

United States District Court,
N.D. Georgia, Atlanta Division.

MOLNLYCKE HEALTH CARE AB and Molnlycke Health Care US, LLC,
Plaintiffs.

v.

MEDLINE INDUSTRIES, INC., and Ossur HF,
Defendants.

Civil Action No. 1:06-CV-1027-WCO

June 21, 2007.

Kristin M. Crall, Steven D. Moore, Susan A. Cahoon, Renae A. Bailey, Kilpatrick Stockton, Atlanta, GA,
for Plaintiffs.

Edward F. McCormack, Justin D. Swindells, Jenkins & Gilchrist, Elizabeth W. Baio, Nixon Peabody,
Chicago, IL, Halsey G. Knapp, Jr., Foltz Martin, Thomas Joseph Mew, IV, Rogers & Hardin, Atlanta, GA,
Baldassare Vinti, James H. Shalek, Jennifer R. Scullion, Jessica Freiheit, Proskauer Rose, New York, NY,
for Defendants.

Steven D. Moore, Kilpatrick Stockton, Phillip S. McKinney, Rogers & Hardin, Atlanta, GA.

ORDER

WILLIAM C. O'KELLEY, Senior District Judge.

The captioned case is before the court for construction of the disputed claim terms in United States Patent No. 6,051,747 (the "'747 patent"). The parties have submitted briefs supporting their respective interpretations of the claims, and, on March 20, 2007, the court held a *Markman* hearing at which it heard evidence and the argument of counsel. This order provides the court's final construction of all claims presently at issue in this case.

I. Background

Plaintiffs Molnlycke Health Care AB and Molnlycke Health Care US, LLC (collectively, "Molnlycke") are the assignee and exclusive licensee, respectively, of the '747 patent. In general terms, the invention claimed in the '747 patent is directed to a wound dressing for weeping sores and the method of producing this wound dressing. The wound dressing is comprised of a layer of absorbent foam and a layer of hydrophobic gel where the gel layer coats the foam layer and adheres to the skin while allowing fluid from the wound to be absorbed into the foam. Although the gel adheres to the skin, it does not stick to wet areas of the wound, thus permitting the dressing to be removed with little pain and damage to the wound. The gel also prevents the reflux of the absorbed wound fluid back into the wound.

Several terms and phrases of the claims in the '747 patent are at issue in this case. In claim 1, an independent claim, the parties dispute the meaning of "pattern of holes," "the layer of foam material being coated with a layer of skin-adhering hydrophobic gel," and "wherein the holes in said foam material are coated with the gel at those end parts of the holes that lie proximal to the wearer's skin when the dressing is worn." In claim 2, defendants seek construction of "holes in the pattern," "pores in said foam material," "extends partially into open pores," and "without closing all pores." In claims 11 and 12, defendants seek construction of "open pores." Plaintiffs do not think that these last five phrases require interpretation. However, plaintiffs request that the court define two terms whose meanings are not disputed: "proximal" in claim 1 and "distal" in claim 6.

II. Claim Construction Standard

Claim construction is a matter of law. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 970-71 (Fed.Cir.1995) (en banc), *aff'd*, 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996). It is well-established that "the claims of the patent define the invention to which the patentee is entitled the right to exclude." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed.Cir.2005) (en banc) (quoting *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1115 (Fed.Cir.2004)). Generally, the words of a claim are given their ordinary and customary meaning, which is "the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application." *Id.* at 1312-13. The person of ordinary skill in the art is deemed to read the claim term in the context of the entire patent, including the specification. *Id.* at 1313.

"In some cases, the ordinary meaning of the claim language as understood by a person of skill in the art may be readily apparent even to lay judges." *Id.* at 1314. Frequently, however, the ordinary and customary meaning of a claim term "requires examination of terms that have a particular meaning in a field of art." *Id.* In such cases where the meaning of the disputed terms is not readily apparent, the court may look to sources available to the public, including "the words of the claims themselves, the remainder of the specification, the prosecution history, and extrinsic evidence concerning relevant scientific principles, the meaning of technical terms, and the state of the art ." *Id.* (quoting *Innova*, 381 F.3d at 1116).

"[T]he claims themselves provide substantial guidance as to the meaning of particular claim terms." *Id.* Both "the context in which a term is used in the asserted claim" and the "[o]ther claims of the patent in question" are useful for understanding the ordinary meaning of a disputed term. *Id.*

"The specification 'is always highly relevant to the claim construction analysis[,] ' and, therefore, "claims 'must be read in view of the specification, of which they are a part.' " *Id.* at 1314-15 (quoting *Vitronics Corp. v. Conceptoronic, Inc.*, 90 F.3d 1576, 1582 (Fed.Cir.1996) and *Markman*, 52 F.3d at 978). Indeed, it is well-established that the specification is "the best source for understanding a technical term." *Multiform Desiccants, Inc. v. Medzam, Ltd.*, 133 F.3d 1473, 1478 (Fed.Cir.1998); *see also* *Metabolite Labs., Inc. v. Lab. Corp. of Am. Holdings*, 370 F.3d 1354, 1360 (Fed.Cir.2004) ("In most cases, the best source for discerning the proper context of claim terms is the patent specification wherein the patent applicant describes the invention."). The correct construction is that which "stays true to the claim language and most naturally aligns with the patent's description of the invention." *Phillips*, 415 F.3d at 1316 (quoting *Renishaw PLC v. Marposs Societa' per Azioni*, 158 F.3d 1243, 1250 (Fed.Cir.1998)). On occasion, "the specification may reveal a special definition given to a claim term by the patentee that differs from the meaning it would otherwise possess. In such cases, the inventor's lexicography governs." *Id.* (citing *CCS Fitness, Inc. v.*

Brunswick Corp., 288 F.3d 1359, 1366 (Fed.Cir.2002)). In other instances, "the specification may reveal an intentional disclaimer, or disavowal, of claim scope by the inventor. In that instance as well, ... the inventor's intention, as expressed in the specification, is regarded as dispositive." *Id.* (citing *SciMed Life Sys., Inc. v. Advanced Cardiovascular Sys., Inc.*, 242 F.3d 1337, 1343-44 (Fed.Cir.2001)).

In addition to considering the claim terms and the specification, the court should also consult the patent's prosecution history. *Id.* at 1317. "Like the specification, the prosecution history provides evidence of how the [Patent and Trademark Office ("PTO")] and the inventor understood the patent." *Id.* (citing *Lemelson v. Gen. Mills, Inc.*, 968 F.2d 1202, 1206 (Fed.Cir.1992)). Unlike the specification, however, the prosecution history "represents an ongoing negotiation between the PTO and the applicant, rather than the final product of that negotiation." *Id.* For that reason, the prosecution history is less useful for claim construction purposes. *Id.*

Finally, the court may also rely on extrinsic evidence, which "consists of all evidence external to the patent and prosecution history, including expert and inventor testimony, dictionaries, and learned treatises." *Id.* (quoting *Markman*, 52 F.3d at 980). Although somewhat useful for the court in determining the meaning of disputed terms, extrinsic evidence is generally less reliable than the intrinsic record for several reasons. *Id.* at 1318. For example, "extrinsic evidence by definition is not part of the patent and does not have the specification's virtue of being created at the time of patent prosecution for explaining the patent's scope and meaning." *Id.* Additionally, "extrinsic evidence consisting of expert reports and testimony is generated at the time of and for the purpose of litigation and thus can suffer from bias that is not present in intrinsic evidence." *Id.*

"There is no magic formula or catechism for conducting claim construction." *Id.* at 1324. The court is not required to follow any particular sequence of steps in analyzing the various sources; "what matters is for the court to attach the appropriate weight to be assigned to those sources in light of the statutes and policies that inform patent law." *Id.*

III. Analysis

A. Claim 1

The parties dispute the construction of several terms and phrases in claim 1. This independent claim recites:

A wound dressing, comprising a layer of absorbent foam material which includes a ***pattern of holes***, said holes opening out on that side of the foam material that lies proximal to the skin of a wearer when the dressing is worn, and the layer of foam material being ***coated with a layer of a skin-adhering hydrophobic gel***; and ***wherein the walls of the holes in said foam material are coated with the gel at those end parts of the holes*** that lie proximal to the wearer's skin when the dressing is worn.

'747 patent, col. 8, ll. 40-48 (emphasis on disputed terms and phrases).

1. "pattern of holes"

Claim 1 of the '747 patent recites a wound dressing that has "a layer of absorbent foam material which includes a pattern of holes, said holes opening out on that side of the foam material that lies proximal to the skin of the wearer when the dressing is worn." '747 patent, col. 8, ll. 40-44. Defendants propose the following construction for the term "pattern of holes":

A distribution of openings in the surface of the side of the foam material that opens out closest to the skin of the wearer when the dressing is worn. Pores in the foam that are blocked by the gel are not "holes" in this context because they do not open out on the proximal side of the foam. The holes may be pores that occur inherently or may be introduced by mechanical means.

Plaintiffs believe that this claim phrase does not require construction, but they do not object to the third sentence of defendants' proposed construction. With regard to the first sentence, plaintiffs believe it is ambiguous because it does not distinguish whether the "distribution of openings" or the "foam material" "opens out closest to the skin" Thus, they seek the following clarification: "a distribution of openings in the surface of the foam material on the side of the foam closest to the skin of the wearer when the dressing is worn." Additionally, plaintiffs object to the second sentence, and, thus, the main dispute centers around defendant's construction that pores in the foam that are blocked by the gel layer do not form part of the "pattern of holes."

Defendants contend that their construction is mandated by the clear language of the claim, which recites "a pattern of holes, *said holes opening out* on that side of the foam that lies proximal to the skin of the wearer." '747 patent, col. 8, ll. 41-43 (emphasis added). Defendants argue that holes *blocked* by the gel *ipso facto* do not *open* out on the proximal side of the foam and cannot be part of the "pattern of holes." Plaintiffs, meanwhile, argue that the phrase "opening out" merely describes the direction of the holes, i.e., that they open out on the side of the foam that faces toward the wound.

The court finds that the second sentence of defendants' proposed construction, by requiring that the pores that constitute the pattern of holes remain open after the gel is applied to the foam, adds a limitation that is not present in the claim or the specification. The claim language does not impose this requirement. The holes that comprise the "pattern of holes" are a feature of the foam. The phrase "opening out on that side of the foam material that lies proximal to the skin of a wearer when the dressing is worn" does not require that the holes remain open when the dressing is worn; instead, it explains that these holes are located on the side of the foam that is closest to the wearer's skin.

Furthermore, the specification does not suggest that the holes blocked by the gel are not part of the "pattern of holes." Indeed, the specification sets forth a preferred embodiment where "the holes of the hole pattern are comprised of the pores in the foam material, wherein the gel also extends slightly into the open pores of the foam material that border on the gel layer, *without closing all pores.*" '747 patent, col. 1, ll. 48-53 (emphasis added). In this preferred embodiment, the pattern of holes is comprised of pores, some of which may be blocked by the gel. Because the specification recognizes that pores within the pattern of holes may be filled, defendants' construction could exclude a preferred embodiment, and, therefore, the court finds the construction improper. *See SanDisk Corp. v. Memorex Prods.*, 415 F.3d 1278, 1285 (Fed.Cir.2005) ("A claim construction that excludes a preferred embodiment ... 'is rarely, if ever, correct .'" (quoting *Vitronics*, 90 F.3d at 1583)).

As plaintiffs have no objection to the third sentence of defendants' construction, the court will accept it. As for the first sentence, the court agrees with plaintiff that there is some need for clarification. Accordingly, the court construes "pattern of holes" as "a distribution of openings in the surface of the foam material on the side of the foam closest to the skin of the wearer when the dressing is worn. The holes may be pores that occur inherently or may be introduced by mechanical means."

2. "coated"

Claim 1 further recites that the layer of foam material is "coated with a layer of skin-adhering hydrophobic gel." '747 patent, col. 8, ll. 44-45. Plaintiffs propose the following construction: "a layer of gel is applied to the layer of foam material. The gel sticks to the skin and repels water." Defendants seek to define the term "coated" as "the application of a thin layer of fluid material that later becomes a solid." FN1 Defendants argue that this limitation is required by the specification, which teaches a process by which a thin layer of uncured liquid gel mixture is applied to a layer of foam and then absorbed by the foam via capillary action and becomes a gel upon curing. Defendants also contend that this construction of the term "coated" is necessary in light of the prior art and the intended purpose of the invention.

FN1. The term "coated" is used again in claim 1: "wherein the walls of the holes in said foam material are coated with the gel at those end parts of the holes." '747 patent, col. 8, ll. 45-47. Generally, a "claim term should be construed consistently with its appearance in other places in the same claim or in other claims of the same patent." *Rexnord Corp. v. Laitram Corp.*, 274 F.3d 1336, 1342 (Fed.Cir.2001). The parties have provided no reason to depart from the general rule in this case. Accordingly, the court will construe this disputed term once with the understanding that its construction will apply throughout the claim.

Defendants essentially argue that claim 1 should be construed as a "product-by-process claim." "A product-by-process claim is one in which the product is defined at least in part in terms of the method or process by which it is made." *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1315 (Fed.Cir.2006) (citations omitted). The infringement inquiry for a product-by-process claim focuses on whether the accused product was made by the claimed process or its equivalent. *Atlantic Thermoplastics Co. v. Faytex Corp.*, 970 F.2d 834, 842 (Fed.Cir.1992). Defendants contend that the '747 patent discloses a wound dressing that is produced by a specific method, namely by applying an uncured gel mixture to a layer of absorbent foam where the gel mixture is drawn by capillary action into the pores or holes in the foam material and subsequently cured. Defendants argue that plaintiffs have limited their claim because the specification teaches only one method of manufacture. Defendants also contend that their proposed construction comports with the stated purpose of the invention, i.e., "prevent[ion of] spontaneous reflux of absorbed fluid into the skin." *See* '747 patent, col. 1, ll. 45-47.

The court finds defendants' arguments unavailing. Claim 1 of the '747 patent discloses a wound dressing product, while claim 14 discloses a method of producing that product. Thus, it is not surprising that the specification describes the manufacturing process for that claimed product. In fact, even if the patent contained only product claims, the law imposes on the patentee an enablement requirement. *See* 35 U.S.C. s. 112 (requiring a description of the invention sufficient to enable one skilled in the art to make and use it). Nothing in the claim language, however, suggests that the term "coated" requires that the gel be applied using a particular process.FN2 Read in context, the term describes only the physical characteristics of the product, not the method of its manufacture. *See Cordis Corp. v. Medtronic AVE, Inc.*, 339 F.3d 1352, 1357 (Fed.Cir.2003) (holding that the phrase "slots formed therein" described the physical characteristics of the product rather than the method of manufacture and refusing to impose a process limitation on the product claims at issue); *Hazani v. United States ITC*, 126 F.3d 1473, 1479 (Fed.Cir.1998) (finding that claims were not product-by-process claims because the term "chemically engraved" described the structure of the product rather than the process used to obtain it).

FN2. The claim language of the '747 patent is markedly different from that of the product-by-process claims

at issue in *SmithKline*. Unlike the *SmithKline* claims, each of which recited a "pharmaceutical composition ... produced on a commercial scale by a process which comprises the steps of: [a), b), and c)], 439 F.3d at 1314 (emphasis added), claim 1 of the '747 patent does not disclose specific manufacturing steps. Col. 8, ll. 40-48.

Defendants' proposed construction seeks to import process limitations into a product claim. The Federal Circuit, however, has made it clear that it is generally improper to limit product claims to a particular process. *See Vanguard Prods. Corp. v. Parker Hannifin Corp.*, 234 F.3d 1370, 1372 (Fed.Cir.2000) ("The method of manufacture, even when cited as advantageous, does not itself convert product claims into claims limited to a particular process."). Indeed, the specification does not indicate that the foam must be coated through one particular method. Although the specification discloses a method through which the claimed product may be produced "very easily," no language suggests that this is the exclusive method of production. *See* '747 patent, col.6, ll. 48-49. While claims should be construed in light of the specification, imposing process limitations on product claims prevents a patent applicant from claiming any subject matter broader than the preferred embodiment. *See Raytheon Co. v. Roper Corp.*, 724 F.2d 951, 957 (Fed.Cir.1983) ("That claims are interpreted in light of the specification does not mean that everything expressed in the specification must be read into all the claims."); *see also SRI Int'l v. Matsushita Elec. Corp.*, 775 F.2d 1107, 1121 (Fed.Cir.1985) ("[I]f structural claims were to be limited to devices operated precisely as a specification-described embodiment is operated, there would be no need for claims.... It is the *claims* that measure the invention.").

Moreover, the court is not convinced by defendants' argument that the prosecution history of the '747 patent requires that process limitations be read into claim 1. Defendants contend that, during prosecution, plaintiffs distinguished their invention from the prior art on the basis of the process taught by the '747 patent. During prosecution of the '747 patent, the PTO examiner rejected claim 1 based on a prior art reference, U.S. Patent No. 5,635,201 (the "'201 patent"), which disclosed a method of manufacturing a particular wound dressing. As defendants point out, the patentee, in his response to the PTO Examiner's rejection, argued that his invention was different from that recited in the '201 patent because the two inventions involved different methods of production. (*See* Vinti Decl., Ex. D at 7 ("Moreover the holes in the gel layer are formed using the capillary action of the foam material. The method of producing the wound dressing as is presently recited in claim [14] is consequently totally different from the manufacturing method of [the '201 patent], wherein gel mixture is blown out of the holes in the perforated plastic sheet")) This portion of the prosecution history, however, refers to the *method* claims of what would become the '747 patent; it does not clearly limit the *product* claims to this manufacturing process. (*See id.*) In fact, further examination of the prosecution history reveals that the patentee distinguished the invention from the prior art by reference to the composition of the product, specifically, the type of carrier material used. (*See* Vinti Decl., Ex. D at 5-6 ("The suitable carrier materials contemplated by [the '201 patent] ... include relatively soft plastic sheets In essence, only sheets of plastic material are mentioned. By sharp contrast, in the wound dressing of the present invention, the carrier material is an *absorbent foam material.*")) FN3

FN3. The '201 patent recites a method of manufacturing a wound dressing of the kind disclosed in European Patent No. 0,261,167 (the "EP '167 patent"), a wound dressing comprised of a hydrophobic substance deposited on and completely encapsulating a net-like material. '201 patent, col. 1, ll. 18-19; EP '167 patent, col. 2, ll. 30-39 and col. 4, ll. 12-24. The EP '167 patent indicates that this reinforcement material could be made of a polyurethane foam. EP '167 patent, col. 4, ll. 4-5. The foam, however, would still need to be "immersed in a bath of silicone gel," and an absorbent bandage would be needed to soak up excess fluid

from the wound because the encapsulation of the foam by the silicone gel would prevent it from absorbing fluid from the wound. *Id.*, col. 3, ll. 5-18 and col. 4, ll. 5-7. Meanwhile, the structure of the wound dressing disclosed in the '747 patent differs in that the same layer of foam that absorbs the exudate also serves as a carrier of the skin-adhering gel. '747 patent, col. 1, ll. 29-47.

The court finds no statements in the prosecution history that evidence a clear and unmistakable disavowal of any subject matter that would limit the product claims to a single manufacturing process. *See* *Superguide Corp. v. DirecTV Enters.*, 358 F.3d 870, 875 (Fed.Cir.2004) ("The prosecution history may not be used to infer the intentional narrowing of a claim absent the applicant's clear disavowal of claim coverage. To be given effect, such a disclaimer must be made with reasonable clarity and deliberateness.") (citations and quotations omitted); *see also* *Omega Eng'g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1325-26 (Fed.Cir.2003) (explaining that the prosecution history can be used to limit the scope of a claim only where "the alleged disavowing actions or statements made during prosecution [are] both clear and unmistakable"). For this reason, as well as those discussed above, the court concludes that claim 1 is not a product-by-process claim and declines to import process limitations into this claim. The court therefore rejects defendants' construction of "coated." The court finds no statements in the specification or prosecution history that limit the term "coated" to anything more than a layer of gel applied to a layer of foam. Furthermore, neither party disputes the interpretation of "skin-adhering" as "sticks to the skin" or "hydrophobic" as "repels water." Accordingly, the court construes the phrase "the layer of foam material being coated with a layer of a skin-adhering hydrophobic gel" as "the application of a layer of gel to a layer of foam material where the gel sticks to the skin and repels water."

3. "the walls of the holes in said foam material are coated with the gel at those end parts of the holes"

Claim 1 of the '747 patent further teaches a wound dressing "wherein the walls of the holes in said foam material are coated with the gel at those end parts of the holes that lie proximal to the wearer's skin when the dressing is worn." '747 patent, col. 8, ll. 45-48. Plaintiffs propose the following construction: "the gel coats the walls of the holes in the foam layer at the end parts of the holes that are closest to the wearer's skin when the dressing is worn." Defendants, however, seek to limit the claim as follows: (1) "the coating of gel on the hole walls must extend around the entire inner perimeter of each of the holes in the pattern as the hole adjoins the gel and must extend a distance into each open hole of the pattern of holes;" and (2) construing "end parts of the holes" to mean "the portions of the holes, including wall portions, that are near the skin when the dressing is worn."

Defendants' proposed construction, which states that the gel must coat the *entire* inner perimeter of *each* hole and to extend a certain distance into *each* hole, imposes "absolute" characteristics. The court finds this construction improper because it is unrealistic and unsupported by the intrinsic evidence. *See* *Astra Aktiebolag v. Andrx Pharms., Inc.*, 222 F.Supp.2d 423, 470-71 (S.D.N.Y.2002) (rejecting defendant's proposed construction because it "would require that the subcoating have no imperfections" and finding defendant's position "inconsistent with the intrinsic evidence and the real world").

Defendants contend that the description of the invention in the *Summary of the Invention* portion of the specification compels their proposed construction. The Federal Circuit has recognized that even where the claim language itself is not limiting, statements in the specification, particularly a description in the summary of invention that broadly describes the overall invention rather than merely describing a preferred embodiment, can lead to the "inescapable conclusion" that the claims require a particular limitation. *See*

Microsoft Corp. v. Multi-Tech Sys., 357 F.3d 1340, 1348 (Fed.Cir.2004) (concluding that "the specification shared by three patents leads to the 'inescapable conclusion' that their claims required communication directly over a telephone line, even though the claim language itself was not so limiting) (quoting SciMed Life Sys., 242 F.3d at 1342). This court, however, finds no language in the *Summary of the Invention* section of the '747 patent that would support defendants' position; neither the claims nor the specification use the words "entire," "each," "every," or any other term that would indicate that the gel coating must be perfect.FN4 Despite defendants' contention, claim 1's statement that the "walls" of the holes be coated with the gel does not indicate that the entire inner perimeter of the hole must be coated; a dressing with multiple holes whose walls were coated with gel would still fall within this claim even if only some portions of the inner perimeter of some of the holes were coated with gel. Furthermore, the phrase "wherein the gel also extends slightly into the open pores of the foam material that border on the gel layer, without closing all pores," which describes a preferred embodiment, also lacks language indicating that the gel must extend into *each* hole in the pattern of holes. ' 747 patent, col. 1, ll. 51-53.

FN4. Furthermore, the court notes that any reliance by defendants on *Microsoft* is misplaced because that case involved a particular set of facts not found here. In *Microsoft*, the Federal Circuit's conclusion that the specification required the communications to occur over a telephone line and not a packet-switched network was based on "clear statements in the specification that the invention ... is directed to communications 'over a standard telephone line.'" 357 F.3d at 1348-49. As noted, the specification of the '747 patent does not contain "clear statements" comparable to those found in the patent specification at issue in *Microsoft*.

Citing the specification as well as the testimony of one of the inventors, defendants also argue that perfection of the gel coating is necessary to "prevent spontaneous reflux of absorbed fluid to the skin or the wound," one of the stated purposes of this gel layer. *Id.*, ll. 45-47. While this may be one of the goals of the invention, the specification does not indicate that absolute prevention of reflux is required. Because the specification supports a broader reading of the claim phrase, the court declines to impose "absolute" requirements. Accordingly, the court rejects defendants' construction to the extent that it requires perfection. Defendants' construction of "the end parts of holes," however, clarifies that the end parts of the holes that are coated with gel include the portions of the walls that are near the skin when the dressing is worn. This construction is supported by the specification. *See id.*, ll. 35-38 ("[T]he walls of the holes in the foam material are coated with gel at those end parts of said walls which lie proximal to the wearer's skin when the dressing is used."). The court therefore construes the phrase "wherein the walls of the holes in said foam material are coated with the gel at those end parts of the holes that lie proximal to the wearer's skin when the dressing is worn" as "the gel coats the walls of the holes in the foam layer at the end portions of those holes, including the wall portions, that are closest to the wearer's skin when the dressing is worn."

B. Dependent Claims

Defendants also seek construction of several phrases contained in dependent claims 2, 11, and 12. Claim 2 recites: "The wound dressing according to claim 1, wherein *the holes of the pattern* are comprised of *pores in said foam material*, and the gel also *extends partially into open pores* of the foam material that border on the gel layer *without closing all pores*." *Id.*, ll. 49-53 (emphasis on disputed terms). Claim 11 recites: "The wound dressing according to claim 1, wherein the foam material is a flexible foam having *open pores*." *Id.*, col. 9, ll. 12-13 (emphasis on disputed terms). Claim 12 recites: "The wound dressing according to claim 1, wherein the foam material is a flexible hydrophilic polyurethane foam with *open pores*." *Id.*, ll. 14-16 (emphasis on disputed terms).

1. "holes in the pattern"

Claim 2 is a dependent claim that incorporates the elements and limitations of claim 1 and further recites that "the holes in the pattern are comprised of pores in said foam material." '747 patent, col. 8, ll. 49-51. Defendants wish to construe "the holes of the pattern" as "the holes in the pattern of holes as described above." Defendants argue that "the holes of the pattern" as used in claim 2 must refer back to the "pattern of holes" recited in claim 1. The specification, however, differentiates between two types of holes that comprise the "pattern of holes" recited in claim 1: (1) holes comprised of pores in the foam material and (2) holes that are "created" in the foam material. *Id.*, col. 1, ll. 50-51, 55-56; *see also* col. 4, ll. 35-41. Indeed, the court has adopted a construction of claim 1 that states that the holes that are part of the pattern of holes may be comprised of pores that occur inherently or may be introduced by mechanical means. Claim 2 recites an additional limitation by reference to one specific type of hole: holes "comprised of pores in said foam material." *Id.*, col. 8, ll. 50-51. Thus, the court believes that defendants' proposed construction would cause unnecessary confusion because it refers back to a construction that described both types of holes. The court concludes that the phrase "the holes of the pattern" requires no construction.

2. "pores in said foam material"

Defendants seek construction of the phrase "pores in said foam material" in claim 2 to clarify that the holes in the foam of the wound dressing recited in this claim are comprised of the pores that occur inherently in the foam rather than those that are "created." The court agrees that this clarification is proper and accepts defendants' construction of "pores in said foam material" as "the holes are the pores that occur inherently in the foam."

3. "extends partially into open pores"

Claim 2 further recites that the gel "extends partially into open pores." '747 patent, col. 8, l. 51. Defendants propose the following construction for this phrase:

The coating of the gel on the walls of the pores must extend around the entire inner perimeter of each of the pores in the pattern as the pore adjoins the gel and must extend a distance into each open pore of the pattern of holes which is less than the total depth of the hole.

Predictably, defendants' arguments in favor of this construction are the same as those raised in support of their position regarding the construction of the claim 1 phrase "wherein the walls of the holes in said foam material are coated with the gel at those end parts of the holes." Defendants now urge the court to adopt a construction of claim 2 that would impose similar limitations: that the gel coating extend around the *entire* inner perimeter of *each* pore and that it extend a distance into *each* open pore. The court finds no language in the claims or the specification that supports defendants' position that the gel coating be perfect. Therefore, for the same reasons that the court refused to impose "absolute" requirements in claim 1, it declines to read similar limitations into claim 2. *See* Section III.A.3, *supra*. The phrase "extends partially into open pores" does not require construction.

4. "without closing all pores"

Claim 2 further recites that the gel extends partially into open pores of the foam material "without closing all pores." '747 patent, col. 8, ll. 52-53. Defendants argue that "without closing all pores" should be construed

as "up to 95% of the pores in the foam may be blocked by the gel and therefore unavailable to absorb wound fluid from the surface of the wound." Defendants contend that the specification's statement that "[t]he percentage number of pores that are not blocked by the gel layer may vary between 5-100%, depending on the type of wound for which the dressing is intended" mandates this proposed construction. *Id.*, col. 2, ll. 60-63. The portion of the specification upon which defendants rely, however, merely describes an embodiment of the invention. Although claims should be construed in light of the specification, it is improper to import a limitation from the specification into the claims and limit claims to the preferred embodiment. *Callicrate v. Wadsworth Mfg.*, 427 F.3d 1361, 1368 (Fed.Cir.2005). Accordingly, the court will not adopt defendants' construction. The phrase "without closing all pores" clearly indicates that not all of the pores may be blocked. The evidence before the court, however, is insufficient to allow the court to determine the percentage of pores that may be blocked such that a wound dressing would fall within this claim. At this time, the court will not construe the phrase "without closing all pores."

5. "open pores"

Claims 11 and 12 each teach a wound dressing according to claim 1 wherein the foam material is a particular type of foam "having open pores." ' 747 patent, col. 9, ll. 12-16. Defendants argue that "open pores" should be construed as "pores that are not blocked by the gel and therefore permit the foam to absorb liquid." Defendants maintain that this construction is proper given that the purpose of the open pores is to permit the foam to absorb liquid. The court, however, disagrees that the term "open" means that the pores are not blocked by the gel. Neither claim 11 nor claim 12 makes reference to the gel layer. *See id.* ("The wound dressing according to claim 1, wherein the foam material is a flexible foam having open pores.... The wound dressing according to claim 1, wherein the foam material is a flexible hydrophilic polyurethane foam with open pores."). Upon reading these claims in context, the court concludes that the term "open" as used in claims 11 and 12 describes an attribute of the pores in the foam. The term "open pores" describes the structure of the foam; it does not impose a limitation regarding the foam's interaction with the gel. Accordingly, the court concludes that the phrase "open pores" as used in claims 11 and 12 requires no construction.

6. Relational Terms

Additionally, the patent includes two relational terms whose meanings are not disputed but which are helpful to define. Plaintiffs have suggested the following constructions, and, as defendants have not disputed them, they shall be adopted:

- (1) "proximal" in claim 1 means "closest to," and
- (2) "distal" in claim 6 means "farthest away from."

IV. Scheduling

Under the scheduling order approved by the court on September 19, 2006, the discovery period was scheduled to expire on April 2, 2007. The Local Patent Rules, however, provide for an additional forty-five (45) days of discovery after the court issues its claim construction ruling if, at that time, there are fewer than thirty (30) days left for discovery under the original discovery track to which the case was assigned. LPR 6.7, NDGa. Accordingly, the discovery period shall expire on August 6, 2007. Other deadlines shall be calculated by reference to the Federal Rules of Civil Procedure, the Local Rules, and the Local Patent Rules.

V. Construction

In light of the foregoing discussion, the court construes the disputed claim terms and phrases as follows:

(1) "pattern of holes" in claim 1 is construed to mean "a distribution of openings in the surface of the foam material on the side of the foam closest to the skin of the wearer when the dressing is worn. The holes may be pores that occur inherently or may be introduced by mechanical means";

(2) "the layer of foam material being coated with a layer of a skin-adhering hydrophobic gel" in claim 1 is construed to mean "the application of a layer of gel to a layer of foam material where the gel sticks to the skin and repels water";

(3) "wherein the walls of the holes in said foam material are coated with the gel at those end parts of the holes that lie proximal to the wearer's skin when the dressing is worn" in claim 1 is construed to mean "the gel coats the walls of the holes in the foam layer at the end portions of those holes, including the wall portions, that are closest to the wearer's skin when the dressing is worn";

(4) "proximal" in claim 1 is construed to mean "closest to";

(5) "pores in said foam material" in claim 2 is construed to mean "the holes are the pores that occur inherently in the foam"; and

(6) "distal" in claim 6 is construed to mean "farthest away from."

IT IS SO ORDERED.

N.D.Ga.,2007.

Molnlycke Health Care AB v. Medline Industries, Inc.

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