United States District Court,
S.D. Ohio, Western Division,

The PROCTER & GAMBLE COMPANY,
Plaintiff,
v.
ORACEUTICAL LLC, et al,
Defendants.

No. 1:03-cv-433

Dec. 1, 2005.

David M. Maiorana, Kenneth R. Adamo, Ryan Boyd McCrum, Jones Day, Joesph D. Pollack, Jones, Day, Reavis, & Pogue, Cleveland, OH, Mark Alan Vanderlaan, Dinsmore & Shohl, Cincinnati, OH, for Plaintiff.

Ann Gallagher Robinson, Frost Brown Todd LLC, Cincinnati, OH, for Oraceutical LLC, Idex Dental Sciences Inc., Robert Eric Montgomery, Britesmile Inc., Britesmile Development Inc.

Arthur A. Gasey, Douglas M. Hall, Frederick C. Laney, Timothy J. Haller, Niro Scavone Haller & Niro, Chicago, IL, for Oraceutical LLC.

MEMORANDUM AND ORDER ON *MARKMAN* ISSUES

THOMAS M. ROSE**, District Judge.**

In this case, Plaintiff Counter-Defendant the Procter & Gamble Company seeks, *inter alia,* a declaration that it is not infringing on United States Patent No. 6,488,914, to which the Court will refer as the '914 patent. Procter & Gamble has named five defendants: Oraceutical LLC, Robert Eric Montgomery, Idex Dental Sciences Inc., Britesmile Inc., and Britesmile Development Inc. The Court will refer to Defendants collectively as "Oraceutical." Britesmile Development Inc. has counter-sued asserting that Procter & Gamble is infringing its patent. In order to bring the case to resolution, the Court is called upon to construct the claims of the patent pursuant to Markman v. Westview Instruments, 52 F.3d 967, 979 (Fed.Cir.1995) aff'd 517 U.S. 370 (1996).

I Background

In 1994, the inventor of the '914 patent, R. Eric Montgomery, believed that tooth-bleaching mixtures that existed were flawed. According to Oraceutical, prior tooth-bleaching methods used the hydrogen peroxide precursor carbamide peroxide. When exposed to moisture, carbamide peroxide dissociates into hydrogen peroxide and urea. Carbamide peroxide's reaction to moisture thus necessitates it being packaged in a low water-content medium, or else it would dissociate prematurely and the hydrogen peroxide would degrade prior to being applied to teeth. Oraceutical also asserts that in many of these products the pH decreases during use, resulting in a more acidic mixture that causes harm to a tooth's surface. Montgomery also believed it possible that prior inventions were less effective due to the absence of anything that could prevent calcium precipitation from blocking the oxidizing agent's penetration of the tooth surface if the pH were to rise above 5.5 during use. The end result of the deficiencies Oraceutical perceives in the prior art is a low-water content carbamide peroxide tooth-whitening composition, requiring users to expose their teeth

to the bleaching mixtures for several hours per treatment.

Oraceutical asserts that Montgomery's invention is novel in that it is comprised mostly of water and hydrogen peroxide and can be distributed in single-component packages. Montgomery also added a calcium chelating agent, that allowed the hydrogen peroxide mixture to more quickly penetrate the tooth, as the chelating agent locked on to the free calcium ions that could lead to precipitants at pH levels above 5.5. Thus, treatments could be completed in 30 minutes or less. Oraceutical further asserts that Montgomery's invention maintains a pH level above 5.5 during use.

On September 25, 1995, Montgomery filed a provisional patent application entitled, "Improved Method of Whitening Teeth." A year later, on September 25, 1996, Montgomery fled a continuation application that matured into U.S. Patent 5,922,307. On November 16, 1998, Montgomery filed a second continuation application that matured into U.S. Patent 6,331,292. On October 31, 2001, Montgomery filed a third continuation application that matured into U.S. Patent 6,488,914. The continuation applications all claim priority over the provisional application.

It is the '914 patent which this order will construe. Therein, Montgomery claimed in pertinent part:

1. A tooth-bleaching mixture for contacting a tooth surface in an oral cavity comprising:

hydrogen peroxide in an effective tooth whitening amount, an aqueous matrix comprising

a calcium chelating agent,

a thickening agent,

wherein the mixture has a pH above 5.5 and wherein the mixture is packaged as a one component system.

2. The mixture of claim 1, wherein the water content is at least 70% by weight, based on the weight of the composition.

* * * *

5. The mixture of claim 1, wherein the aqueous mixture has a water content of at least 75% by weight, based on the weight of the composition.

* * * *

8. A tooth-bleaching mixture for contacting a tooth surface in an oral cavity comprising:

hydrogen peroxide,

an aqueous matrix comprising a high molecular weight cross-linked polyacrylic acid in an amount between approximately 2.0% and approximately 0.5% by weight, based on the weight of the mixture,

an alkaline pH adjusting agent, and

sodium stannate trihydrate or 1-Hydroxyethylidene-1,1 diphosphonic acid, in an amount between approximately 0.02% and approximately 0.5% by weight, based on the weight of the mixture,

wherein the mixture has a pH above 5.5 and wherein the mixture is packaged as a single component system.

* * * *

12. A tooth-bleaching mixture for contacting a tooth surface in an oral cavity comprising:

hydrogen peroxide in an effective tooth whitening amount,

a thickening agent,

water,

an alkalizing agent, and

a calcium chelating agent,

wherein the tooth-bleaching mixture has a pH above 5.5 and wherein the tooth-bleaching mixture is a single component system.

Doc. 66, ex. 1, cols. 8-10.

On June 16, 2003, Procter & Gamble filed a suit seeking, *inter alia,* declaratory judgment that it was not in violation of the continuation patents. Doc. 1. The complaint states other causes of action, including one for breach of contract. Procter & Gamble named as defendants: Oraceutical LLC, Robert Eric Montgomery, Idex Dental Sciences Inc, Britesmile Inc, Britesmile Development Inc. At this point in the litigation, however, the parties have settled any dispute concerning infringement of two of the patents and, as regards the patent claims, only seek resolution concerning the '914 patent. Britesmile Development Inc. has counterclaimed asserting that Procter & Gamble is in violation of the '914 patent. Docs. 38. Britesmile Development Inc. also filed a separate action to the same effect, which has been consolidated with this case. Doc. 112. In order to resolve the patent disputes, the Court must construe the patent at issue.

Out of the quoted language of the patent claim, Oraceutical has requested the Court to construct the phrase "aqueous matrix" to mean "a gel, paste or liquid consisting of more than 50% water in which the hydrogen peroxide-containing compound is placed for administration to the subject." Procter & Gamble counters that this phrase means "the gel, paste or liquid, containing water, in which the hydrogen peroxide-containing compound is placed."

A second phrase Oraceutical requests to have constructed is "wherein the mixture has a pH above 5.5" which Oraceutical would have require the tooth-bleaching mixture to have a pH above 5.5 even when in contact with a tooth surface in an oral cavity. Hence their proposed construction: "Requires the mixture pH to be above 5.5 during use and 'above 5.5' means greater than 5.5." Procter & Gamble would have this phrase mean "the pH of the mixture is 5.6 or higher, measured neat after final mixing and prior to packaging."

To these phrases, Procter & Gamble adds "alkaline adjusting agent" and "alkalizing agent" in claims 2 and 5, which it would have mean "an agent found in the mixture that raises the pH to 5.6 or higher." Oraceutical understands "alkaline adjusting agent" to mean "An agent found in the mixture that raises the pH." Doc. 74 at 19.

Procter & Gamble also requests that the Court construct the term "mixture" to mean "a combination containing all of the recited claim elements after final mixture but prior to packaging." Oraceutical counters that "mixture" means "A combination containing all of the recited claim elements, but does not exclude interaction with saliva in use." Doc. 74 at 19.

Procter & Gamble requests that "wherein the mixture is packaged as a one (single) component system" and "wherein the mixture is a single-component system" both be construed as to mean: "all of the listed elements are present in a system consisting of only a single mixture as packaged by the manufacturer and nothing is added to, mixed with, or combined with that mixture in order to complete the claimed composition." Oraceutical counters by suggesting that the Court add to this construction: "This does not exclude interaction with saliva from the scope of the claimed tooth-bleaching mixture."

Procter & Gamble requests that "hydrogen peroxide" be read to mean: "any hydrogen peroxide in its chemical form H_2O_2 that is present in the composition, either as hydrogen peroxide itself, or as a hydrogen peroxide precursor." Oraceutical would rely on only the first phrase, "Any hydrogen peroxide in its chemical form H_2O_2 that is present in the composition." Doc. 74 at 19.

Finally, Procter & Gamble wishes the Court to construe "at least 70% (75%) water" to mean "at least 70% by weight" and "at least 75% by weight." (Part K) Oraceutical's proposed construction differs by nuance: "At least 70% (75%) of the mixture's total weight comes from water." Doc. 74 at 20. FN1

FN1. Procter & Gamble has asked for several other constructions that Oraceutical does not oppose: "effective tooth whitening amount" will be read to mean "an amount of hydrogen peroxide sufficient to provide some whitening effect, as compared to the teeth before use of the composition." "Calcium chelating agent" will be read to mean: "an agent found in the mixture that inhibits, through chelation, the precipitation of calcium ions." "Thickening agent" will be read as: "an agent found in the mixture that increases the viscosity of the composition."

I. CLAIM CONSTRUCTION PRINCIPLES AND ANALYSIS

A. Intrinsic Evidence

"It is well settled that, in interpreting an asserted claim, [a] court should look first to the intrinsic evidence of record, i.e., the patent itself, including the claims, the specification, and if in evidence, the prosecution history.... Such intrinsic evidence is the most significant source of the legally operative meaning of disputed claim language." Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed.Cir.1996). "In most situations, an analysis of the intrinsic evidence alone will resolve any ambiguity in a disputed claim term. In such circumstances, it is improper to rely on extrinsic evidence [such as expert opinions]." Id. at 1583.

"Even with the intrinsic evidence, however, there is a hierarchy of analytical tools." Digital Biometrics v. Identix, Inc., 149 F.3d 1335, 1344 (Fed.Cir.1998). "[A] construing court does not accord the specification, prosecution history, and other relevant evidence the same weight as the claims themselves, but consults these sources to give the necessary context to the claim language." Eastman Kodak Co. v. Goodyear Tire & Rubber Co., 114 F.3d 1547, 1552 (Fed.Cir.1997) (overruled in part on other grounds by Cybor Corp. v. FAS Techs., 138 F.3d 1448, 1456 (Fed.Cir.1998)(en banc)). The starting point "is always with the language of the asserted claim itself...." Phonometrics, Inc. v. Northern Telecom., 133 F.3d 1459, 1464 (Fed.Cir.1998). At the same time, "there is no magic formula or catechism for conducting claim construction. Nor is the court barred from considering any particular sources or required to analyze sources in any specific sequence, as long as those sources are not used to contradict claim meaning that is unambiguous in light of the intrinsic evidence." Phillips v. AWH Corp., 415 F.3d 1303, 1324 (Fed.Cir.2005).

B. The Claim Language Itself

"It is the claims that measure the invention." Sjolund v. Musland, 847 F.2d 1573, 1578 (Fed.Cir.1988). "Courts can neither broaden nor narrow the claims to give the patentee something different than what he has set forth. No matter how great the temptations of fairness or policy making, courts do not rework claims.

They only interpret them." *E.I. DuPont de Nemours & Co. v. Phillips Petroleum Co.,* 849 F.2d 1440, 1443 (Fed.Cir.1988).

"[W]ords of the claims themselves, both asserted and nonasserted, ... define the scope of the patented invention." Vitronics, 90 F.3d at 1582. "[T]he words of a claim are generally given their ordinary and accustomed meaning...." Carroll Touch, Inc. v. Electro Mechanical Systems, Inc., 15 F.3d 1573, 1577 (Fed.Cir.1993). A technical term is generally given its ordinary meaning as understood "by persons skilled in the art...." Phillips Petroleum Co. v. Huntsman Polymers Corp., 157 F.3d 866, 871 (Fed.Cir.1998). "The touchstone for discerning the usage of claim language is the understanding of those terms among artisans of ordinary skill in the relevant art at the time of invention." Metabolite Laboratories, Inc. v. Laboratory Corp. of America Holdings, 370 F.3d 1354, 1360 (Fed.Cir.2004). Indeed, "[i]n some cases, the ordinary meaning of claim language as understood by a person of skill in the art may be readily apparent even to lay judges...." Phillips v. AWH Corp., 415 F.3d at 1313.

"General descriptive terms will ordinarily be given their full meaning; modifiers will not be added to broad terms standing alone.... In short, courts must presume that the terms in the claim mean what they say, and, unless otherwise compelled, give full effect to the ordinary and accustomed meaning of claim terms." Johnson Worldwide Assocs. v. Zebco Corp., 175 F.3d 985, 989 (Fed.Cir.1999) (citations omitted). This is a "heavy presumption in favor of the ordinary meaning of claim language...." Zebco Corp., 175 F.3d at 989; see Metabolite, 370 F.3d at 1360.

C. The Patent Specification

"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. In addition to providing contemporaneous technological context for defining claim terms, the patent may also define a claim term in the specification 'in a manner inconsistent with its ordinary meaning." Metabolite, 370 F.3d at 1360 (citations omitted).

When does a patent specification permit or require a deviation from the heavy presumption favoring the ordinary meaning of claim language? "[I]t is always necessary to review the specification to determine whether the inventor has used any terms in a manner inconsistent with their ordinary meaning." Vitronics, 90 F.3d at 1582. Upon such review, deviation from the presumed ordinary meaning of claim language arises in either of two situations:

The first arises if the patentee has chosen to be his or her own lexicographer by clearly setting forth an explicit definition for a claim term.... The second is where the term or terms chosen by the patentee so deprive the claim of clarity that there is no means by which the scope of the claim may be ascertained from the language used.... In these two circumstances, a term or terms used in the claim invites-or indeed, requires-reference to intrinsic ... evidence ... to determine the scope of the claim language.

Zebco Corp., 175 F.3d at 990 (internal citations omitted). When the specification is consulted it acts "as sort of a dictionary, which explains the invention and may define terms used in the claims." Markman v. Westview Instruments, 52 F.3d 967, 979 (Fed.Cir.1995), aff'd., 517 U.S. 370 (1996). Consulting the specification as a "dictionary," however, may not foment a revolution in claim language interpretation. "The caveat is that any special definition given to a word must be clearly defined in the specification," id. at 980, and the specification "can supply understanding of unclear claim terms, but should never trump the clear meaning of claim terms." Zebco Corp., 175 F.3d at 990 (construing *E.I. DuPont,* 849 F.2d at 1433).

Caution must therefore be exercised to remain faithful to the distinct roles of patent specifications versus patent claims. While "[c]laims must be read in view of the specification ...," the specification does not set the boundaries of a particular patent, "[t]hat is the function and purpose of claims." Markman, 52 F .3d at 979-80. In light of these distinct purposes, two taboos-"reading in" and "reading out"-emerge. "Reading in"

prohibits using the specification to import additional limitations into clear and unambiguous claim language: "[A]ll that appears in the specification is not necessarily within the scope of the claims and thus entitled to protection. What is not claimed, even though disclosed [in the specification] as part of the 'invention,' cannot be enjoined." Novo Nordisk of N. Am. v. Genetech, Inc., 77 F.3d 1364, 1369 (Fed.Cir.1996). "Reading out" prohibits the reverse: The specification may not be used to extract or nullify limitations set forth in clear and unambiguous claim language. Texas Instruments, Inc. v. United States ITC, 988 F.2d 1165, 1171 (Fed.Cir.1993).

D. The Prosecution History

"To construe claim language, the court should also consider the patent's prosecution history, if it is in evidence ... This 'undisputed public record' of proceedings in the ... [PTO] is of primary significance in understanding the claims ... The court has broad power to look as a matter of law to the prosecution history of the patent in order to ascertain the true meaning of language used in the patent claims...." Markman, 52 F.3d at 980 (internal citations omitted). The PTO's undisputed record of its proceedings is "often of critical significance in determining the meaning of the claims." Vitronics, 90 F.3d at 1582. "As in the case of the specification, the patent applicant's consistent usage of a term in prosecuting the patent may enlighten the meaning of that term." Metabolite, 370 F.3d at 1360 (citation omitted).

"Ultimately, the interpretation to be given a term can only be determined and confirmed with a full understanding of what the invention actually invented and intended to envelop with the claim.... The construction that stays true to the claim language and most naturally aligns with the patent's description of the invention will be, in the end, the correct construction." *Renishaw,* 158 F.3d at 1243.

III. ANALYSIS

A. "Aqueous Matrix"

Oraceutical requests the Court to construct the phrase "aqueous matrix" to mean "a gel, paste or liquid consisting of more than 50% water in which the hydrogen peroxide-containing compound is placed for administration to the subject." Procter & Gamble counters that this phrase means "the gel, paste or liquid, containing water, in which the hydrogen peroxide-containing compound is placed." Thus, Oraceutical requests a construction that demands not just the presence of water, but that it be more than 50% by content and that it be specified that the matrix contains the hydrogen peroxide compound "for administration to the subject."

In support of its position, Oraceutical first informs the Court that Chambers, *Dictionary of Science and Technology,* 1999, at 58, defines "aqueous: as "[c]onsisting largely of water; dissolved in water." The second definition it lists, however, favors Procter & Gamble's mere presence of water position: "relating to or made with water." McGraw Hill's, *Dictionary of Scientific and Technical Terms,* 1994, at 127. More importantly, Procter & Gamble also points out that, according to the claim, the matrix may be either "gel, paste or liquid" leading one away from the conclusion that the matrix would need to contain more than 50% water. While "a claim term may be clearly redefined without an explicit statement of redefinition," Phillips v. AWH Corp., 415 F.3d at 1321 (citing Bell Atl. Network Servs., Inc. v. Covad Communications Group, Inc., 262 F.3d 1258, 1268 (Fed.Cir.2001)), the '914 specification does not provide an implicitly contrary definition when it criticizes prior tooth-bleaching compositions that were "anhydrous (devoid of water)." Doc. 66 at 19 (citing col. 2, ll. 38-50 "hygroscopic carriers maintaining low water content."). It was merely establishing the utility of the invention for which a patent was sought.

Oraceutical effectively wants the Court to take a term devoid of numerals, "aqueous matrix," and give it a numerical limitation. The Federal Circuit has instructed that nonnumerically limited descriptive claim terms "are construed using the same rules of construction as any other claim term." Ecolab, Inc. v. Envirochem, Inc., 264 F.3d 1358, 1366 (Fed.Cir.2001). That is, numerical limitations will only be read in when there

exists some other reason to do so, such as the presence of functional limitations in the claim itself. The Court perceives no reason here to limit the instant claim beyond its terms. The Court finds that one skilled in the art would read "aqueous matrix" to mean: "the gel, paste or liquid, containing water, in which the hydrogen peroxide-containing compound is placed."

B. "Wherein the mixture has a pH above 5.5"

Oraceutical requests "wherein the mixture has a pH above 5.5" to be construed as requiring the tooth-bleaching mixture to have a pH above 5.5 when in contact with a tooth surface in an oral cavity, or, as Oraceutical articulates it: "Requires the mixture pH to be above 5.5 during use and 'above 5.5' means greater than 5.5." Oraceutical reaches this "during use" construction by asserting that the phrase in the preamble to the claim "a tooth-bleaching mixture for contacting a tooth surface in an oral cavity," to be a claim limitation of the independent claims 1, 8, and 12. Procter & Gamble would have this phrase mean "the pH of the mixture is 5.6 or higher, measured neat after final mixing and prior to packaging."

Oraceutical reaches its position by asserting that the phrase "A tooth-bleaching mixture for contacting a tooth surface in an oral cavity," in the preamble is a limitation that affects the claim "wherein the mixture has a pH above 5.5 and wherein the mixture is packaged as a single-component system." According to Oraceutical:

[T]he preamble, "A tooth-bleaching mixture for contacting a tooth surface in an oral cavity," provides the antecedent for "the mixture" in the phrase "wherein the mixture has a pH above 5.5." As such, the claim itself dictates that the pH of "the mixture" must be above 5.5 when contacting a tooth surface. The plain meaning of independent claims 1, 8 and 12, when viewed in context, therefore requires the mixture to have a pH above 5.5 in use.

What Oraceutical ignores is that the preamble was added to distinguish the invention from the prior invention of Pohl, who had taught a mixture for bleaching hair. It is with regard to the Pohl invention, a hair bleaching agent that had to be mixed prior to use, that the preamble acts as a limitation, if at all. Reading the phrase "during use" to modify all aspects of the claim would broaden its scope, not limit it.

Oraceutical also argues that the description of the product's usefulness in the specification should be used to expand the claim to encompass an invention that retains a pH level substantially above 5.5 pH during use. In this case, there is no evidence that Montgomery used the specification to set forth definitions contrary to the common understanding of "wherein the mixture has a pH above 5.5 and wherein the mixture is packaged as a single-component system ." Nor do these terms deprive the claim of clarity so that there is no means by which the scope of the claim may be ascertained from the language used. See Zebco Corp., 175 F.3d at 990. To adopt Oraceutical's position would be to read additional limitations into clear and unambiguous claim language. Novo Nordisk of N. Am. v. Genetech, Inc., 77 F.3d 1364, 1369 (Fed.Cir.1996) ("What is not claimed, even though disclosed [in the specification] as part of the 'invention,' cannot be enjoined.").

Finally, as an alternative argument, Oraceutical states that it would be ironic for the Court to reject its reading, as the patent examiner rejected a claim for an invention that measured at the proper pH level "during packaging for an extended period of time and prior to using in the oral cavity." Doc. 66 ex. 3 at 95. The Court perceives no irony, as even the rejected language referred not merely to pH during packaging, but also to pH "prior to using in the oral cavity."

Thus, the Court agrees with Oraceutical that "above 5.5" means "greater than 5.5," but declines to read in the limitation of "during use." Therefore, the Court finds that one skilled in the art would read "wherein the mixture has a pH above 5.5" to mean, "the pH of the mixture is greater than 5.5, measured neat after final mixing and prior to packaging."

C. "Alkaline adjusting agent" or "Alkalizing Agent"

Procter & Gamble would have "alkaline adjusting agent" and "alkalizing agent" mean "an agent found in the mixture that raises the pH to 5.6 or higher." Oraceutical understands "alkaline adjusting agent" to mean: "An agent found in the mixture that raises the pH." Doc. 74 at 19. The parties essentially agree that the phrases refer to an agent that raises the pH, but Procter & Gamble here persists in pressing its claim that the pH level must be raised to 5.6 or higher. The Court has already rejected Procter & Gamble's bid to raise the pH threshold to 5.6 or higher in the previous section of analysis. Thus, the Court finds that one skilled in the art would understand the phrases to mean "an agent found in the mixture that raises the pH."

D. "Mixture"

Procter & Gamble requests that the Court construct the term "mixture" to mean "a combination containing all of the recited claim elements after final mixture but prior to packaging." Oraceutical counters that "mixture" means: "A combination containing all of the recited claim elements, but does not exclude interaction with saliva in use." Doc. 74 at 19.

Procter & Gamble's position is based upon a straightforward reading of the claim, which is for "[a] tooth-bleaching mixture ... wherein the mixture is packaged as a one component system." Thus, while the mixture might mix with saliva during use and this may affect the utility of the invention, it is the packaged mixture which has been claimed by Oraceutical. Oraceutical counters by asking the Court to look to the language of the '307 patent, which derived from the same provisional patent and which claimed a tooth-bleaching mixture "wherein the pH of the tooth-bleaching composition during the bleaching process is substantially constant within a range of 6.0-10.00; packaging the composition as a one-component system ... and applying the composition to the tooth surface." Doc. 74, ex. 5, at 10, col. 10, ll 11-14. Oraceutical does not provide a basis for the Court to read this language from the '307 patent into this construction of the '907 patent. Oraceutical's "final compelling point" on this question it to point to case law that allows for the addition of ingredients not listed in a patent, but not providing a basis for exercising that ability in the instant case. Doc. 74, at 11 (citing Mars, Inc. v. H.J. Heinz, 377 F.3d 1369, 1377 (Fed.Cir.2004)).

The claim establishes a temporal reference point for the claim when it states, "wherein the mixture is packaged." While the specification describes the usefulness of the invention with reference to its ability to maintain a desired pH level when in contact with saliva, doc. 74, ex. 1, col. 4, lns, 27-31, "[w]hat is not claimed, even though disclosed [in the specification] as part of the 'invention,' cannot be enjoined." Novo Nordisk of N. Am., 77 F.3d at 1369. The specification may not be used to extract or nullify limitations set forth in clear and unambiguous claim language. Texas Instruments, Inc. v. United States ITC, 988 F.2d 1165, 1171 (Fed.Cir.1993). The Court agrees with Procter & Gamble and finds that a person skilled in the art would understand the claim to incorporate the listed ingredients when packaged.

E. "Wherein the mixture is packaged as a one (single) component system" and "wherein the mixture is a single-component system"

Procter & Gamble requests that "wherein the mixture is packaged as a one (single) component system" and "wherein the mixture is a single-component system" both be construed to mean: "all of the listed elements are present in a system consisting of only a single mixture as packaged by the manufacturer and nothing is added to, mixed with, or combined with that mixture in order to complete the claimed composition." Oraceutical counters by suggesting that the Court write this construction: "A combination containing all of the recited claim elements, but does not exclude interaction with saliva in use." The Court agrees partially with Oraceutical: a mixture in this case is "a combination containing all of the recited claim elements." Saliva, however, is not one of the claim elements, and is thus not part of the mixture.

As discussed in the section above, the claim establishes a temporal reference point for the claim when it

states, "wherein the mixture is packaged." The Court finds that those skilled in the art would understand "wherein the mixture is packaged as a one (single) component system" and "wherein the mixture is a single-component system" to refer to "all of the listed elements in a system consisting of a single mixture as packaged by the manufacturer."

F. "Hydrogen Peroxide"

Procter & Gamble requests that "hydrogen peroxide" be read to mean: "any hydrogen peroxide in its chemical form H2 O2 that is present in the composition, either as hydrogen peroxide itself, or as a hydrogen peroxide precursor." Oraceutical would rely on only the first phrase, "Any hydrogen peroxide in its chemical form H2 O2 that is present in the composition." Doc. 74 at 19. Indeed, Montgomery amended his patent application, striking the phrase, "a hydrogen peroxide-containing compound," replacing it with "hydrogen peroxide." The Court agrees with Oraceutical, "hydrogen peroxide" means "hydrogen peroxide," and not "hydrogen peroxide or a hydrogen peroxide precursor." Thus, the Court finds that one skilled in the art would understand "hydrogen peroxide" to mean "any hydrogen peroxide in its chemical form $H_2 O_2$ that is present in the composition."

G. "At least 70% (75%) by weight"

Finally, Procter & Gamble wishes the Court to construe claims two and five. Claim two states: "The mixture of claim 1, wherein the water content is at least 70% by weight, based on the weight of the composition." Claim five changes "70%" to "75%." Procter & Gamble would change this by inserting the word "added" to modify "water." Procter & Gamble reaches this conclusion by analyzing the prosecution history and specification of the '914 patent, ignoring the rule that neither of these documents can change the clear language of a claims. The Court finds that one skilled in the art would understand "The mixture of claim 1, wherein the water content is at least 70% [or 75%] by weight, based on the weight of the composition" to mean just what is says.

IV Conclusion

The Court has thus construed the contested terms in the following manner:

Contested Term	Construction
"aqueous matrix"	"the gel, paste or liquid, containing water, in which the hydrogen peroxide-containing compound is placed"
"wherein the mixture has a pH above 5.5"	"the pH of the mixture is greater than 5.5, measured neat after final mixing and prior to packaging"
"alkaline adjusting agent" and "alkalizing agent"	"an agent found in the mixture that raises the pH"
"mixture"	"the listed ingredients when packaged"
"wherein the mixture is packaged as a one (single) component system" and "wherein the mixture is a single-component system"	"all of the listed elements in a system consisting of a single mixture as packaged by the manufacturer"
"hydrogen peroxide"	"any hydrogen peroxide in its chemical form H_2O_2 that is present in the composition"
"The mixture of claim 1, wherein the water content is at least 70% [or 75%] by weight, based on the weight of the composition"	"The mixture of claim 1, wherein the water content is at least 70% [or 75%] by weight, based on the weight of the composition"

DONE and **ORDERED.**

S.D.Ohio,2005.

Procter & Gamble Co. v. Oraceutical LLC

Produced by Sans Paper, LLC.