United States District Court,
S.D. California.

ALLTECH, INC,
Plaintiff.
v.
CENZONE TECH, INC. and Jung Fu Wu,
Defendants.
Cenzone Tech, Inc., and Jung Fu Wu,
Counterclaimants.
v.
Alltech, Inc,
Counterdefendant.

No. 06 CV 0153 JM (RBB)

Jan. 4, 2007.

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CLAIM CONSTRUCTION ORDER FOR UNITED STATES PATENT NUMBER 6,045,834

JEFFREY T. MILLER**, District Judge.**

Pursuant to Markman v. Westview Instruments, Inc., 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996), on December 20, 2006 the court conducted a Markman hearing in the above-titled patent infringement action regarding construction of the disputed claim terms for U.S. Patent Number 6,045, 834 ("the '834 patent"). Prior to the Markman hearing, on December 19, 2006, a tutorial was held during which the parties briefed the court on the science of animal feed additives.

I. *BACKGROUND*

The '834 Patent involves a method of removing mycotoxins from animal feeds wherein a composition of modified yeast cell wall extract and mineral clay is added to animal feeds and binds the mycotoxins contained therein upon consumption by the animal. Mycotoxins are toxins, or poisonous substances, produced by fungi. The presence of mycotoxins in animal feed can adversely affect the health of animals

consuming the contaminated feed by, for example, causing nervous disorders, causing tumor growth, or preventing the animal from absorbing nutrition from the contaminated feed. Plaintiff and Defendants are competitors in the animal feed additive market. The disputed terms are summarized herein and in the attached joint claim construction worksheet, incorporated by reference.

II. *PRINCIPLES OF CLAIM CONSTRUCTION*

Section 112 of the Patent Act, provides that the patent specification

shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

35 U.S.C. s. 112. The purpose of the specification is to teach and enable one skilled in the art how to make and use the invention and provide a best mode for doing so. Phillips v. AWH Corp., 415 F.3d 1303, 1323 (Fed.Cir.2005) (en banc). The specification is "always highly relevant to the claim construction analysis. Usually it is dispositive; it is the single best guide to the meaning of a disputed term." Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed.Cir.1996). The prosecution history, or written record of proceedings before the PTO, must also be considered. Phillips, 415 F.3d at 1313.

In construing a patent, the court must consider intrinsic evidence and may consider extrinsic evidence when appropriate. Intrinsic evidence consists of the specification, the claims, and the prosecution history. The specification and claims are weighted more heavily than the prosecution history. Id. at 1317.

On the other hand, extrinsic evidence includes things such as dictionaries, expert testimony, and learned treatises. Extrinsic evidence "may be useful to the court, but it is unlikely to result in a reliable interpretation of patent claim scope unless considered in the context of the intrinsic evidence." Id. at 1319. Extrinsic evidence may also be unreliable, e.g. "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" and therefore court must "keep in mind the flaws inherent" in extrinsic evidence when considering it. Id. at 1318. Nevertheless, extrinsic evidence "can help educate the court regarding the field of the invention and can help the court determine what a person of ordinary skill in the art would understand the claim terms to mean[.]" Id . at 1319.

Besides evidence, several rules of construction also aid the court in construing patent claims. One rule of construction is that limitations from the specification should not be read into the claims. As the Federal Circuit has recognized,

the distinction between using the specification to interpret the meaning of a claim and importing limitations from the specification into the claim can be a difficult one to apply in practice .... However, the line between construing terms and importing limitations can be discerned with reasonable certainty and predictability if the court's focus remains on understanding how a person of ordinary skill in the art would understand the claim terms. For instance, although the specification often describes very specific embodiments of the

invention, we have repeatedly warned against confining the claims to those embodiments .... In particular, we have expressly rejected the contention that if a patent describes only a single embodiment, the claims of the patent must be construed as being limited to that embodiment .... To avoid importing limitations from the specification into the claims, it is important to keep in mind that the purposes of the specification are to teach and enable those of skill in the art to make and use the invention and to provide a best mode for doing so.

Id. at 1323 (citations omitted). Thus, although the specification will describe a way of practicing the invention, that particular way of practicing it must not be read into the claim language itself. This means that an accused invention can infringe the patent even where it does not deploy the specific practices or embodiments described in the patent specification.

Another rule of claim construction is the doctrine of claim differentiation, which creates a presumption that each claim in a patent has a different scope. Sunrace Roots Enter. Co., Ltd. v. SRAM Corp., 336 F.3d 1298, 1302 (Fed.Cir.2003). This means that an independent claim is presumed not to contain a limitation described in the corresponding dependent claim. *See* id. at 1302-03. This presumption "is especially strong when the limitation in dispute is the only meaningful difference between an independent and dependent claim, and one party is urging that the limitation in the dependent claim should be read into the independent claim." Id. at 1303.

Finally, a claim term appearing in multiple claims should be construed consistently across those claims. Inverness Medical Switzerland GmbH v. Princeton Biomeditech Corp., 309 F.3d 1365, 1371 (Fed.Cir.2002).

When construing patent claims, the court's focus is on how a person of ordinary skill in the art ("POSA") would understand the terms therein in light of the patent as a whole. Phillips, 415 F.3d at 1323. The parties have agreed to define a POSA here as a person who has a Bachelor's degree in animal nutrition or related field, and about three to five years of experience in animal nutrition and/or animal feed formulation.

III. *ANALYSIS*

With the above principles in mind, the court now construes the disputed terms.

A. *Claim 1*

Claim 1 provides in full, "A composition for binding and thereby inactivating a mycotoxin in an animal feed, comprising a modified yeast cell wall extract and a mineral clay."

1. Disputed Term: "Animal." FN1

FN1. Although the joint claim construction worksheet reflects that the parties have set forth competing constructions of "for binding and thereby inactivating a mycotoxin in an animal feed" in claim 1, the parties have since resolved their dispute with respect this phrase and thus the court need not construe it. *See* Defs. Initial Brief at 4.

The dispute here centers on whether "animal" includes invertebrate and vertebrate species such as fish, shrimp or snails. Plaintiff proposes the following construction: "The term 'animal' means any non-human mammal or bird." Defendant proposes " 'Animal' means any kind of non-human animal, including both

vertebrate animals and invertebrate animals."

To properly construe "animal", the court must determine how a person of ordinary skill in the art would understand the term in the context of the claims, the specification, and the prosecution history. In addition, "animal" is to be given its ordinary and customary meaning used by persons of ordinary skill in the art. Nystrom v. Trex Co., Inc., 424 F.3d 1136, 1142 (Fed.Cir.2005).

Looking at the intrinsic evidence as a whole, the court finds that Plaintiff's proposed construction is the better one. The claims' only indication of what "animal" means for purposes of claim 1 is dependent claim 12's enumeration of specific species. Claim 12 recites, "The composition of claim 1, formulated for feeding to an animal selected from the group consisting of avian, bovine, porcine, equine, ovine, and caprine species." This language creates, under the doctrine of claim differentiation, a presumption that "animal" in independent claim 1 would include species *other* than those species enumerated in claim 12. On this basis, Defendant argues that the inventors intended "animal" in claim 1 to have a broad meaning and encompass species such as fish and shrimp. *See* Tr. at 40-41. To bolster its argument, Defendant points out that the specification recites that the invention "may be fed to *any* animal, including *but not limited to,* avian, bovine, porcine, equine, ovine, caprine, canine, and feline species." '834 Patent at col. 4, ll. 63-65; Tr. at 40. Defendant also points to the dictionary definition of "animal" as "a multicellular organism of the kingdom Animalia characterized by the capacity for locomotion, fixed bodily structure, and restricted growth ..." and argues that fish and shrimp meet this definition. Tr. at 42.

Although Defendant is correct that, under the doctrine of claim differentiation, "animal" in claim 1 is presumed broader than the species enumerated in claim 12, it does not necessarily follow that "animal" in claim 1 means, as Defendants would have it, any kind of non-human animal, including both vertebrate animals and invertebrate animals such as fish and shrimp. Nystrom, 424 F.3d at 1143 (limiting construction of "board" to wood cut from a log based on specification's repeated references to same, even though independent claim did not expressly contain such limitation). Nature provides species other than those of the "avian, bovine, porcine, equine, ovine, and caprine species" as recited in claim 12. For example, the specification teaches that the invention may also be fed to canine and feline species. '834 Patent, col. 3, ll. 20-25. The specification also makes repeated references to "livestock." '834 Patent, col. 1, ll. 30, 45-50, col. 2, ll. 10-12, and mentions that mycotoxins "may also impact human health, as many are transferred into milk or meat following ingestion by the animal." Id. at col. 2, ll 1-5. Also discussed is the ingestion of mycotoxins by pigs, dairy cattle, horses, poultry, and chicks, id. at col 1, ll. 50-67, as well as the insufficiency of the prior art involving feeding clay-only mixtures to animals because "in domestic livestock production situations, excreted clays may cause problems with clogging of manure handling equipment", id. at col. 2, ll. 39-40.

Thus, the language of the patent description, taken as a whole, informs a POSA that the invention is to be fed to non-human mammals and birds. As noted in Bell Atlantic Network Services, Inc. v. Covad Communications Group, Inc., 262 F.3d 1258 (Fed.Cir.2001), a patent specification may clearly redefine claim terms either expressly or by implication "such that the meaning may be 'found in or ascertained by a reading of the patent documents.' " Id. at 1268 (quoting Vitronics Corp., 90 F.3d at 1582.)

Although the dictionary definition, cited by Defendant, is broader than the court's construction, the language of the claims and specification favor adopting Plaintiff's narrower construction. Nystrom, 424 F.3d at 1145 ("It is improper to read the term to encompass a broader definition simply because it may be found in a dictionary, treatise, or other extrinsic source."). And although there is no disavowal of the scope of "animal"

in claim 1, there is also nothing in the intrinsic record to support the conclusion that a POSA would have construed "animal" in claim 1 to include species such as fish, shrimp, snails, and worms. Nystrom, 424 F.3d at 1145. Rather, the excerpts from the specification cited above all support the conclusion that "animal" does not include such species. Thus, plaintiff's proposed construction is the correct one because it " '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 Reinshaw PLC v. Marposs Societa' per Azioni, 158 F.3d 1243, 1250 (Fed.Cir.1998)). FN2

FN2. Defendant also presents the following evidence in support of its argument that a POSA would understand "animal" to have its plain and ordinary meaning of "any nonhuman animal." Defendant submits that Plaintiff represented in a symposium on biotechnology in the feed industry that pets and aquaculture are "the fastest growing areas in animal nutrition", and that Plaintiff awarded its 2006" Young Animal Scientist Award" to an individual who wrote a paper on aquaculture diets. From this, Defendant argues that Plaintiff is estopped from now asserting that "animal" does not include species such as fish and shrimp. Tr. at 42-43. This argument lacks merit because it is, at minimum, doubtful whether an experienced animal nutritionist would rely on such evidence to understand "animal" in the ' 834 patent, especially in light of the specification's repeated references to mammals and birds, to "livestock", as well as the specification's failure to mention species such as fish, shrimp, worms, and insects.

For the foregoing reasons, ***the court adopts Plaintiff's proposed construction of "animal" to mean any non-human mammal or bird.***

2. Disputed Term: "Mycotoxin."

Plaintiff proposes "The term "mycotoxin" has its plain and ordinary meaning as used in the animal nutrition industry and means a toxin produced by fungi such as molds." Defendant argues "mycotoxin" should be construed as " "Mycotoxin" means a poisonous substance produced by a fungus, e.g., a yeast, mold, smut, or mushroom." There is little difference between the parties' proposed constructions. Moreover, the court agrees with Defendant that the language "has its plain and ordinary meaning as used in the animal nutrition industry" is unnecessary. Defs. Initial Brief at 5.

With respect to whether "toxin" or "poisonous substance" should govern, the court finds that "poisonous substance" would be more understandable and useful for a jury. The specification refers to "toxin" throughout, but it is clear that "toxins" means a substance causing adverse health effects in animals. This concept is adequately captured in the less technical phrase "poisonous substance."

Plaintiff objects to Defendants' suggested construction of "e.g. a yeast, mold, smut, or mushroom" on the ground that it will confuse a jury, and that simply referring to "fungi such as molds" is clearer. The court agrees with Plaintiff that including language about yeasts, smuts, or mushrooms would not add anything to a jury's understanding of "mycotoxin." The specification refers to "toxins produced by invading molds", '834 Patent, col. 1, ll. 24-25, and to "[t]raditional methods of dealing with mycotoxins include use of mold inhibitors to prevent mold growth in stored feeds", id. col. 2, ll. 8-10. The specification does not mention mushrooms, smuts, or toxins produced by yeasts.

Accordingly, the court adopts the following construction: ***"Mycotoxin" means a poisonous substance produced by fungi, such as molds.***

3. Disputed Term: "Modified Yeast Cell Wall."

Plaintiff construes "modified yeast cell wall" in claim 1 to mean a yeast cell wall that has been altered to increase its ability to bind mycotoxins. By contrast, Defendant construes the term to mean a cell wall altered by means of alcohol shocking, or as alternatively suggested at the Markman hearing, simply "altered."

Preliminarily, the court rejects Defendant's invitation to construe "modified" as simply "altered." This construction merely substitutes one word for another without clarifying the disputed term's meaning.

The starting point for claim construction is how a POSA would understand the claims, considered in the context of the specification and prosecution history. Dependent claim 4 is "the composition of claim 1, wherein the yeast cell wall is modified prior to extraction." Dependent claim 5 is "the composition of claim 4, wherein the yeast cell wall is modified by an alcohol shocking of the yeast thereby increasing the mycotoxin-binding capacity of the yeast cell wall." Therefore, under the doctrine of claim differentiation, "modified" in claim 1 is presumed to be different in scope-i.e. include ways of modifying the yeast cell wall other than by alcohol-shocking-than in claim 4 or 5. Defendants argue this presumption is rebutted because under *Nystrom,* the following language in the specification indicates that the '834 Patent inventors intended to claim only modification by alcohol shocking:

The present invention **also provides a method of enhancing and improving the mycotoxin-binding characteristics of a yeast cell wall extract ... by an alcohol shocking** of the yeast organism during growth, e.g. during fermentation, resulting in a thickening of the yeast cell wall and an increase in the surface area available for mycotoxin binding of the resultant cell wall extract.

'834 Patent, col. 4, ll. 8-15 (emphasis added). Plaintiffs argue that limiting modification to alcohol shocking would be impermissibly limiting the claim to a preferred embodiment.

Construction of "modified yeast cell wall" in claim 1 is a close question. On the one hand, the inventors chose language in the specification-"The present invention also provides a method of enhancing and improving the ... yeast cell wall extract ... by an alcohol shocking"-that supports limiting modification to alcohol shocking. Nystrom, 424 F.3d at 1143. No other means of altering the cell wall is described in the intrinsic evidence. And the fact that the inventors described preferrred embodiments of alcohol shocking, '834 Patent, col. 4, ll 17-28, but did not provide that alcohol shocking itself was a preferred embodiment weighs in favor of Defendants' construction. On the other hand, Plaintiff's argument that alcohol shocking is merely a preferred embodiment which should not limit the claims-as evidenced by the specification's reciting that the invention "***also*** provides a method" for improving the yeast cell wall-is also compelling. Id. at col. 4, ll. 8-15 (emphasis added). Plaintiff's argument is further bolstered by the doctrine of claim differentiation, which presumes that "modified" in claim 1 is broader than merely alteration through alcohol shocking as expressly recited in claim 5.

As noted in Phillips, 415 F.3d at 1323, "to avoid importing limitations from the specification into the claims, it is important to keep in mind that the purposes of the specification are to teach and enable those of skill in the art to make and use the invention and to provide a best mode for doing so." It is undisputed that a POSA would understand that alcohol shocking is merely one method for altering yeast cell walls. From this, it is reasonable to conclude that the '834 Patent inventors intended to teach alcohol shocking as merely the best mode, or preferred embodiment, of their invention. This case is distinguishable from *Nystrom* on which

Defendants rely because there, the patentee made repeated references throughout the specification that "board" was intended to describe wood decking material cut from a log. Nystrom, 424 F.3d at 1143-44. Here, the discussion of alcohol shocking is limited to one paragraph of the specification. '834 Patent, col. 4, ll. 8-27. Although this paragraph describes alcohol shocking in some detail, alcohol shocking is not "maintained throughout the written description" as consistently as the references to boards cut from wood in Nystrom. 424 F.3d at 1143. Moreover, in *Nystrom* the patentee made repeated references in the prosecution history to boards made only of wood. *Id*. at 1144. By contrast here, the parties have presented nothing from the prosecution history indicating that the inventors intended "modified yeast cell wall" to mean only alteration by alcohol shocking. For these reasons, Defendants' proposed construction is inadequate.

Plaintiff's proposed construction, however, is problematic because it merely describes the goal of cell wall modification and would render superfluous the language about increasing the mycotoxinbinding capacity of the yeast cell wall in claim 5. *See* '834 Patent, col. 7, ll. 55-60. Both parties agree that the goal of modifying the yeast cell wall is to cause the cell wall to thicken, thereby increasing the cell wall's surface area and ability to bind more mycotoxins. ***Accordingly, the court adopts the following construction of "modified yeast cell wall" for purposes of claim 1: "Modified yeast cell wall" means a yeast cell wall that has been altered to increase its thickness and surface area.***

B. *Claim 4*

Claim 4 recites in full, "The composition of claim 1, wherein the yeast cell wall is modified prior to extraction." The only disputed term here is "modified." Plaintiff proposes the following construction: " 'Modified' means altered to increase the mycotoxin-binding ability." Defendant proposes " 'Modified' means altered by alcohol shocking."

A claim term should be construed consistently across multiple claims. Inverness Medical, 309 F.3d at 1371. In light of the court's construction of "modified yeast cell wall" in claim 1, ***the court hereby adopts the same construction of "modified" in claim 4, that is, "modified" means altered to increase its thickness and surface area.***

C. *Claim 5*

Claim 5 recites in full, "The composition of claim 4, wherein the yeast cell wall is modified by an alcohol shocking of the yeast thereby increasing the mycotoxin-binding capacity of the yeast cell wall."

1. Disputed Term: "modified."

For the reasons already stated, ***the court construes "modified" in claim 5 to mean altered to increase its thickness and surface area.***

2. Disputed Term: "alcohol shocking."

Plaintiff proposes "alcohol shocking" be construed as "stress to the yeast organism resulting from exposure to an alcohol-containing environment during growth (e.g., during fermentation)." Defendants propose " 'Alcohol shocking' means a single-step addition of an alcohol to a culture of yeast or other cell or organisms causing a very rapid increase in the alcohol concentration."

First, Defendants' "very rapid increase" language finds no support in the intrinsic or extrinsic evidence. The

claims, specification, and prosecution history say nothing about "a very rapid increase." Moreover, as Plaintiff correctly points out, Defendants' extrinsic evidence in the form of scientific literature does not use "shock" to mean the length of time the cell is exposed to a different environmental condition, but rather the change in condition itself. Pls. Responsive Brief at 14; *compare* Defs. Lodgment, Ex. 6 at 5 (brief osmotic shock lasting 5 minutes) *with* Ex. 9 at 3-4 (describing shock treatment lasting between thirty and sixty minutes).

There is, however, support for the argument that "alcohol shocking" means an exogenous addition of alcohol to the yeast cell during growth and not exposure to alcohol produced by the yeast cell itself during fermentation. The specification provides that the cell wall's binding characteristics are improved "by an alcohol shocking of the yeast organism **during growth,** e.g. **during fermentation,** resulting in a thickening of the yeast cell wall [.]" '834 Patent, col. 4, ll. 10-15 (emphasis added). This language would support a finding that "fermentation" is an example of yeast cell "growth", as demonstrated by the word "during" preceding both "growth" and "fermentation." The use of "e.g." also shows that the sentence is intended to also read "by an alcohol shocking of the yeast organism during fermentation." In the same paragraph, the specification goes on to provide that "[a]ny of a number of standard commercially available alcohols may be used, including, but not limited to methyl, ethyl, and isopropyl alcohols." Id. at col. 4, ll. 15-20. The context and proximity of these two excerpts favors a definition of "alcohol shocking" to be an exogenous addition of alcohol to the yeast cell during growth. *See* Bell Atlantic, 262 F.3d at 1268 (providing that a patent specification may define claim terms expressly or by implication).

Finally, relying on extrinsic evidence, Defendants object to the Plaintiff's proposal to use the word "stress" on the ground that a POSA would understand "stress" to be very different from "shock". However, as Plaintiff correctly points out, Defendants' extrinsic evidence uses "shock" and "stress" interchangeably. Pls. Responsive Brief at 13; *see, e.g.,* Defs Lodgment, Ex. 11 at 1-2.

Thus, the court construes "alcohol shocking" to mean stress to the yeast organism resulting from exposure to an alcohol-containing environment during growth wherein the alcohol is added from an external source.

D. ***Claim 15***

Claim 15 recites in full, "An animal feed comprising a composition comprised of a modified yeast cell wall extract and a mineral clay in an amount effective to bind and thereby inactivate a mycotoxin present in the animal feed."

1. Disputed term: "amount efective to bind and thereby inactivate a mycotoxin present in the animal feed."

Plaintiff proposes the phrase means "an amount sufficient to either adsorb and thereby reduce the absorption of mycotoxins by an animal or reduce the deleterious effects of mycotoxins in an animal." Defendant proposes "an amount which binds to and makes incapable of action a mycotoxin present in an animal feed."

In light of the intrinsic evidence, the court finds Plaintiff's construction is the more sensible one. The specification provides that the "present invention is directed to compositions and methods for **reducing or ameliorating** the absorption of a variety of mycotoxins in animal feeds[.]" '834 Patent, col. 1, ll 10-15 (emphasis added). The specification further provides for the **"decrease[d]** absorption or uptake of the mycotoxins by the affected animal, thereby improving performance and health, and **reducing** the incidence

of mycotoxin-associated diseases." Id. at col. 3, ll. 25-30 (emphasis added). Plaintiff's construction is in harmony with the specification. Vitronics Corp. ., 90 F.3d at 1582 (providing that specification is the best source for understanding a disputed term).

Defendants' proposed construction is inadequate because it essentially restates the claim language except that it substitutes "inactivate" for "makes incapable of action". Moreover, it is unclear what "makes incapable of action" means.

Therefore, the court construes "amount effective to bind and thereby inactivate a mycotoxin present in the animal feed" to mean an amount sufficient to either adsorb and thereby reduce the absorption of mycotoxins by an animal or reduce the deleterious effects of mycotoxins in an animal.

2. Disputed Term: "inactivate."

Plaintiff contends the court need not construe this term, and therefore has not put forth a proposed construction. Defendants construe "inactivate" as "to make incapable of action." Defendants argue that the intrinsic evidence does not clearly indicate Plaintiff intended "inactivate" to have anything other than its plain and ordinary meaning, and that the dictionary definition of "inactivate" supports its proposed construction, "to make incapable of action." *See* Defs. Responsive Brief at 13-14.

However, Defendants' construction is too narrow in view of the intrinsic evidence. Again, the invention focuses on the reduction in, not eradication of, the adverse health effects of mycotoxins in animal feed. FN3

FN3. Relying on International Rectifier Corp. v. Ixys Corp., 361 F.3d 1363 (Fed.Cir.2004), Defendants also argue that Plaintiffs chose the narrower term "inactivate" in their claim language and therefore it must be bound by it. Id. at 1371-72 (reversing district court, who construed claim term in accordance with specification but contra the dictionary). However, *International Rectifier* deployed the then-existing analytic framework under by Texas Digital Sys., Inc. v. Telegenix, 308 F.3d 1193 (Fed.Cir.2002), for Markman hearings. *Texas Digital* placed primary importance on the dictionary over the written specification, an approach that was expressly rejected by the Federal Circuit in *Phillips,* decided after *International Rectifier*. Phillips, 415 F.3d at 1320 (*Texas Digital*' s methodology "placed too much reliance on extrinsic sources such as dictionaries, treatises, and encyclopedias and too little on intrinsic sources, in particular the specification and prosecution history."). Therefore, *International Rectifier's* reasoning has been superseded by *Phillips,* and *Phillips* provides that the specification is a better source for interpreting a disputed claim term than the dictionary.

In sum, the court agrees with Plaintiff that "inactivate" need not be construed because the court's construction of "amount effective to bind ..." clause of Claim 15 is sufficient to convey the meaning of "inactivate" within the context of that clause.

E. *Claim 17*

Claim 17 provides in full, "A method for reducing mycotoxin contamination of an animal consuming a feedstuff, comprising feeding to an animal an effective amount of a composition comprising a modified yeast cell wall extract and a mineral clay thereby binding and inactivating the mycotoxin in the animal feed." The disputed term is "effective amount." Plaintiff proposes "an amount sufficient to bring about the desired result of either adsorbing and inactivating a mycotoxin in an animal feed or reducing the deleterious

effects of mycotoxins in an animal." Defendant proposes " 'An effective amount' means an amount which is sufficient to bind and inactivate mycotoxins present in an animal feed."

The court finds Plaintiff's construction aligns better with the intrinsic evidence for the reasons stated with respect to claim 15. Accordingly, the court adopts Plaintiff's construction.

IV. *CONCLUSION*

The court hereby construes the claims as set forth in this order and in the attached claim construction worksheet.

IT IS SO ORDERED.

JOINT CLAIM CONSTRUCTION WORKSHEET

Court's Claim Constructions

Alltech, Inc. v. Cenzone Tech, Inc., et al.

Case No. 06-CV-0153

PATENT CLAIM	AGREED PROPOSED CONSTRUCTION	PLAINTIFF'S PROPOSED CONSTRUCTION	DEFENDANTS' PROPOSED CONSTRUCTION	COURT'S CONSTRUCTION
1. A composition **for binding and thereby inactivating a mycotoxin in an animal** feed, comprising a **modified yeast cell wall extract** and a **mineral clay.**		The phrase **"for binding and thereby inactivating a mycotoxin in an animal feed"** is a limitation on the composition of claim 1.	The phrase **"for binding and thereby inactivating a mycotoxin in an animal feed"** is merely a statement of intent which does not limit the scope of the claim.	Parties no longer disagree on this construction and therefore the court need not construe it. *See* Defs. Initial Brief at 4.
		The term **"animal"** means any non-human mammal or bird.	**"Animal"** means any kind of non-human animal, including both vertebrate animals and invertebrate	The term **"animal"** means any non-human mammal or bird.

				animals.
	The term "**animal feed**" refers to any composition that is suitable for providing nutrition to any kind of animal.			
		The term "**mycotoxin**" has its plain and ordinary meaning as used in the animal nutrition industry and means a toxin produced by fungi such as molds.	"**Mycotoxin**" means a poisonous substance produced by a fungus, e.g., a yeast, mold, smut, or mushroom.	"Mycotoxin" means a poisonous substance produced by fungi, such as molds.
		The term "**modified yeast cell wall,**" means a yeast cell wall that has been altered to increase its ability to bind mycotoxins.	"**Modified yeast cell wall**" means cell wall altered by means of alcohol shocking.	"Modified yeast cell wall," means a yeast cell wall that has been altered to increase its thickness and surface area.
	The term "**yeast cell wall extract**" refers to a composition of yeast cell material, including yeast cell walls, where at least a portion of the yeast cell walls have been separated from their intracellular components.			
	The term "**mineral clay**" means a material that contains silicates and is suitable for inclusion in animal diets.			
4. The		The term	"**Modified**"	"Modified" means

composition of claim 1, wherein the yeast cell wall is **modified** prior to extraction.		**"modified"** means altered to increase the mycotoxin-binding ability.	means altered by alcohol shocking.	altered to increase its thickness and surface area.
5. The composition of claim 4, wherein the yeast cell wall is **modified** by an **alcohol shocking** of the yeast thereby increasing the **mycotoxin-binding capacity** of the yeast cell wall .		The term **"modified"** means altered to increase the mycotoxinbinding ability.	Same as for "modified" in Claim 4.	"Modified" means altered to increase its thickness and surface area.
		The term **"alcohol shocking"** means stress to the yeast organism resulting from exposure to an alcohol-containing environment during growth (e.g., during fermentation).	**"Alcohol shocking"** means a single-step addition of an alcohol to a culture of yeast or other cell or organisms causing a very rapid increase in the alcohol concentration.	"Alcohol shocking" to mean stress to the yeast organism resulting from exposure to an alcoholcontaining environment during growth wherein the alcohol is added from an external source.
	The term **"mycotoxinbinding capacity"** means the ability to bind mycotoxins.			
15. An animal feed comprising a composition comprised of a modified yeast cell wall extract and a mineral clay in an **amount effective to bind and**		The phrase **"amount effective to bind and thereby inactivate a mycotoxin present in the animal feed"** means an amount sufficient to either adsorb and thereby	The phrase **"amount effective to bind and thereby inactivate a mycotoxin present in the animal feed"** means an	The phrase **"amount effective to bind and thereby inactivate a mycotoxin present in the animal feed"** means an amount sufficient to either adsorb and thereby reduce the absorption

thereby inactivate a mycotoxin present in the animal feed.	reduce the absorption of mycotoxins by an animal or reduce the deleterious effects of mycotoxins in an animal.	amount which binds to and makes incapable of action a mycotoxin present in an animal feed.	of mycotoxins by an animal or reduce the deleterious effects of mycotoxins in an animal.
	Alltech objects to Cenzone's identification of the term "inactivate" as a term requiring the Court's construction.	"**Inactivate**" means to make incapable of action.	This term does not require the court's construction.
17. A method for reducing mycotoxin contamination of an animal consuming a feedstuff, comprising feeding to an animal an **effective amount** of a composition comprising a modified yeast cell wall extract and a mineral clay thereby binding and inactivating the mycotoxin in the animal feed.	The term "**effective amount**" means an amount sufficient to bring about the desired result of either adsorbing and inactivating a mycotoxin in an animal feed or reducing the deleterious effects of mycotoxins in an animal.	"**An effective amount**" means an amount which is sufficient to bind and inactivate mycotoxins present in an animal feed.	The term "**effective amount**" means an amount sufficient to bring about the desired result of either adsorbing and inactivating a mycotoxin in an animal feed or reducing the deleterious effects of mycotoxins in an animal.

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