

United States District Court,
D. Massachusetts.

DIVERSIFIED BIOTECH, INC,
Plaintiff.

v.

PHENIX RESEARCH PRODUCTS, INC,
Defendant.

Civil Action No. 03-10941-RCL

April 22, 2004.

Mark P. White, Susan Fort, White & Fudala, Lexington, MA, for Plaintiff.

Arthur J. Behiel, Thomas W. Lathram, Silicon Edge Law Group, Pleasanton, CA, Eric L. Brodie, Stephen D. Rosenberg, The McCormack Firm, LLC, Boston, MA, for Defendant.

ORDER ON CONSTRUCTION OF CLAIMS

LINDSAY, District Judge.

In this action, the plaintiff, Diversified Biotech, Inc. ("DBI"), alleges that the defendant, Phenix Research Products, Inc. ("Phenix") infringed DBI's United States patent numbered 5,836,618 ("the '618 patent"). There are two steps to an infringement analysis: the first is to determine "the meaning and scope of the patent claims asserted to be infringed" and the second is to compare "the properly construed claims to the device accused of infringing." *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed.Cir.1995) (en banc), *aff'd*, 517 U.S. 370 (1996). While the second step presents a question of fact for the fact-finder, the first step is a question of law for the court. *Id.* at 979. It is this first step, known as claim construction, that I must now perform. Both parties briefed their proposed claims constructions and presented evidence, at a one-day *Markman* hearing on March 17, 2004, in support of their respective contentions.

Before turning to the particulars of the claim construction, I must address preliminary matters that are predicates for my analysis. Specifically, I must determine the "art" to which the '618 patent pertains, and the level of education and experience possessed by "a person of ordinary skill in the art." *See Teleflex, Inc. v. Ficoso N. Am. Corp.*, 299 F.3d 1313, 1325 (Fed.Cir.2002). Based on the consistent testimony of the parties' competing experts, I conclude that the '618 patent pertains to the art of "pressure sensitive adhesive labels," and that a person of ordinary skill in this art would hold a bachelor's degree in chemistry and have between three and ten years of experience in the development and/or manufacture of pressure-sensitive adhesive labels.

Having addressed these preliminary issues, I now turn to the task of claim construction. For reasons set forth on the record at the March 17, 2004 *Markman* hearing, I construe the disputed terms of the '618 patent

as follows:

- 1) **Pressure Sensitive Adhesive Label**-A label comprising a waterproof, non-polyvinyl thermoplastic facestock material with a markable waterproof upper surface and a waterproof adhesive lower surface.
- 2) **Cryogenic Storage Vial**-A vial which must withstand storage at a temperature of minus eighty degrees Celsius or lower, but not less than minus one-hundred ninety six degrees Celsius.
- 3) **Cryogenic Storage Conditions**-Conditions in which the label must withstand exposure to a temperature of minus eighty degrees Celsius or lower, but not less than minus one-hundred ninety six degrees Celsius.
- 4) **Sized**-Of a size convenient for labeling vials and other containers used under cryogenic conditions.
- 5) **Thermoplastic**-A polymer having the property of softening or fusing when heated and becoming rigid again when cooled.
- 6) **Non-polyvinyl**-Non-polyvinyl chloride.
- 7) **Facestock**-The major structural layer of the label which carries the adhesive.
- 8) **Machine Direction**-The direction of label manufacture and spooling; the lengthwise direction of facestock as it comes through the manufacturing device.
- 9) **Transverse Direction**-The direction perpendicular to the direction of manufacture; the direction at right angles to the machine direction..

SO ORDERED.

D.Mass.,2004.

Diversified Biotech, Inc. v. Phenix Research Products, Inc.

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