, and 89)

Plaintiff contends that this claim limitation means a technique where two dissimilar materials, coming from an extruder and a pump, are combined within an extrusion die forming a first/inner component within a second/shell component. Defendants contend that based on the intrinsic evidence, the claim limitation means the act of forming components by jointly extruding two dissimilar materials such that the inner component is introduced into the interior of the formed shell component.

In support of their more limited construction, Defendants argue that the term "within" means "in or into the interior." *Webster's Collegiate Dictionary* 1359 (10th ed.1996). Thus, "co-extrusion within" the shell component means "co-extrusion into the interior" of the shell component, and the shell component must already be in existence when the inner component leaves its extruding tube.

Defendants also argue that during the prosecution of the patent-in-suit, Plaintiff added the "co-extrusion within" limitation in response to the first rejection by the Examiner, in order to gain allowance of its claims over the prior art as patented by Repholz ("Prior Art"). According to Defendants, the Prior Art used slightly recessed tubes that extruded the inner component into the outer component, which was also extruded, and the combined components exited a die to form a third center-filled extrudate. *See* Defendants' Memorandum of Points and Authorities in Support of its Construction of the Asserted Claims, pg. 21, lines 4-17. Plaintiff stated to the Examiner that its claims were distinctly different from those of the Prior Art. *See* Jt.App., Exhibit B, pg. 136. Therefore, Defendants assert that the prosecution history, in combination with the ordinary meaning of the word "within," support their construction of the claim.

The intrinsic evidence in this case makes clear that "co-extrusion ... within, co-extruding ... within" simply means "a technique where two dissimilar materials are combined by means of two extruders or an extruder and a pump to form a product wherein one material is contained within the other." This interpretation is supported by the extrinsic evidence offered by Plaintiffs. *See* Scheider Decl., Exhibit 10, pg. 63 and Herbster Decl. para. 11; *see also* Pitney Bowes, Inc. v. Hewlett-Packard Co., 182 F.3d 1298, 1308-09 (Fed.Cir.1999) (holding that a court may consider extrinsic evidence to ensure that the court's understanding of the technical aspects of the invention is not at odds with the understanding of one skilled in the art). In the section entitled, "Detailed Description of the Invention," the written specification states, "[i]n one preferred embodiment of the invention, an extruded shell product includes an inner cream material pumped into a shell extruder die plate and distributed evenly within extruded ropes." Jt.App., Exhibit A, col.4, lines 55-58. Nowhere in this description or in any of the claims is there a detailed description of the exact mechanical process by which the extrusion technique is completed, or the type of apparatus by which the product is formed. While, as Defendants point out, Plaintiff did distinguish its proposed patent from the Prior Art in the prosecution history, there is no indication that the distinction is based on a difference between extruding the inner component in an already existing extrudate shell component, or combining the two components within an extrusion die. *See* Jt.App., Exhibit B, pg. 136. Therefore, importing Defendants'

proposed limitation into the phrase is improper.

C. "Cream-textured matrix" (Claims 17, 25, 78 and 89)

Plaintiff argues that "cream-textured matrix" means a non-brittle, deformable or soft bound mass. Defendants argue that the phrase means a bound mass with the look and feel of cream.FN2

FN2. Defendants also assert that Plaintiff expressly disclaimed any composition that is thick enough to be formed into a separate extrudate for converging with the outer cereal-based extrudate to form a third, dual-component extrudate. It is unclear whether Defendants seek to incorporate this assertion into their proposed construction of the claim term.

There is no dispute between the parties that the ordinary meaning of the term "matrix" is "bound mass." Furthermore, the ordinary meaning of "texture" is "consistency, tactile characteristic." Therefore, the ordinary meaning of the phrase "cream-textured matrix" is "a bound mass, which has the consistency of cream," and the intrinsic evidence does not appear to further elaborate or limit the ordinary meaning of the term.

In support of a more limited construction of the phrase, Defendants cite only to the prosecution history in which Plaintiff distinguishes its claim from the Prior Art. According to Defendants, Plaintiffs emphasized that the Prior Art lacked a cream-like matrix because, in order for the inner component described by the Prior Art to be operable in the co-extrusion apparatus, the inner component had to be thicker than a cream-like matrix so that it could be formed into a separate extrudate to converge with the second outer extrudate. *See* Defendants' Memorandum of Point and Authorities in Opposition to Kal Kan's Opening Brief (citing Jt.App. Exhibit B, pg. 136). However, while Defendants' evidence may provide instruction as to the viscosity of the inner component, it fails to have any bearing on the actual meaning or definition of the term "cream-textured matrix." Therefore, the ordinary meaning of the term is manifest, and no further elaboration is necessary.

D. "Lipid-based component" (Claim 78)

Plaintiff asserts that the term "lipid-based component" means an inner component having at least about 10% lipids by weight. Defendants contend that the phrase means a component having lipids as the fundamental part.FN3

FN3. Defendants further assert that Plaintiff expressly disclaimed any component that has an aqueous phase. Again, it is unclear whether Defendants seek to incorporate this assertion into their proposed construction of the claim term.

In support of its argument, Plaintiff contends that: 1) the ordinary meaning of the term refers to an inner component with lipids as a fundamental part, and 2) the invention relates to using lipids in a sufficient amount to eliminate the need for moisture control agents while still providing a plurality of textures to increase palatability. *See* Jt.App., Exhibit A, col.3, lines 28-49. Based on its argument, Plaintiff concludes that the amount of lipids that comprises a "fundamental part" is the amount of lipids required to successfully practice the invention. According to Plaintiff, that amount, as provided in the specification, is greater than about 10%. *See* Jt.App., Exhibit A, col.5, lines 64-65.

Based on this Court's reading of the specification, Plaintiff's argument is not well-taken. The claim language at issue uses general descriptive words, without specifying a numeric limitation, and the portion of the specification cited by Plaintiff merely states "it is *preferable* for the lipid content ... [to] be greater than about 10% by weight. *See* Jt.App., Exhibit A, col.5, lines 64-65 (emphasis added). The specification then goes on to state that higher weight percentages are still more advantageous. *See* Jt.App., Exhibit A, col. 5, lines 66-67 and col.6, lines 1-3. As such, the specification regarding lipid weight percentages appears to serve as more of a guideline, rather than a definitional limitation. Furthermore, the Federal Circuit has held that an element that is claimed using general, descriptive words is ordinarily not limited to numerical ranges recited in the specification or other claims. *See* *Modine Mfg. Co. v. United States Int'l Trade Comm'n*, 75 F.3d 1545, 1551 (Fed.Cir.1996).

Defendants argue that "lipid-based" means a component having lipids as the fundamental part. Defendants further stated in oral argument that "fundamental" means "majority." Therefore, it would follow that Defendants propose a construction whereby lipids would necessarily constitute the majority ingredient of the component. However, there is nothing in the intrinsic evidence that supports this position.

The ordinary meaning of "base" is "a main ingredient; a supporting or carrying ingredient." *Webster's Ninth New Collegiate Dictionary* 133 (9th ed.1990). Therefore, it would stand to reason that the ordinary meaning of the phrase "lipid-based component" is "a component in which lipids serve as the main, supporting or carrying ingredient." This definition, by itself, does not imply a quantifiable amount of lipids. However, in the context of the patent, the amount of lipids necessary to be considered a main, supporting or carrying ingredient would be the amount of lipids necessary to make the subject matter (i.e., inner component) function in the way for which it was designed. According to the prosecution history, Plaintiff distinguished its invention from the Prior Art in response to the Examiner's rejection of Plaintiff's claims as being unpatentable over the Prior Art. With regard to the inner component, Plaintiff's main assertion was that the Prior Art taught away from Plaintiff's invention because the Prior Art (1) had to be thicker than a cream-like matrix, and (2) had to provide for the transport of water from the outer component to the inner component. In contrast, the *transport of water was not possible* in Plaintiff's invention since the "first component was formed from a lipid-based cream-like matrix with no aqueous phase and water will not migrate into a fat-based solution." Jt.App., Exhibit B, pg. 137 (emphasis added). Therefore, in order to for the inner component to successfully function as it was designed to function, the inner component of Plaintiff's invention must contain an amount of lipids sufficient to prevent the migration of water from the outer component into the inner component.

Reading the phrase in the context of the claim language and reviewing the intrinsic evidence, this Court finds that the meaning of "lipid-based" means "an inner component in which lipids constitute a sufficient portion to prevent the migration of water from the outer component into the inner component."

E. Summary of Construction

Based on the foregoing analysis, the proper construction of the claim limitations at issue are:

Claim Limitation	Proper Construction
"containing a mixture of lipid and solid ingredients"	A composition wholly of lipids and solid ingredients.

"co-extrusion ... within" or "co-extruding ... within"	A technique where two dissimilar materials are combined by means of two extruders or an extruder and a pump to form a product wherein one material is contained within the other.
"cream-textured matrix"	A bound mass, which has the consistency of cream
"lipid-based component"	An inner component in which lipids constitute a sufficient portion to prevent the migration of water from the outer component into the inner component.

IV. Conclusion

Having considered the papers filed in support of each party's claim construction, the evidence presented by the parties, the other pleadings and papers on file, and the oral argument at the Markman hearing, the Court gives each of the disputed terms the meanings stated in Section III(E).

C.D.Cal.,2003.

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