United States District Court,
W.D. Texas, San Antonio Division.

KINETIC CONCEPTS, INC., KCI Licensing, Inc. KCI USA, Inc. and Wake Forest University Health Sciences,
Plaintiffs.
v.
BLUESKY MEDICAL CORPORATION, Medela AG, Medela, Inc., and Patient Care Systems, Inc,
Defendants.

No. SA-03-CA-0832-RF

Jan. 24, 2006.

Alan Michael Ferrill, Cox Smith Matthews Incorporated, Kirt S. O'Neill, R. Laurence Macon, Akin Gump Strauss Hauer & Feld LLP, San Antonio, TX, for Plaintiffs.

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ORDER CONSTRUING PATENTS '643 AND '081 CLAIM TERMS

ROYAL FURGESON**, District Judge.**

BEFORE THE COURT are a number of filings with regard to the claim construction for the disputed claim terms in patent '643 and '081. FN1 A *Markman* hearing was held on November 14, 2005, and the parties subsequently submitted additional briefing to the court regarding the proper construction of the disputed claim terms. After due consideration of the arguments presented and the relevant case law, the Court ORDERS the following ' 643 and ' 081 patent term constructions: FN2

FN1. *See, for instance,* Joint Claim Construction and Prehearing Statement (Docket No. 321); Plaintiffs' Opening Brief on Claim Construction of Disputed Claim Terms from the '643 and '081 Patents (Docket No. 332); Joint Motion for Entry of Order Adopting Parties' Stipulated Claim Term Construction (Docket No. 333); Defendants' Opening Brief Regarding Claim Construction for the '081 Patent and Certain Claims of the '643 Patent (Docket No. 334); Plaintiffs' Responsive Claim Construction Brief on the Disputed Claim Terms from the '643 and ' 081 Patents (Docket No. 351); Defendants' Responsive Brief Regarding Second Claim Construction Hearing ('081 Patent and Certain Claims of ' 643 Patent) (Docket No. 352); Defendants' Reply to Plaintiffs' Responsive Claim Construction Brief on the Disputed Claim Terms from the ' 643 and '081 Patents (Docket No. 370); Plaintiffs' Reply Claim Construction Brief (Docket No. 373).

FN2. BlueSky's allegations of claim indefniteness have not yet been heard or decided by this court, and this order in no way limits or precludes those arguments.

(1) The term "facilitating the healing of wounds" in Claims 1, 27, and 54 of Patent '081 shall be construed as "facilitating the healing of injuries."

(2) The term "screen means for positioning at the wound within the sealing means for preventing the overgrowth of tissue in the wound" in Claims 1 and 27 of Patent '081 shall be construed as "a porous material that applies a counter-acting force to granulation tissue to stop growth of granulation tissue above the level of skin surrounding the wound, the porous material being positioned at the wound within the sealing means."

(3) The term "screen means for positioning at the wound within the sealing means, said screen means having a pore size sufficiently large to prevent the overgrowth of tissue in the wound" in Claim 54 of Patent '081 is construed as "a porous material that applies a counter-acting force to granulation tissue to stop growth of granulation tissue above the level of skin surrounding the wound, the porous material being positioned at the wound within the sealing means."

(4) The term "screen adapted to prevent overgrowth of wound tissue, said screen being located between said wound and said cover in Claim 1 of Patent '643 shall be construed as "a porous material that applies a counter-acting force to granulation tissue to stop growth of granulation tissue above the level of skin surrounding the wound, the porous material being positioned at the wound within the sealing means."

(5) The term "impermeable cover" in Claims 1, 6, 11, 16, 26, and 28 of Patent '643 shall be construed as a liquid-tight (WVTR < 836) or gas tight cover.

BACKGROUND

The factual background of the case and of the '643 patent was set forth in this Court's Order Construing Patent '643 Claim Terms (Docket No. 258). With regard to this claim construction, the parties request the Court to construe two more terms from the '643 patent, as well as three terms from the '081 patent. On July 8, 1997, the U.S. Patent and trademark office issued U.S. Patent No. 5,645,081 ("081 Patent") with regard to the V.A.C. System to Drs. Argenta and Morykwas, entitled "Method of Treating Tissue Damage and Apparatus for Same." The record reflects that the '081 Patent is a continuation of the '643 Patent, resulting in a parent-child relationship, with the '081 patent being the parent and the '643 patent being the child.

The Abstract for the '081 patent provides the following summary of the invention at issue:

The invention disclosed is a method of treating tissue damage comprising applying a negative pressure to a wound sufficient in time and magnitude to promote tissue migration and thus facilitate closure of the wound. The method is applicable to wounds, burns, infected wounds, and live tissue attachments. Configurations of apparatus for carrying out the method are also disclosed.

LEGAL PRINCIPLES GOVERNING CLAIM CONSTRUCTION

Claim language defines claim scope, and "the first step in an infringement analysis is to construe the claims,

i.e., to determine the scope and meaning of that which is allegedly infringed." FN3 Generally claims should be given their ordinary meaning as understood by a person having ordinary skill in the art.FN4 Disputes as to the meaning and scope of terms used in the claims are determined as a matter of law, based on the claims, the rest of the patent specification, and the prosecution history.FN5 At all times during the claim-construction analysis, the language of the patent claims controls. FN6 Even though the claim language controls, the claims should be read in view of the patent specification, which includes the written descriptions and the drawings.FN7 The Court may also receive guidance from dictionaries and other extrinsic evidence.FN8 Dictionaries may be used as an interpretive aid, but they may not be used to vary or contradict the claim language or the specification.FN9

FN3. Amgen Inc. v. Hoechst Marion Roussel, Inc., 314 F.3d 1313, 1324 (Fed.Cir.2003) (citing Markman v. Westview Instr, Inc., 52 F.3d 967, 976 (Fed.Cir.1995), affd, 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996)).

FN4. Hockerson-Halberstadt, Inc. v. Avia Group Int'l, Inc., 222 F.3d 951, 955 (Fed.Cir.2000).

FN5. Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed.Cir.1996); Markman, 52 F.3d at 979-80.

FN6. York Prods., INIc. v. Cent. Tractor Farm & Family Ctr., 99 F.3d 1568, 1572 (Fed.Cir.1996).

FN7. Markman, 52 F.3d at 979.

FN8. SuperGuide Corp. v. DirecTV Enters., Inc., 358 F.3d 870, 875 (Fed.Cir.2004) ("[D]ictionaries are often helpful in ascertaining the plain and ordinary meaning of claim language.")

FN9. Phillips v. AWH Corp., 415 F.3d 1303, 1321 (Fed.Cir.2005) ("[H]eavy reliance on the dictionary divorced from the intrinsic evidence risks transforming meaning of the claim term to the artisan into the meaning of the term in the abstract, out of its particular context, which is the specification.").

'081 Patent Claims

At issue in this Order is Plaintiffs' charge that Defendants infringed claims in the '081 patent. The parties have stipulated to agreed constructions for most of the '081 patent claims, but the terms underlined below in claims 1, 27, and 54 of the '081 patent remain in dispute:

-> Claim 1: An apparatus for *facilitating the healing of wounds,* comprising:

- vacuum means for creating a negative pressure between about 0 .1 and 0.99 atmospheres on the area of skin including and surrounding the wound;-sealing means operatively associated with said vacuum means

for maintaining said negative pressure on said wound by contacting the skin surrounding said wound; and

- screen means for positioning at the wound within the sealing means for preventing the overgrowth of tissue in the wound.

-> Claim 27: An apparatus for *facilitating the healing of wounds,* comprising:

- vacuum means for creating a negative pressure on the area of skin including and surrounding the wound, wherein said vacuum means operates cyclically to provide periods of application and non-application of suction with the ratio of duration of application period to non-application period between about 1:10 and 10:1;

- sealing means operatively associated with said vacuum means for maintaining said negative pressure on said wound by contacting the skin surrounding said wound; and

- screen means for positioning at the wound within the sealing means for preventing the overgrowth of tissue in the wound.

-> Claim 54: An apparatus for *facilitating the healing of wounds,* comprising:

- vacuum means for creating a negative pressure on the area of skin including and surrounding the wound;

- sealing means operatively associated with said vacuum means for maintaining said negative pressure on said wound by contacting the skin surrounding said wound; and

- screen means for positioning at the wound within the sealing means, said screen means having a pore size sufficiently large to prevent the overgrowth of tissue in the wound.

First, with regard to the term "facilitating the healing of wounds" in Claims 1, 27, and 54, Plaintiffs contend that the term has already been construed in the Court's Order Construing Patent '643 Claim Terms (Docket Nol. 258) in which the Court defined "wound" to mean "injury." Plaintiffs contend that "facilitating" and "healing" are so common as to not warrant further construction. Alternatively, Plaintiffs argue that if the Court does find it necessary to construe this term that it adopt the construction "promoting or accelerating the healing of injuries." In contrast, Defendants contend that the invention does not "heal" wounds in the traditional sense of the word, but instead simply increases the likelihood that the wound will heal. Therefore, Defendants propose that the term be construed as "promoting conditions that increase the likelihood of injury repair ."

Second, concerning the term "screen means for positioning at the wound within the sealing means for preventing the overgrowth of tissue in the wound" in Claims 1 and 27, and the term "screen means for positioning at the wound within the sealing means, said screen means having a pore size sufficiently large to prevent the overgrowth of tissue in the wound," Defendants argue that "screen" must be construed to mean "barrier." Further, Defendants claim that "overgrown" tissue is a special type of wound tissue known as "hypertrophic granulation." Plaintiffs counter that the "screen" element of these claims is the porous material repeatedly mentioned in both the '081 and '643 patents.

'643 Patent Claims

Also at issue in this Order is Plaintiffs' charge that Defendants infringed on claims in the '643 patent. The parties have stipulated to agreed constructions for most of the '643 patent claims, but the terms underlined below in claims 1, 6, 11, 16, 26, and 28 remain in dispute:

-> An appliance for administering a reduced pressure treatment to a wound comprising:

(a) an *impermeable cover* adapted to cover and enclose the wound and adapted to maintain reduced pressure at the site of the wound;

(b) a seal adapted to seal said cover to tissue surrounding the wound;

(c) reduced pressure supply means for connection to a source of suction, said reduced pressure supply means cooperating with said cover to supply said reduced pressure beneath said cover; and

(d) *a screen adapted to prevent overgrowth of wound tissue, said screen being located between said wound and said cover*.

-> Claim 6: An apparatus for treating a wound comprising:

(a) a vacuum system adapted to produce a reduced pressure, wherein said vacuum system includes a collection device for collecting fluid aspirated from the wound, wherein said collection device includes means for halting said application of reduced pressure to the wound when said fluid exceeds a predetermined quantity; and

(b) a reduced pressure appliance operably connected with said vacuum system adapted to apply said reduced pressure to the wound, the appliance including:

(i) an *impermeable cover* adapted to cover and enclose the wound and adapted to maintain reduced pressure at the site of the wound;

(ii) a seal adapted to seal said cover to tissue surrounding the wound; and

(iii) reduced pressure supply means for connection with the vacuum system adapted to supply said reduced pressure within said cover to the wound.

-> Claim 11: A method of treating a wound comprising the steps of:

(a) applying a reduced pressure to the wound, wherein said applying step comprises of:

(i) placing a porous screen over the wound;

(ii) locating an *impermeable cover* over the wound, said cover having a suction port;

(iii) sealing the periphery of said *impermeable cover* to tissue surrounding the wound; and

(iv) operably connecting said suction port with a vacuum system for producing said reduced pressure; and

(b) maintaining said reduced pressure until the wound has progressed toward a selected stage of healing.

-> Claim 16: An appliance for administering a reduced pressure treatment to a wound comprising:

(a) an *impermeable cover* adapted to cover and enclose the wound and adapted to maintain reduced pressure at the site of the wound, wherein said cover comprises a flexible sheet;

(b) a seal adapted to seal said cover to tissue surrounding the wound; and

(c) reduced pressure supply means for connection to a source of suction, said reduced pressure supply means cooperating with said cover to supply said reduced pressure beneath said cover.

-> Claim 26: An apparatus for treating a wound comprising:

(a) a vacuum system adapted to produce a reduced pressure, wherein said vacuum system comprises:

(i) a vacuum pump;

(ii) a filter for preventing said pump from venting micro-organisms aspirated from the wound; and

(b) a reduced pressure appliance operably connected with said vacuum system adapted to apply said reduced pressure to the wound, the appliance including:

(i) an *impermeable cover* adapted to cover and enclose the wound and adapted to maintain reduced pressure at the site of the wound;

(ii) a seal adapted to seal said cover to tissue surrounding the wound; and

(iii) reduced pressure supply means for connection with the vacuum system adapted to supply said reduced pressure to the wound, wherein said reduced pressure supply means comprises a length of tubing connected between said vacuum and said cover.

-> Claim 28: An apparatus for treating a wound comprising:

(a) a vacuum system adapted to produce a reduced pressure, wherein said vacuum system comprises control means for cyclically controlling said production of reduced pressure in alternating periods of production and non-production of reduced pressure; and

(b) a reduced pressure appliance operably connected with said vacuum system adapted to apply said reduced pressure to the wound, the appliance including:

(i) an *impermeable cover* adapted to cover and enclose the wound and adapted to maintain reduced pressure at the site of the wound;

(ii) a seal adapted to seal said cover to tissue surrounding the wound; and

(iii) reduced pressure supply means for connection with the vacuum system adapted to supply said reduced

pressure to the wound.

First, with regard to the term "impermeable cover" in Claims 1, 6, 11, 16, 26, and 28, Plaintiffs contend that this term was previously construed by the Court in the Order Construing Patent '643 Claims (Docket No. 258) when the Court construed "appliance" to mean a "wound cover that is generally fluid-tight or gas-tight." Plaintiffs claim that the wound cover referred to in the '643 patent is an impermeable wound cover. Defendants counter that for a wound cover to be impermeable, it must necessarily be both fluid-tight and gas-tight, not one or the other.

Second, concerning the term "screen adapted to prevent overgrowth of wound tissue, said screen being located between said wound and said cover," both Plaintiffs' and Defendants' arguments are the same as those described for this term in the '081 Patent.

DISCUSSION OF '081 PATENT

I. ***Claims 1, 27, and 54-"facilitating the healing of wounds"***

The Court previously construed "wound" to mean "injury." FN10 Because the meaning of the words "facilitating" and "healing" are not unclear and the specification does not provide an alternative meaning, the Court finds that the words should be interpreted according to their plain and ordinary meaning and the term to be construed as "facilitating the healing of injuries." FN11

FN10. Order Construing Patent '643 Claims (Docket 258) at p. 7.

FN11. *See* Hockerson-Halbertstadt, Inc. v. Avia Group International, Ltd., 222 F.3d 951, 955 (Fed.Cir.2000); *see also* Johnson Worldwide Associates, Inc. v. Zebco Corp., 175 F.3d 985, 989-90 (Fed.Cir.1999) ("The general rule is, of course, that terms in the claim are to be given their ordinary and accustomed meaning.").

II. ***Claims 1 and 27-"screen means for positioning at the wound within the sealing means for preventing the overgrowth of tissue in the wound"***

Plaintiffs argue that "screen" should be construed as "porous material," while the Defendants contend that "screen" should be interpreted to mean "barrier" and the term "hypertrophic granulation" should be added to describe the "overgrowth" tissue. The Court finds that "porous material" is supported by the patent specification.FN12 On the other hand, the term "barrier" does not appear anywhere in the specification. Similarly, the term "hypertrophic granulation" is not used at all in the patent specification. In fact, the specification describes granulation tissue as having ameliorative properties. FN13 In contrast, hypertrophic granulation has a negative connotation, and therefore, is contrary to the patent specification and should not be included in the claim term construction. Accordingly, the Court adopts Plaintiffs' construction of "a porous material that applies a counter-acting force to granulation tissue to stop growth of granulation tissue above the level of skin surrounding the wound, the porous material being located between the wound and the cover."

FN12. *See* '081 Patent, col. 4, ll 48-50.

FN13. Id. at col. 2, ll 52-58.

III. ***Claim 54-"screen means for positioning at the wound within the sealing means, said screen means having a pore size sufficiently large to prevent the overgrowth of tissue in the wound"***

Plaintiffs' and Defendants' proposed constructions for this "screen means" claim are identical to the constructions for Claim 1 and 27, discussed above, except that Defendants adopt the term "porous" for this claim. Accordingly, the Court adopts Plaintiffs' construction of "a porous material that applies a counter-acting force to granulation tissue to stop growth of granulation tissue above the level of skin surrounding the wound, the porous material being located between the wound and the cover."

DISCUSSION OF '643 CLAIM TERMS

I. ***Claim 1: "screen adapted to prevent overgrowth of wound tissue, said screen being located between said wound and said cover"***

Plaintiffs' and Defendants' proposed constructions for this "screen means" claim are identical to the constructions for Claim 1, 27, and 54 in the '081 patent, discussed above. Accordingly, the Court adopts Plaintiffs' construction of "a porous material that applies a counter-acting force to granulation tissue to stop growth of granulation tissue above the level of skin surrounding the wound, the porous material being located between the wound and the cover."

II. ***Claims 1, 6, 11, 16, 26, and 28: "impermeable cover"***

Parties contest the construction of the term "impermeable cover," recited in claims 1, 6, 11, 16, 26, and 28 of the '643 patent. KCI argues that "a generally fluid-tight or gas-tight cover" properly defines the disputed claim term, while BlueSky asserts that the claim term should be construed to mean "fluid-tight and gas-tight." FN14

FN14. At the Markman hearing, both parties conceded that there exist a few gas-impermeable yet liquid-permeable materials and that those materials are not relevant to the contested issues; they are, therefore, not considered in this analysis.

BlueSky argues that due to the use of "impermeable" in the claim, an impermeable cover must, by its plain meaning, be both liquid-tight and gas-tight. Though the claim itself recites an "impermeable cover," the Court looks to the specification to see if there is a definition that varies the common meaning of the word "impermeable." FN15 BlueSky's suggested construction does not expressly appear in the specification; rather, the specification refers to the cover as fluid impermeable or gas impermeable, in the disjunctive.FN16 Moreover, the specification, at times, refers to the two separately.FN17 Therefore, the specification teaches a fluid-tight or gas-tight cover.

FN15. "Although words in a claim are generally given their ordinary and customary meaning, a patentee may choose to be his own lexicographer and use terms in a manner other than their ordinary meaning, as long as the special definition is clearly stated in the patent specification or file history." Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed.Cir.1996).

FN16. The patent specification refers to a fluid impermeable or gas impermeable cover (col.7, ll.52-55).

FN17. The patent specification refers to a fluid impermeable cover (col. 2, 1.67; col. 10, ll. 31-33 & 64-66; col. 11, 1.38; col. 12, ll. 4-5.) The patent specification also refers to a gas impermeable cover (col. 3, 1.54; col. 7, 1.43).

Turning to the disagreement over use of "generally," BlueSky argues that the claim language itself clearly states that the cover is impermeable, without qualification. Furthermore, claim 23 employs qualifying language, demonstrating that KCI knew how to, and in fact did, claim an element of its invention imprecisely.FN18 Because KCI chose not to claim impermeable imprecisely, BlueSky argues that KCI should not now be allowed to redefine the scope of the claim.FN19 Additionally, BlueSky points to instances in the specification in which the word generally does not preface the terms fluid-tight and gas-tight.FN20

FN18. Claim 23 recites:
An appliance for administering a reduced pressure treatment to a wound comprising:

(a) an *impermeable cover* adapted to cover and enclose the wound and adapted to maintain reduced pressure at the site of the wound, wherein said cover is *sufficiently* rigid to support said cover out of contact with the wound ... (emphasis added).

FN19. *See* Jeneric/Pentron, Inc. v. Dillon Co., 205 F.3d 1377, 1381 (Fed.Cir.2000).

FN20. The patent specification describes the cover as fluid or gas impermeable, not qualified by the word "generally" (see col. 2, 1.67; col. 3, 1.54; col. 6, ll. 34 & 33; col. 7, ll. 43, 53, & 54; col. 10, 1.32; col. 11, 1.38; col. 12, 1.5).

KCI counters, citing abundant references to the use of "generally" in the specification to describe the extent of permeability. Moreover, the prosecution history of the '081 patent reinforces this contention.FN21 However, "generally" is never used to describe the permeability of the cover, itself, in the ' 643 patent specification but, rather, modifies the enclosure created by the appliance.FN22 Therefore, the use of "generally," in describing the permeability of the cover, is neither claimed in a qualified manner nor supported by the specification.

FN21. The '081 patent is the parent of the '643 continuation-in-part. In the prosecution history of the '081 patent, KCI distinguished the Zamierowski patent, stating that "in the present invention, it is desired to maintain a relatively high moisture level near the wound since a sufficient level of moisture is desirable to

aid in the healing process. Accordingly, the use of a relatively impermeable membrane is beneficial." BlueSky Opening Brief Regarding Claims Construction for the '081 Patent and Certain Claims of the '643 Patent, MINC 002432.

FN22. The patent specification utilizes the qualifier "generally" in describing the enclosure (see col. 3, ll. 6 & 7; col. 5, ll. 41 & 42; col. 6, ll. 28-29 & 39-40; col. 11, ll. 30 & 31) and the degree of circularity of the cover in one embodiment (see col. 10, 1.67; col. 11, 1.22).

With respect to the use of "fluid," BlueSky contends that the common usage of the term includes both liquid and gas, as understood by a person having ordinary skill in the art.FN23 BlueSky's argument is not without merit. Accordingly, fluid, as used by KCI in the prosecution history of the ' 081 patent, refers to both liquid and gas.FN24 However, KCI argues that the term, as used in the ' 643 patent specification, refers only to liquid. Ultimately, the patent specification consistently uses fluid synonymously with liquid.FN25 Moreover, BlueSky's construction of "fluid" lacks merit because it would render the latter half of the phrase redundant. FN26

FN23. When interpreting claims, the proper inquiry asks how a person of ordinary skill in the art would have understood claim terms at the time of the invention. Phillips v. AWH Corp., 415 F.3d 1303, 1313 (Fed.Cir.2005) (en banc). "Importantly, the person of ordinary skill in the art is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification." *Id*.

FN24. If "fluid-impermeable," as used in the prosecution history, meant only liquidimpermeable, the cover would be semi-permeable, and KCI's argument would be meaningless, as there would be no distinction between its invention and the invention argued to be distinguishable.

FN25. "[T]he same terms appearing in different portions of the claims should be given the same meaning unless it is clear from the specification and prosecution history that the terms have different meanings at different portions of the claims. If possible, this court construes claim terms 'in a manner that renders the patent internally consistent.' " Frank's Casing Crew & Rental Tools, Inc. v. Weatherford Int'l, Inc., 389 F.3d 1370, 1376 (Fed.Cir.2004) (citations omitted). The patent uses fluid, meaning liquid, in describing and claiming the vacuum aspect of the invention (see claim 6; see also, e.g., col. 3, 1.41; col. 7, ll. 59, 64, & 65; col. 8, 1.66; col. 9, ll. 2, 50, & 51; see also col. 9, ll. 59 & 60).

FN26. Liquid and gas impermeable or gas impermeable both describe the same materials (excluding those rare gas-impermeable and liquid-permeable substances, as previously noted).

Construing "fluid" to mean liquid, as the specification requires, potentially implicates the judicially created doctrine of prosecution history estoppel. FN27 During the concurrent prosecution of the ' 081 patent, KCI responded to the patent examiner's s. 102(b) FN28 rejection of similar claim language, in view of the Zamierowski patent. In so doing, KCI distinguished its invention from that of Zamierowski, which claimed

a suction device for healing wounds with a semi-permeable cover. KCI argued: "[Our claim] recites the use of a 'fluidimpermeable cover. In contrast, Zamierowski, *et al*. discloses the use of a 'semi-permeable' cover and does not teach or suggest the use of a fluid-impermeable cover." Contrary to KCI's protestation, this limitation, created by KCI's response to an examiner's objection to the later-issued parent application, is relevant to the instant analysis.FN29

FN27. Amgen, Inc. v. Hoechst Marion Roussel, Inc., 287 F.Supp.2d 126 (D.Mass.2003).

FN28. 35 U.S.C. s. 102(b).

FN29. *See* Microsoft Corporation v. Multi-tech Systems, Inc., 357 F.3d 1340, 1346-1350 (Fed.Cir.2004), *cert. denied,* 543 U.S. 821, 125 S.Ct. 61, 160 L.Ed.2d 31 (2004) ("Any statement of the patentee in the prosecution of a related application as to the scope of the invention would be relevant to claim construction ..."); *but see* id. at 1354-55 (Rader, J., dissenting) ("[T]his court today dismisses the rule in *Georgia-Pacific v. United States Gypsum Co*. and applies the prosecution history of a later patent to limit the narrower claims of a patent issuing before such statements were made") (citing 195 F.3d 1322, 1333 (Fed.Cir.1999)). Although KCI does not raise the contention, the degree of permeability of the invention remains consistent in both parent and child-does not constitute any new matter in the child patent.

BlueSky rightly argues that KCI should not now be able to recapture that which it renounced. The Zamierowski patent teaches the use of Tegaderm,FN30 a material with a permeability rating of 836 WVTR.FN31 As a result of KCI's argument before the PTO, KCI has, at least, disclaimed all permeability greater than or equal to 836 WVTR, with respect to the invention of the ' 643 patent.

FN30. See patent no. 4, 969, 880 (col.3, 1.59).

FN31. BlueSky provided this uncontested water vapor transfer rate of Tegaderm at the Markman hearing.

Therefore, the term "impermeable cover," as claimed in the '643 patent, will be construed as follows: **a liquid-tight (WVTR < 836) or gas tight cover.**

CONCLUSION

For the foregoing reasons, the Court ORDERS that the four remaining disputed terms be construed in accordance with the discussion above.

The Court ORDERS that:

(1) The term "facilitating the healing of a wound" in Claims 1, 27, and 54 of Patent '081 shall be construed as "facilitating the healing of injuries."

(2) The term "screen means for positioning at the wound within the sealing means for preventing the

overgrowth of tissue in the wound" in Claims 1 and 27 of Patent '081 shall be construed as "a porous material that applies a counter-acting force to granulation tissue to stop growth of granulation tissue above the level of skin surrounding the wound, the porous material being positioned at the wound within the sealing means."

(3) The term "screen means for positioning at the wound within the sealing means, said screen means having a pore size sufficiently large to prevent the overgrowth of tissue in the wound" in Claim 54 of Patent '081 is construed as "a porous material that applies a counter-acting force to granulation tissue to stop growth of granulation tissue above the level of skin surrounding the wound, the porous material being positioned at the wound within the sealing means."

(4) The term "screen adapted to prevent overgrowth of wound tissue, said screen being located between said wound and said cover in Claim 1 of Patent '643 shall be construed as "a porous material that applies a counter-acting force to granulation tissue to stop growth of granulation tissue above the level of skin surrounding the wound, the porous material being positioned at the wound within the sealing means."

(5) The term "impermeable cover" in Claims 1, 6, 11, 16, 26, and 28 of Patent '643 shall be construed as a liquid-tight (WVTR < 836) or gas tight cover.

It is SO ORDERED.

W.D.Tex.,2006.
Kinetic Concepts, Inc. v. Bluesky Medical Corp.