

United States District Court,
N.D. Indiana, Hammond Division.

COOK BIOTECH INCORPORATED and Purdue Research Foundation,
Plaintiffs.

v.

ACELL, INCORPORATED, Stephen F. Badylak, and Alan R. Spievack,
Defendants.

Aug. 31, 2004.

Daniel J. Lueders, Holiday Wellington Banta, John C. McNett, Quentin G. Cantrell, Woodard Emhardt Moriarty McNett & Henry LLP, Indianapolis, IN, William P. Kealey, Stuart & Branigin LLP, Lafayette, IN, for Plaintiffs.

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MEMORANDUM AND ORDER

ALLEN SHARP, District Judge.

On or about December 22, 2003, this Court entered an Order denying Plaintiff's, Cook Biotech Incorporated ("Cook"), Motion for a Preliminary Injunction. Since that time, the record has grown substantially along with the evidence surrounding the extremely demanding details of this case. On August 2, 2004, this Court held a *Markman* hearing in Lafayette, Indiana. The parties were then given until August 16, 2004 to file post-hearing *Markman* briefs which are before this Court at present moment. It is now the responsibility of this Court to construe the claims of the United States Patent No. 5, 554, 389 ("389 patent") FN1.

FN1. This patent is at times also referred to as the "UBS" patent.

I. Background

On June 23, 2003, Cook, along with Purdue Research Foundation, ("PRF") filed their Complaint and in Count III, alleged that products made by ACell Incorporated ("ACell") infringed the '389 patent. Then on September 3, 2003, Cook filed a motion for a preliminary injunction in which it sought to enjoin ACell from making and selling its current ACell Vet products. Cook asserted that ACell's Vet product infringed claims 1 and 8 of the UBS patent. As stated, on December 22, 2003, this Court denied Cook's Motion for a Preliminary Injunction.

The parties are in disagreement about the scope of the claims of the '389 patent. Cook and PRF argue that

the claims should be construed to capture layers on the luminal side of the submucosa down to and including the basement membrane. On the other hand, ACell contends that the claims of the UBS '389 patent do not extend to compositions that are not 'essentially submucosa,' and argue that the basement membrane and tunica propria are delaminated from the urinary bladder in making urinary bladder submucosa ("UBS").

In its December 22, 2003 Order, this Court determined that Cook had failed to meet the burden of establishing a likelihood of success on the merits, showing that the '389 patent was infringed. However, as was made clear in that Order and is reiterated here, such determination was not, in any way, meant to serve as a *Markman* analysis.FN2 This Court stated that it was under no obligation to perform a *full-blown* Markman analysis at that time, and further stated that this Court was not bound by such a preliminary interpretation for subsequent proceedings in the case. *See*, Sofamor Danek Group, Inc., v. DePuy-Motech, Inc., 74 F.3d 1216, 1221 (Fed.Cir.1996).

FN2. The preliminary injunction Order only addressed certain aspects of Claims 1 and 8.

II. Analysis

Determining patent infringement requires determining whether an individual without authority, makes, uses, offers to sell, sells, or imports the patented invention within the United States, its territories, or its possessions, during the term of the patent. 35 U.S.C. s. 271(a). A finding of infringement requires a two-step analytical approach. First, the claims of the patent must be construed as a matter of law to determine their proper scope. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed.Cir.1995). Second, a factual determination must be made as to whether the properly construed claims read on the accused product. *Id.* At this stage, the only duty of this Court is the first of these steps, to construe the claims of the patent.FN3

FN3. At this point discovery has not even been completed in this case. However, there is a pending motion for summary judgment on the issue of infringement, filed by ACell, which will be addressed later in this opinion.

Claim Construction

When deciding whether a party has infringed a patent, the Court must first construe the claims of the patent and then compare the allegedly infringing device to the scope and meaning of the claims as determined by the Court. *Genentech, Inc. v. Wellcome Found. Ltd.*, 29 F.3d 1555, 1560 (Fed.Cir.1994). It is within the Court's jurisdiction to construe the claims of the patent, as the Supreme Court has affirmed that claim construction presents questions of law that are to be determined by the Court. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 390, 116 S.Ct. 1384, 134 L.Ed.2d 577, (1996). When the Court construes the claims of the patents in question, the Court determines what is covered by the patents by examining the patents' claims, specifications, and prosecution histories.

The purpose of construing the claims of a patent is to determine the meaning and scope of the patent claims that the plaintiff is asserting have been infringed. *Markman* 52 F.3d at 979. The focus of the court when it construes a disputed claim term is not the subjective intent of the parties when they employed a certain term, but 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. *Id.* at 986. When the court undertakes its duty of construing the claims, it must first look to intrinsic evidence: the claims, the specification and the prosecution history. *Markman*, 52 F.3d at 979. The claims "particularly point out and distinctly clai[m] the subject matter which the applicant regards as his invention." *Markman*, 517 U.S. at 373, (*citing* 35 U.S.C. s. 112). When construing claims, the appropriate starting point for the court's inquiry is always with the words of both the asserted and nonasserted claims. *Comark Communications, Inc. v. Harris Corp.*, 156 F.3d 1182, 1186 (Fed.Cir.1998); *see also*, *Renishaw PLC v. Marposs Societa' per Azioni*, 158 F.3d 1243, 1248 (Fed.Cir.1998).

It is the claim, not the specification, that defines the scope of the patent and accordingly, the patentee's rights. *York Products, Inc. v. Central Tractor Farm & Family Ctr.*, 99 F.3d 1568, 1572 (Fed.Cir.1996); *Markman*, 52 F.3d at 970-71. As the Federal Circuit has noted, "[a]bsent a special and particular definition created by the patent applicant, terms in a claim are to be given their ordinary and accustomed meaning." *Renishaw*, 158 F.3d at 1249. Claims must be read in light of the specification. *Markman*, 52 F.3d at 979. However, the Federal Circuit has made clear that limitations from the specification may not be read into the claims. *Comark*, 156 F.3d at 1186 (citing *Sjolund v. Musland*, 847 F.2d 1573, 1581 (Fed.Cir.1988)).

The court should not limit the invention to the specific examples or preferred embodiment found in the specification. *Texas Instruments, Inc. v. United States Int'l Trade Comm'n*, 805 F.2d 1558, 1563 (Fed.Cir.1986). Thus, the "repetition in the written description of a preferred aspect of a claim invention does not limit the scope of an invention that is described in the claims in different and broader terms." *Laitram Corp. v. NEC Corp.*, 163 F.3d 1342, 1348 (Fed.Cir.1998). Furthermore, the court cannot interpret the meaning of a word found in a claim by adding an extraneous limitation found in the specification. *Id.* There is a fine line between reading a claim in light of the specification and reading a limitation from the specification, and the court must cautiously look to the specifications for assistance in defining unclear terms instead of assistance in limiting terms. *Comark*, 156 F.3d at 1186-87; *See generally*, *Trilithic, Inc. v. Wavetek U.S ., Inc.*, 64 F.Supp.2d 816 (S.D.Ind.1999).

For a *Markman* decision "the analytical focus must begin and remain centered on the language of the claims themselves for it is that language that the patentee chose to use to 'particularly point out and distinctly claim the subject matter which the patentee regards as his invention.' 35 U.S.C. s. 112, para. 2." *Texas Digital Systems, Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1201-02 (Fed.Cir.2002). Extrinsic evidence, particularly inventor testimony, cannot be used to contradict the intrinsic evidence (the patent claims, specification, and file history); it may only be used to resolve ambiguity in the intrinsic evidence. *See*, *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582-1583 (Fed.Cir.1996).

The ordinary meaning of a term may be found in dictionary definitions that existed at the time of the patent application process. *See Texas Digital*, 308 F.3d at 1202-03; *Teleflex, Inc. v. Ficosa N. Am. Corp.*, 299 F.3d 1313, 1325 (Fed.Cir.2002). Even when ambiguity in claim language exists, extrinsic evidence such as inventor testimony is a resource of last resort. The asserted patent's specification, its file history, and dictionaries must all take precedence when there is a conflict. *See*, *Vitronics*, 90 F.3d at 1582-83. Thus, inventor testimony cannot be used to contradict the ordinary meaning of claims terms as set forth in dictionaries, and claim terms should be construed to capture the full range of consistent dictionary definitions. *See*, *Texas Digital*, 308 F.3d at 1201-03; *Teleflex*, 299 F.3d at 1325.

The purpose behind claim construction is to draft correct jury instructions regarding the meaning of legal and technical claim terms. Specific to this matter, Cook requests this Court to define for the jury the following claim terms: (1) "comprising," (2) "at least the luminal portion of the tunica mucosa," (3)

"submucosa," (4) "an effective amount," (5) "non-immunogenic," and (6) "inducing endogenous connective tissue growth." FN4

FN4. There does not seem to be a dispute between the parties as to the proper construction of (5) "non-immunogenic," and (6) "inducing endogenous connective tissue growth."

Cook proffers the following jury instructions:

"There are certain terms in the patent claims that I need to construe for you. In reaching your verdict you must apply these meanings to the claim terms for all purposes:

1. The term "comprising" is open ended, meaning that a claim containing this term covers a product that has each element in the claim, *even if* that product also has one or more elements, steps, or ingredients not specified in the claim. In other words, if you find that ACell's product includes each element in a claim, then you should find infringement even if you find that ACell's product also includes other tissue types or elements.

2. The term, "submucosa" is the name for a type of tissue of the urinary bladder. "Submucosa" is defined as "the submucous tissue" in the bladder. "Submucosa" is the name of a tissue type, and therefore this term does not necessarily mean the entire submucosal *layer* or any particular amount of the submucosa.

3. The phrase, "at least the luminal portion of the tunica mucosa" has two parts. "At least" has its ordinary meaning that you use in everyday life. Thus, the claim meaning of removing "at least" a portion of something is satisfied if you remove substantially all of that portion, whether or not you also remove other things. "The luminal portion of the tunica mucosa" is the epithelial cells that line the interior of the bladder. Thus, in the claim, removing "at least the luminal portion of the tunica mucosa" means removing substantially all of the epithelial cells that line the bladder. Removal of substantially all of the epithelial cell plus removal of other tissue types would likewise satisfy this claim term.

4. The term in Claim 8 only, "an amount effective," means to administer a sufficient quantity of material to aid in the healing of a patient. The patient may be human or veterinary."

5. The term, "inducing endogenous connective tissue growth" means, "to bring on connective tissue growth in the patient." The term "non-immunogenic" means, "not evoking an immune response by the patient."

ACell contends that based on its arguments, this Court should instruct the jury as follows: "The Court is required to instruct you on the meaning of disputed claim terms. The parties have disputed the meaning of "urinary bladder submucosa" as used in each of the three claims of the '389 patent asserted by plaintiffs against defendant ACell Incorporated. The Court has determined that 'urinary bladder submucosa' means a composition that is 'essentially submucosa.' A composition is 'essentially submucosa' if it has greater than 98% submucosal material in it. A composition that contains basement membrane or lamina (tunica) propria is not 'essentially submucosa.' "

As to '389 claims 1 and 7, ACell request that this Court instruct the jury that delamination of "at least the luminal portion of the tunica mucosa of a segment of a urinary bladder of a warm blooded vertebrate" requires removal of at least the lamina (tunica) propria, the basement membrane, and all epithelial cells.

As to '389 claim 8, defendants request that in addition to the instruction regarding "urinary bladder submucosa," the Court instruct the jury that "comprising urinary bladder submucosa in an amount effective to induce endogenous connective tissue growth at the site that the composition is administered" requires that plaintiffs prove by a preponderance of the evidence that the accused composition (ACell Vet(TM)) contains submucosa tissue in an amount effective to induce endogenous connective tissue growth at the site that ACell Vet(TM) is administered. Plaintiffs cannot meet their burden unless they specifically show that such tissue growth is attributable to submucosa and not lamina (tunica) propria or basement membrane.

"comprising"

Cook asserts the following jury instruction based on the term "comprising":

The term "comprising" is open ended, meaning that a claim containing this term covers a product that has each element in the claim, *even if* that product also has one or more elements, steps, or ingredients not specified in the claim. In other words, if you find that ACell's product includes each element in a claim, then you should find infringement even if you find that ACell's product also includes other tissue types or elements.

The '389 claims expressly recite the broader term "comprising" and not the term "consisting essentially of." For example, claim 1 of the '389 patent reads:

1. A composition comprising urinary bladder submucosa delaminated from both the abluminal muscle layers and at least the luminal portion of the tunica mucosa of a segment of a urinary bladder of a warm blooded vertebrate.

Cook argues that ACell seeks to improperly rewrite the claim to be:

1. A composition that consists essentially of urinary bladder submucosa.

Furthermore, the patent specification sets forth both the comprising embodiment and the more limited consisting essentially of embodiment:

The tissue graft composition in accordance with the present invention comprises urinary bladder submucosa of a warm-blooded vertebrate delaminated from adjacent bladder tissue layers. The present tissue graft composition thus comprises the bladder submucosa delaminated from abluminal muscle cell layers and at least the luminal portion of the mucosal layer of a segment of urinary bladder of a warm-blooded vertebrate. Typically the delamination technique described below provides a tissue composition consisting essentially of urinary bladder submucosa. These compositions [plural] are referred to herein generically as urinary bladder submucosa (UBS). '389 Patent, Exhibit A, column 1, line 65-column 2, line 9.

It would be error to limit a claim to one of two disclosed embodiments, when the literal language of the claim dictates otherwise. *See*, Northern Telecom Ltd. v. Samsung Electronics Co., 215 F.3d 1281, 1294 (Fed.Cir.2000).

In *Medichem, S.A. v. Rolabo, S.L.*, 353 F.3d 928 (Fed.Cir.2003), on appeal, the Federal Circuit began its analysis by reviewing the district court's claim construction. The Federal Circuit noted that claim 1 of the

[827] patent used the transition term *comprising*. The Court noted that this open-ended transition term dictated that the claimed process encompassed the inclusion of additional elements or method steps. As further noted by the Court, if [Rolabo] wanted to exclude ... it could have used the close-ended transition term *consisting of*, rather than *comprising*. *See also*, AFG Industries, Inc. v. Cardinal IG Company, Inc. 239 F.3d 1239 (Fed.Cir.2001). In light of such established precedent, in regard to the term "comprising" this Court must accept Cook's proffered jury instruction and reject ACell's proposition to instruct the jury that 'urinary bladder submucosa' means a composition that is 'essentially submucosa.'

"submucosa"

In connection to the above analysis based on the term "comprising," ACell seems to argue that a composition comprising urinary bladder submucosa has to be made exclusively of urinary bladder submucosa. However, as stated above, if this were the desired outcome the close-ended term *consisting essentially of* could have been used over the more open-ended *comprising*. The plain reading and ordinary meaning of submucosa as set forth in the specification of the '389 patent includes multiple embodiments.

The tissue graft composition in accordance with the present invention comprises urinary bladder submucosa of a warm-blooded vertebrate delaminated from adjacent bladder tissue layers. The present tissue graft composition thus *comprises* the bladder submucosa delaminated from abluminal muscle cell layers and at least the luminal portion of the mucosal layer of a segment of urinary bladder of a warm-blooded vertebrate. Typically the delamination technique described below provides a tissue composition *consisting essentially of* urinary bladder submucosa. These compositions are referred to herein generically as urinary bladder submucosa (UBS).

'389 Patent, Exhibit A, column 1, line 65-column 2, line 9

The patent appears to state that UBS includes both embodiments with only submucosa as well as broader embodiments with more than just submucosa. In *Northern Telecom*, 215 F.3d at 1294, the Federal Circuit found that a claim that required "plasma etching" covered processes that included both plasma and ionic etching. In this matter, although the patent focuses on the 'typical' embodiment that "consisted essentially of" submucosa, the focus does not wipe out the other broader embodiment of "comprising" submucosa.

"at least the luminal portion of the tunica mucosa"

ACell argues that whatever urinary bladder submucosa is said to comprise, it cannot comprise what has been removed, namely the lamina (tunica) propria, basement membrane, or epithelial cells. ACell contends that it is clear that the intentions of the '389 inventors was submucosa with no lamina propria or material luminal to it. ACell, relying in large part on the testimony of Dr. Badylak, as well as the incorporated '508 specification, requests this Court to instruct the jury that delamination of "at least the luminal portion of the tunica mucosa of a segment of a urinary bladder of a warm blooded vertebrate" requires removal of at least the lamina (tunica) propria, the basement membrane, and all epithelial cells.

However, the very definition that Dr. Badylak contradicts in his testimony, is consistent with ordinary dictionary meanings. The "tunica mucosa" is "the mucous membrane lining of various tubular structures, comprising the epithelium, basement membrane, lamina propria mucosae, and lamina muscularis mucosae." *DORLAND'S ILLUSTRATED MEDICAL DICTIONARY*, W.B. SAUNDERS COMPANY (1965) (reprinted 1969), Exhibit J. Furthermore, in the urinary bladder, the epithelium is made of multiple layers of cells. *Id.*; *see also*, *FUNCTIONAL HISTOLOGY*, WHEATER ET AL., page 69, figures 5.16 and 5.17 and

accompanying text (1987). By definition, the tunica mucosa is not separate from the epithelium, basement membrane, and lamia propria. Therefore, "at least the luminal portion of the tunica mucosa" would not require the entire tunica mucosa including the basement membrane, tunica propria and all epithelial cells to be removed as ACell contends. Furthermore, at the *Markman* hearing, Dr. Harbin convincingly demonstrated that there was no compelling reason or desire on the part of Cook to remove the lamina propria, basement membrane, or any other non-cellular component of an extra-cellular matrix and competently distinguished between the incorporated '508 specification and the '389 patent.

"in an amount effective to"

ACell requests this Court to instruct the jury that "comprising urinary bladder submucosa in an amount effective to induce endogenous connective tissue growth at the site that the composition is administered" requires that plaintiffs prove by a preponderance of the evidence that the accused composition (ACell Vet(TM)) contains submucosa tissue in an amount effective to induce endogenous connective tissue growth at the site that ACell Vet(TM) is administered. In its December 22, 2003 Order denying Cook's Motion for a Preliminary Injunction, this Court, placed a great deal of emphasis on an opinion authored by Judge Posner, which held that minimal inadvertent infringement is insufficient to infringe a patent claim.. *See*, *SmithKlineBeecham Corp. v. Apotex Corp.*, 247 F.Supp.2d 1011, 1051 (N.D.Ill.2003) (Posner, J.).

However, since then, Judge Posner's *SmithKline* decision has been reversed. Four months after this Court's preliminary injunction decision, the Federal Circuit overturned that case, holding, as a matter of law, that the literal scope of the claim term does not in fact, cover minimal inadvertent infringement.

SmithKlineBeecham Corp. v. Apotex Corp., 365 F.3d 1306 (Fed.Cir.2004). Although Judge Posner concluded that reading a claim ... to include compositions with only a few molecules ... would "produce absurd results" and would "not serve any policy of patent law," *SmithKline*, 247 F.Supp.2d at 1030, the Federal Circuit responded that literal claim construction "is not a policy-driven inquiry." *SmithKline*, 365 F.3d at 1314.

ACell argues however, that its point is that the '389 inventors carefully defined UBS to exclude the lamina (tunica) propria and material luminal to it and that *SmithKline* has no *Markman* relevance. However, this has been addressed above and such argument fails. Under its ordinary meaning, "at least the luminal portion of the tunica mucosa" would not necessarily require the entire tunica mucosa including the basement membrane, tunica propria and all epithelial cells to be removed as ACell contends.

In short, where a composition claim requires an ingredient without specifying a quantity, it is reversible error to read in a quantitative limitation. Therefore, ACell's proffered jury instruction on "an amount effective to" must be rejected. ACell also argues that a limitation should be placed on the ' 389 patent in regards to the manufacturing process provided in the specification for making UBS. However, it is legal error to incorporate method limitations into a device claim even when the patent only teaches a single method. *AFG Indust. v. Cardinal IG Co.*, 2004 U.S.App. LEXIS 14342, at *13; *see also* *Vanguard Products Corp. V. Parker Hannifin Corp.*, 234 F.3d 1370 (Fed.Cir.2000).

Markman Ruling

At the time this Court entered its preliminary injunction determination no *Markman* hearing had been held. In that preliminary injunction Order, this Court focused on the 'typical' embodiment while not affording the proper focus to the broader embodiment as well as the literal language of the claim. Further, only certain aspects of Claims 1 and 8 were determined by this Court when, in actuality, it would have best served

everyone to address all of the disputed terms in the claims initially. In lay terms, the cart was put somewhat before the horse here. *Markman* is the foundation by which claim construction is based and therefore in order to properly construe disputed claims or terms a full blown *Markman* analysis and post briefing of such is the most useful instrument in aiding the court in its responsibility of claim construction. It is worth note, that undoubtedly this is a very convoluted and very fact-specific, difficult case, as are most patent cases, and the more information attained the easier the tasks of the court become. An illustration of the difficulty of these cases need go no further than the inconsistencies that exist throughout our system. This is not a criticism in the least, but is stated merely to demonstrate the intricacies of patent law which seem to remain in constant dispute among the various courts.

That being said, in its preliminary injunction determination, this Court was persuaded to attach the more limited scope to the patent. While this Court was not persuaded that the term 'comprising' limited the patent to essentially submucosa in and of itself, it held that the specification was clear that the inventors wanted the submucosa delaminated from adjacent bladder tissue layers. However, in order to determine the full extent of what this means in regards to claim construction, it is necessary to construe "at least the luminal portion of the tunica mucosa." In light of the evidence conveyed at the *Markman* hearing as well as the ordinary meaning of tunica mucosa as defined, this Court is now convinced that removal of "at least the luminal portion of the tunica mucosa," does not necessarily mean removal of the basement membrane, tunica propria and all epithelial cells. Therefore, the broader scope of the patent would seem to apply.

For a *Markman* decision "the analytical focus must begin and remain centered on the language of the claims themselves for it is that language that the patentee chose to use to 'particularly point out and distinctly claim the subject matter which the patentee regards as his invention.' 35 U.S.C. s. 112, para. 2." *Texas Digital Systems, Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1201-02 (Fed.Cir.2002). In order to overcome the presumption in favor of ordinary meaning, a defendant must show: (1) that "the patentee demonstrated an intent to deviate from the ordinary and accustomed meaning of a claim term by redefining the term"; or (2) where the file history includes words "representing a clear disavowal of claim scope." *Teleflex*, 299 F.3d at 1327; *see also* *Texas Digital*, 308 F.3d at 1204. A patentee has shown an intent to deviate from the ordinary meaning when, "acting as his own lexicographer, [he] has clearly set forth an explicit definition of the term different from its ordinary meaning." *Texas Digital*, 308 F.3d at 1204; *see also* *Inverness Medical Switzerland GmbH and Unipath Diagnostics, Inc. v. Princeton Biomeditech Corp.*, 309 F.3d 1365, 1372 (Fed.Cir.2002). None of these circumstances exist here and therefore the rule of ordinary meaning must govern.

Now, that a full blown *Markman* hearing has been held, and this Court has all of the disputed terms and proffered jury instructions on claim construction from each side before it, it is in a better position to construe all of the terms. In doing so, based on the foregoing, ACell's proposed instructions on claim construction must be rejected and Cook's proposed jury instructions, being consistent with the terms of the '389 patent as well as the intrinsic record, adopted.

Summary Judgment Motion

It is also necessary at this time to discuss the pending motion for summary judgment which was filed by ACell. ACell filed a motion for summary judgment on the issue of infringement. In its brief ACell argues that this Court's preliminary claim construction of Claim 1 in its December 22, 2003 Order precludes a finding of infringement as a matter of law. Throughout its brief ACell refers to the preliminary injunction determination as the *Markman* ruling. This is error. In that December 22, 2003 preliminary injunction Order

this Court was clear that such was not to be construed as a full-blown *Markman* analysis and that claim interpretation for a preliminary injunction is necessarily a preliminary determination and that this court would not be bound by such a preliminary interpretation for subsequent proceedings in this case. *See*, *Sofamor Danek Group, Inc., v. DePuy-Motech, Inc.*, 74 F.3d 1216, 1221 (Fed.Cir.1996).

The summary judgment standard in patent cases when determining infringement is a two-step process. First, the court determines the scope and meaning of the asserted claim. Then, the court compares the properly construed claims with the accused device or product to reach a finding regarding infringement. *Johnson Worldwide Assocs., Inc. v. Zebco Corp.*, 175 F.3d 985, 988 (Fed.Cir.1999). This court reviews the first determination without deference. *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1456 (Fed.Cir.1998). In the context of summary judgment, this court reviews the second determination for genuine disputes of material facts that would preclude a grant of summary judgment. *Hilgraeve Corp. v. McAfee Assocs., Inc.*, 224 F.3d 1349, 1352-54 (Fed.Cir.2000). In particular, a trial court cannot reach a conclusive finding of noninfringement if the record shows some evidence supporting a finding of noninfringement and some evidence to the contrary. *AFG Indus., Inc. v. Cardinal IG Co., Inc.* 2004 U.S.App. LEXIS 14342 (Fed.Cir. July 13, 2004).

At the time of the briefing of the motion for summary judgment, ACell was relying on this Court's preliminary determination. Besides the fact that a *Markman* hearing had not been held and an analysis based on such hearing had not been performed at that time, there were also other claims that had not yet been construed. Additionally, discovery has not yet been completed in this matter. In order to properly adjudicate summary judgment in this matter, and in light of the present *Markman* determination, the appropriate remedy is to delay any consideration of summary judgment. Therefore the motion for summary judgment filed by ACell on the issue of infringement is **DENIED** at this time, with the opportunity to renew and re-file any such dispositive motions after the completion of discovery and in accordance with this Order.FN5

FN5. Accordingly, ACell's Rule 54(b) Judgment Motion is also **DENIED** at this time.

III. Conclusion

Based on the foregoing, Cook's proposed jury instructions on claim construction are hereby adopted in accordance with *Markman*. ACell's Motion for Summary Judgment (Doc. # 102) is **DENIED**, with opportunity to renew and re-file any and all dispositive motions once discovery is completed and in accordance with this Order. And finally, ACell's Motion For Entry of Judgment under Rule 54(b) (Doc. # 104) is **DENIED**.

IT IS SO ORDERED.

N.D.Ind.,2004.

Cook Biotech Inc. v. ACell, Inc.

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