United States District Court,
D. Delaware.

PHARMASTEM THERAPEUTICS, INC,
Plaintiff.
v.
VIACELL INC., Cryo-Cell International, Inc., Corcell, Inc., Stemcyte, Inc., CBR Systems, Inc. f/k/a Cord Blood Registry, Inc., Birthcells Technology, Inc., Nustem Technologies, Inc., and Bio-Cell, Inc,
Defendants.

No. 02-148 GMS

Jan. 13, 2003.

ORDER

SLEET**, J.**

After considering the submissions of the parties and hearing oral argument on the matter, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the court construes the disputed claims of the patents-in-suit as follows:

U.S. Patent Nos. 5,004,681 *and* 5,192,553*:*

1. "hematopoietic stem cells"

"hematopoietic stem cells" is construed to mean "cells capable of effecting repopulation of blood and other hematopoeietic organs."

2. "cryopreservative"

"cryopreservative" is construed to mean "an agent capable of preserving at very low temperatures."

3. "cryopreservation," "cryopreserving," and "cryopreserved"

"cryopreservation," "cryopreserving," and "cryopreserved" are construed to mean "preserving at very low temperatures that may also include an additional agent capable of preserving the cells, blood components, or compositions."

4. "therapeutic composition"

"therapeutic composition" is construed to mean "a composition that is useful for the treatment or prevention of diseases or disorders."

5. "[stem cells] in an amount sufficient"

"[stem cells] in an amount sufficient" is construed to mean "in a quantity as much as is needed." FN1

FN1. Consistent with the court's oral ruling during the Markman hearing on January 10, 2003, the court will not address the defendants' indefiniteness argument at this stage of the proceedings. While the court recognizes that a determination of indefiniteness is necessarily intertwined to some degree with claim construction, it is clear that the court must first attempt to determine what a claim means before it can determine whether the claim is invalid for indefiniteness. *See* ASM America, Inc. v. Genus, Inc., 2002 WL 1892200, (N.D.Cal. Aug. 15, 2002) (recognizing that claim construction must proceed before an indefiniteness challenge); *see also* Intervet America, Inc. v. Kee-Vet Labs., 887 F.2d 1050, 1053 (Fed.Cir.1989). The court's position at this time does not, however, represent an actual adjudication on the defendants' indefiniteness defense. At present, the court is merely holding that the claim is sufficiently definite to survive claim construction.

Finally, the court wishes to note that the defendants bear the burden of proving invalidity by clear and convincing evidence. *See* North American Vaccine, Inc. v. American Cyanamid Co., 7 F.3d 1571, 1579 (Fed.Cir.1993). The defendants have not, however, filed a motion seeking to invalidate the patents on indefiniteness grounds. Rather, they simply assert their arguments in their opposition claim construction brief. Such an approach is clearly an attempt at an end-run around the court's scheduling order regarding the filing of dispositive motions, and will not be sanctioned.

6. "derived"

"derived" is a commonly understood word and requires no additional construction.

7. "can proliferate within the host"

"can proliferate within the host" is construed to mean "capable of increasing in quantity."

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