United States District Court,
D. Delaware.

BOSTON SCIENTIFIC SCIMED, INC. and Boston Scientific Corporation,
Plaintiffs.
v.
CORDIS CORPORATION and Johnson & Johnson, Inc,
Defendants.

No. Civ. 03-283-SLR

June 3, 2005.

Andre G. Bouchard, Karen L. Pascale, Bouchard, Margules & Friedlander, P.A., Wilmington, DE, for Plaintiffs.

John G. Day, Steven J. Balick, Ashby & Geddes, Wilmington, DE, for Defendants.

MEMORANDUM ORDER

ROBINSON**, J.**

At Wilmington this 3rd day of June, 2005, having heard oral argument and having reviewed the papers submitted in connection with the parties' proposed claim construction;

IT IS ORDERED that the disputed claim language in U.S. Patent No. 6,120,536 ("the '536 patent"), as identified by the above referenced parties, shall be construed consistent with the tenets of claim construction set forth by the United States Court of Appeals for the Federal Circuit, as follows:

A. Claim 1 of the '536 patent**.**

1. "A coating for release of at least one biologically active material, wherein said coating comprises an undercoat ... and wherein said coating further comprises a topcoat which at least partially covers the undercoat."

Consistent with the claim language and its ordinary meaning, FN1 the specification FN2 and the prosecution history,FN3 the court construes this phrase to mean "a coating with at least two separate layers, an undercoat that is applied under a topcoat, the topcoat at least partially covering the undercoat."

FN1. '536 patent, col. 13, 11. 18-25 (defining each layer separately and assigning each its own properties, i.e. "undercoat comprising a hydrophobic elastomeric material incorporating an amount of biologically active material ..." and "a topcoat ... comprising a biostable, non-thrombogenic material ...").

FN2. *See generally,* '536 patent (describing method for preparing and applying undercoating as separate from preparation and application of topcoat).

FN3. During prosecution of the '536 patent, the patentees disclaimed stents with single layer coatings. To distinguish their invention from prior art, the patentees insisted that their invention required a coating that was comprised of "separate layers." (D.I. 300, Ex. 9 at DFH106-108) By making these statements, the patentees "rejected the examiner's broad assessment of claim scope and stated in a public record what [their] invention could not be", thus, surrendering the broader claim scope that would have included stents coated with less than two separate layers. Omega Eng'g, Inc. v. Raytek Corp., 334 F.3d 1314, 1327 (Fed.Cir.2003).

2. "Elastomeric material."

Consistent with the claim language and its ordinary meaning FN4 and the specification,FN5 the court construes "elastomeric material" to mean "a material that is able to stretch or expand without breaking, and to return to its original dimensions."

FN4. In determining the ordinary meaning of the claim language, the court relied in part on statements made by the patentee during prosecution of two applications that are related to the '536 patent. (D.I. 304, Ex. 21 at 6-7; Ex. 22 at 13-14) Statements made by the patentee in these related applications are relevant to considerations of the '536 patent. *See* Jonsson v. Stanley Works, 903 F.2d 812, 818 (Fed.Cir.1990). While the court has found that none of these statements amounted to an "explicit disclaimer of subject matter sufficient to vary the scope of the claim," the statements were helpful in determining the ordinary meaning within the relevant art. Novartis Pharm., Corp. v. Eon Labs Mfg. Inc., 363 F.3d 1306, 1311 (Fed.Cir.2004).

FN5. '536 patent, col. 5, 11. 50-59.

3. "Non-thrombogenic material which provides long term non-thrombogenicity to the device portion during and after release of the biologically active material."

Consistent with the claim language and its ordinary meaning,FN6 the specification FN7 and the prosecution history,FN8 the court construes this phrase as meaning "a material that does not promote thrombosis for a period of time that extends both during and after release of the biologically active material."

FN6. '536 patent, col. 13, 11. 23-24; Stedman's Medical Dictionary 1831 (27th ed.2000) (defining "thrombogenic" as "[c]ausing thrombosis or coagulation of the blood"). In the background of the invention, the patentee refers to prior art with "thrombolytic agents." ('536 patent, col. 2, 1. 36) Something that is "thrombolytic" "break[s] up or dissolve[s] a thrombus." Stedman's Medical Dictionary 1831 (27th ed.2000). Notably, the patentees used a more passive term to describe their invention and the court has construed it accordingly.

FN7. '536 patent, col. 2, 11. 30-46; col. 6, 11. 52-55. Defendants argue that construction of this limitation

should include the instruction that there is a "significant reduction in thrombogenicity over that experienced with bare metal stents." (D.I.307) There is nothing in the specification or prosecution history that the patentees intended the claim to be limited in this way.

FN8. D.I. 300, Ex. 9 at DFH 106.

4. "Topcoat is substantially free of an elutable material."

Consistent with the claim language and its ordinary meaning FN9 and the specification,FN10 the court construes this phrase to mean "the topcoat is largely or approximately free of an elutable material."

FN9. *See, e.g.,* Cordis Corp. v. Medtronic AVE, Inc., 339 F.3d 1352, 1360 (Fed.Cir.2003).

FN10. '536 patent, col. 6, 11. 28-32 (explicitly defining "elution")

B. Claim 8 of the '536 patent**.**

1. "Open lattice sidewall structure."

Consistent with the claim language and its ordinary meaning, the court construes this limitation to mean "regular geometric pattern of openings in the side wall of the stent."

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