United States District Court,
D. Hawaii.

**William R. KOWALSKI,**
Plaintiff.
v.
**MOMMY GINA TUNA RESOURCES, et al,**
Defendants.
**William R. Kowalski,**
Plaintiff.
v.
**Citra Mina Seafood Corporatio,**
Citra Mina Seafood Corporation.
**William R. Kowalski,**
Plaintiff.
v.
**Richard Friend,**
and Seafriend.

Civ. Nos. 05-00679 BMK, 06-00182 BMK, 05-00787 BMK

**Sept. 30, 2008.**

Martin E. Hsia, Alston Hunt Floyd & Ing, Honolulu, HI, Michelle L. H. Ing, Crowell Ing, LLP, Salem, OR, for Plaintiffs.

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***ORDER FURTHER CONSTRUING THE KOWALSKI PATENT, AND GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON INFRINGEMENT***

BARRY M. KURREN**, United States Magistrate Judge.**

Before the Court is Plaintiff's Motion for Partial Summary Judgment on Infringement. This motion concerns the taste of frozen fish. Specifically, Plaintiff William R. Kowalski's ("Kowalski") process for applying filtered smoke to tuna (or other seafood) before freezing it so as to preserve the taste and appearance of freshness after the fish is frozen and thawed. U.S. Patent 5,972,401, titled "Process for Manufacturing Tasteless Super-Purified Smoke for Treating Seafood to be Frozen and Thawed," was awarded to Plaintiff William R. Kowalski ("Kowalski"), on October 26, 1999 (hereinafter "Kowalski Patent"). Kowalski's process involves three steps: (1) burning organic material to produce smoke, (2) filtering the smoke to

remove components of the smoke that impart odor and taste, and (3) applying the smoke to tuna (or other meat) before freezing (Kowalski Patent Col. 22-23, beginning at ln. 65).

Defendants are also in the business of preserving fish with filtered smoke. Kowalski brought the present actions FN1 against Defendants Mommy Gina Tuna Resources, King Tuna Inc., Citra Mina, Seafriend, Richard Friend, and Jake Lu (Collectively "Original Defendants") for infringement of the Kowalski Patent. Subsequently, Kowalski joined Defendants Mommy Gina Tuna Resources, Inc.("MGTR, Inc."), GJ Fresh LLC ("GJFresh"), Citra Mina Property Holdings ("Citra Mina Holdings"), and Integral Seafood LLC("Integral") (Collectively "25(c) Defendants") under Fed.R.Civ.P. 25(c) as transferees of interest. FN2

FN1. *Kowalski v. Mommy Gina Tuna Resources, et al.,* Civ. No. 05-00679 BMK; *Kowalski v. Integral Seafood LLC;* Civ. No. 06-00182 BMK; and *Kowalski v. Friend;* Civ. No. 05-00787 BMK.

FN2. Integral was initially named as a party to *Kowalski v. Integral Seafood LLC;* Civ. No. 06-00182 BMK in Kowalski's original complaint. However, Integral was dismissed from the case for lack of personal jurisdiction and joined with other 25(c) Defendants in *Kowalski v. Mommy Gina Tuna Resources, et al.,* Civ. No. 05-00679 BMK. *See* Order (1) Granting Defendant Integral Seafood, LLC's Motion to Dismiss for Lack of Personal Jurisdiction; (2) Granting Plaintiff's Counter Motion to Join Integral Seafood, LLC Under Rule 25(C); and (3) Denying Without Prejudice Plaintiff's Counter Motion to Join Mommy Gina Tuna Resources, Inc.; Order Granting Motion for Application of Rule 25(C)

It is undisputed that Original Defendants produced, sold or imported fish that had undergone a process inclusive of the steps claimed by the Kowalski Patent. The parties also agree that the fish produced, sold or imported by Defendants, like fish treated with Kowalski's process, has no traditional smoked or smoky taste as might be associated with smoked ham or smoked salmon. Where the parties disagree is whether the Kowalski Patent claims a process that imparts no taste whatsoever to fish so treated. Defendants take the position that it does; therefore they have introduced evidence, sufficient to withstand summary judgment, to show that Original Defendants' smoking process does impart a distinct flavor, although not a traditional smoky flavor, to fish so treated. Kowalski argues that the Kowalski Patent claims are broader, claiming a process that eliminates all smoky taste imparted by the filtered smoke, but not limited to a process that preserves the flavor of fresh tuna unchanged. Under this construction of the Kowalski Patent, Kowalski contends, Defendants' process manifestly infringes the Kowalski Patent and Defendants proffer no evidence to rebut this point.

On July 2, 2008, Kowalski filed a Motion For Partial Summary Judgement On Infringement. Based on the submissions of the parties, it became clear that prerequisite to a determination on infringement the Court must construe certain language in the claims of the patent. Specifically, the Court must construe the adjective ***smoke*** as used in Claims 1 and 67 of the Kowalski Patent. The Court ordered additional briefing from the parties on the proper construction of the relevant language of the claims of the Kowalski Patent, and on September 22, 2008 held a hearing on this and other issues.

This Court has already construed several terms in the Kowalski Patent. This Court held *Markman* hearings to construe claims of the Kowalski Patent on August 31, 2007 and on November 16, 2007, and provided additional clarification upon a Motion for Clarification and Reconsideration.FN3 The Court construes the patent in accordance with its prior orders.

FN3. *See* Claims Construction Order For The Yamaoka and Kowalski Patents, Oct. 17, 2007; Order Construing Claims 1, 33, 67, 68 and 69 Of The Kowalski Patent, Nov. 19, 2007; Order Granting Motion For Clarification And Reconsideration Of Claims Construction Order, Nov 15, 2007.

Based on the Kowalski Patent's claims and specifications, the prosecution history of the Kowalski patent, parties' submissions in support and opposition to the motions, and the arguments of the parties, the Court CONSTRUES the claims of the Kowalski Patent as set forth below; GRANTS in part and DENIES in part Plaintiff's Motion For Partial Summary Judgment on Infringement.

## *STANDARD OF REVIEW*

"An infringement analysis involves two steps." Markman v. Westview Instruments, Inc., 52 F.3d 967, 976 (Fed.Cir.1995), aff'd, 517 U.S. 370, 391, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996). First, the Court must construe the terms of the patent claims; next, the construed claims must be compared to the allegedly infringing product or process. *Id*. Claims are construed as a matter of law; the "determination as to whether the claims ... read on the accused device [or process] presents an issue of fact." Elkay Mfg. Co. v. EBCO Mfg. Co., et al., 192 F.3d 973, 976 (Fed.Cir.1999).

The claims of a patent define its scope. Phillips v. AWH, 415 F.3d 1303, 1312 (Fed.Cir.2005). Claims are to be construed according to their ordinary custom and meaning as understood by a "a person of ordinary skill in the art in question at the time of the invention." Phillips, 415 F.3d at 1312. A deviation from the ordinary meaning of terms is justified if the patentee has chosen to act as lexicographer or if the patentee has relinquished a potential claim construction in an amendment to the patent or in an argument to overcome or distinguish a reference. Vitronics Corp. v. Conceptronics, Inc., 90 F.3d 1576, 1582-83 (Fed.Cir.1996).

In construing patent claims, the Court looks first to the intrinsic evidence consisting of the language of the claims, the specifications of the patent, and, if in evidence, the prosecution history of the patent "for it is that language that the patentee chose to use to 'particularly point[ ] out and distinctly claim[ ] the subject matter which the patentee regards as his invention." Interactive Gift Express, Inc., v. Compuserve, Inc., 256 F.3d 1323, 1331 (Fed.Cir.2001) (quoting 35 U.S.C. s. 112). However, all intrinsic evidence is not equal. Vitronics, 90 F.3d at 1582. The language of the claims themselves is the first place courts must look in construing patents' claims. Riverwood Int'l Corp. v. RA. Jones & Co., 324 F.3d 1346, 1347 (Fed.Cir.2003). Where the claim language is unclear, the court may look to the specifications and patent prosecution history to help ascertain the meaning of the claims. NTP, Inc. v. Research in Motion, Ltd., 418 F.3d 1282, 1293 (Fed.Cir.2005); *see also* Eastman Kodak Co. v. Goodyear Tire & Rubber Co., 114 F.3d 1547, 1552 (Fed.Cir.1997) (stating that "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.")

If, after reviewing all intrinsic evidence, the proper construction of the patent claims remains ambiguous, the court may then take into account extrinsic evidence. Phillips, 415 F.3d at 1317. Extrinsic evidence consists of all evidence external to the patent and file history, including dictionaries, expert testimony, learned treatises, and prior art. Markman, 52 F.3d at 979-80. The Court looks to extrinsic evidence "only when the claim language remains genuinely ambiguous after consideration of the intrinsic evidence." " Interactive Gift Express, 256 F.3d at 1332.

Motions for summary judgment are only granted when the court determines that there is no genuine issue of material fact, and that the undisputed facts warrant judgment for the moving party as a matter of law. Fed.R.Civ.P. 56(c). In determining whether a genuine issue of material fact exists, courts must resolve all ambiguities and draw all factual inferences in favor of the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *see also* Avia Group Int'l v. L.A. Gear California Inc., 853 F.2d 1557, 1560 (Fed.Cir.1988).

The court's function in deciding a motion for summary judgment is not to try issues of fact, but to determine whether there are any issues to be tried. Anderson, 477 U.S. at 249. If there is any evidence in the record from which a reasonable inference could be drawn in favor of the non-moving party on a material issue of fact, summary judgment is improper. Hodash v. Block Drug Co., 786 F.2d 1136, 1141 (Fed.Cir.1986). "Where, as here, the parties do not dispute any relevant facts regarding the accused product but disagree over which of two possible meanings of [the patent claims] is the proper one, the question of literal infringement collapses to one of claim construction and is thus amenable to summary judgment." Athletic Alternatives v. Prince Mfg., 73 F.3d 1573, 1578 (Fed.Cir.1996)

The movant bears the initial burden of demonstrating the absence of all genuine issues of material fact. Cooper v. Ford Motor Co., 748 F.2d 677, 679 (Fed.Cir.1984). Once this initial showing is made by the movant, the burden then shifts to the nonmovant to demonstrate the existence of a genuine dispute. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

***ANALYSIS***

The Kowalski Patent contains 73 claims. Only the language of claims 1 and 67 are at issue on these motions. The Kowalski Patent claims:

1. A process for treating meat comprising: heating organic material to generate smoke having a gaseous

vapor phase;

super purifying said smoke to reduce taste imparting

components below thresholds for imparting ***smoke*** odor

and taste, whereby a substantially tasteless super-purified

smoke is created; and

treating meat having a freezing point with said tasteless super-purified smoke.

(Kowalski Patent, Col. 22-23, at 65 (emphasis added.)) The Kowalski Patent also claims:

67. A process for treating food comprising:

heating organic material to generate smoke;

filtering components that impart ***smoke*** flavor from said Smoke

to below limits for imparting ***smoke*** flavoring to food;

and

exposing said filtered smoke to food without imparting a ***smoke***

flavor to said food.

(Kowalski Patent, Col. 28, at 11-18.(emphasis added.))

The task for the Court is to construe the word ***smoke*** as an adjectival modifier of the words taste, flavor, and flavoring. Defendants argue that ***smoke*** in this context is used to identify the cause or source of the taste or flavor. (Def. Opp. 11 ("Such a flavor change would be the direct result of applying the smoke to the fish.")) "Even if the taste imparted is not a traditional 'smoky' taste, the smoke imparts a taste and therefore is a 'smoke taste;" (Def.Opp.11). Kowalski argues that in this context the word ***smoke*** refers to the "unique and distinct flavor, taste or odor of food that people call 'smoked'." (Pl. Reply 10). Under this construction, the Kowalski patent claims a process to produce fish that "does not have a detectable flavor, taste or odor ... of smoked food when consumed." (Pl. Repl 10).

**A.** ***INTRINSIC EVIDENCE***

**1.** ***THE PATENT CLAIMS***

The starting place for any claims construction analysis is the language of the claims themselves. Defendants point to the use of the phrases "tasteless smoke", "tasteless super purified smoke", "substantially tasteless super purified smoke" and other variations of the phrase as conclusive proof that the patent claims a process that imparts no taste to the treated fish. It is true that the phrase appears in the claims, throughout the patent as a whole, in the patent prosecution history, and even in the title of the patent. However, the words in a claim can deviate from their ordinary meaning if it is clear that the Patentee intended a different meaning in the context of the patent. Markman, 52 F.3d at 980. This Court has previously construed these phrases and has found that " 'super-purifying' is a name that can be used for such a reduction of taste causing components and 'substantially tasteless super-purified smoke' is a name that can be used for the resulting smoke that does not impart smoke taste." (Order Construing Claims 1, 33, 67, 68, and 69 of the Kowalski Patent July 19, 2007 10). In other words, the patentee, exercising his prerogative as lexicographer of the patent, has adopted the phrases "tasteless smoke", "tasteless super purified smoke", and "substantially tasteless super purified smoke" to describe an intermediate or final product of the patented process. These phrases, therefore, have no independent meaning, and despite their ubiquity throughout the patent and related documents, offer no useful guidance for the proper construction of other terms in the claims.

Defendants also find support for their proposed construction of the claims in the language of other claims which suggests a process that imparts no taste or odor whatsoever to the treated fish. The language of Claim 12 includes "filtering the gaseous vapor phase of said smoke to eliminate any remaining odor and taste imparting gaseous vapor compounds and phenols." Claim 60 describes a purification process "to reduce taste and odor imparting particulates and vapors below taste and odor recognition thresholds...."

However, several of the claims use language that clearly supports Plaintiff's construction. These claims describe the same process described in Claims 1and 67, but they unequivocally identify the resulting product as fish without a traditional smoked or smoky taste. Claim 46 teaches a process that treats meat "without imparting a smoky taste to said meat." Claim 64 teaches a process that removes "particulate and gaseous vapor compounds ... that impart smoked flavor to foods." Of particular significance are Claims 49 and 50 which use the modifiers ***smoke*** and smoky interchangeably. Claim 49 describes a process to "eliminat[e] said smoke taste compounds ... whereby said treated meat does not have a smoky taste." Claim 50 describes "eliminating smoke taste compounds ... whereby said treated meat does not retain a smoky taste."

The construction offered by Plaintiff also has the advantage of lending independent significance to each word in the claims; Defendants' interpretation would essentially read the modifier ***smoke*** as irrelevant and unnecessary to the meaning of the claim. Claim 1 FN4, for example, reads in part "super purifying said smoke to reduce taste imparting components below thresholds for imparting smoke odor and taste...." Under Defendants' construction, the adjective ***smoke*** can be deleted without changing the meaning of the claim; with or without the word ***smoke*** the claim would be that ***no*** odor or taste is being imparted.

FN4. Claim 1 and Claim 67 do not meaningfully differ as relates to this issue of construction.

Thus, while the language of the claims is susceptible to either party's proposed construction, Plaintiff's construction is more strongly supported. The next step in the claims construction process is to look to the other intrinsic evidence: the patent as a whole including the specifications, and the prosecution history of the patent.

**2. *THE PATENT SPECIFICATIONS***

As with the patent claims, the patent specifications provide some support for the constructions proposed by either of the parties, but the weight of the evidence favors Plaintiff's construction. Defendants point to several references to Plaintiff's patented process that can be interpreted as describing a process that imparts no taste to the treated meat or fish. (Kowalski Patent, Col. 7-8, at 67; Col. 8, at 38-40; Col. 12, at 40-41; Col. 13, at 66-67; Col. 21, at 1-5; Col. 21, at 37-39.)

However, there are also several references that expressly describe a process that imparts no smoky or smoked taste. (Kowalski Patent, Col. 3, at 22-23; Col. 4, at 26-28; Col. 4, at 61-62; Col. 8, at 46-51; Col. 12, at 3-6.) In addition, the patent specification states that the intention of the patent is to produce seafood that "appears and tastes similar to fresh after it is frozen and thawed." (Kowalski Patent Col. 1, at 30 (emphasis added)). A taste ***similar*** to fresh is distinguishable from a taste ***identical*** to fresh, which would comport with the Defendant's proposed construction.

The specification also states that the gaseous components filtered by the process are those responsible for "characteristic smoke" flavor. (Kowalski Patent, Col 8, at 17-18; Col 8, at 27.) These references are particularly persuasive because the Patent uses the modifier ***smoke,*** not smoky or smoked, but is clearly referring to a characteristic flavor, i.e. that flavor conventionally attributed to smoked foods. This provides strong evidence that the modifier ***smoke*** is used in the patent to refer to a smoked flavor. *Vitronics,* 90 F.3d at1582. ("The specification acts as a dictionary when it expressly defines terms used in the claims or when it defines terms by implication." (Citing Markman, 52 F.3d at 979.))

**3. *THE PATENT PROSECUTION HISTORY***

The final component of intrinsic evidence that the Court looks to in construing patent claims is the prosecution history of the patent. The prosecution history provides guidance for when a patent term should be read to deviate from its ordinary meaning because of the way the patent was distinguished from the prior art in the field. Vitronics, 90 F.3d at 1582 ("[T]he record before the Patent and Trademark Office is often of critical significance in determining the meaning of the claims.")

Defendants point to statements in Patentee's Declaration in Support of Petition to Make Special Under Rule 102(d) as evidence that the process claimed imparts no taste whatsoever. Specifically, the patentee repeatedly distinguishes the Kowalski Patent from prior art references because those references, "fail to meet the above stated limitation of reducing taste imparting particulates and vapors below recognition thresholds for odor and taste." (Decl. in Supp. of Pet. to Make Special 3). Defendant argues that in distinguishing the Kowalski Patent from prior art, Kowalski expressly limited the claims to a process that imparts no taste whatsoever to the meat or fish treated.

However, a thorough examination of the Prosecution History of the Kowalski Patent undermines or subverts Defendant's argument. In his June 17, 1999 Notice of Allowability, the Patent Examiner states the reason for allowing the patent: "the claimed process ... defines over prior art of record by comprising the steps of generating smoke, removing smoke odor and/or taste ... such that the food does not retain a smoky odor or taste." The Patent Examiner uses the words smoke and smoky interchangeably. Thus, the Patent Examiner has understood the scope of the patent, despite all Kowalski's references to the tastelessness of the smoke, to claim a process that imparts no smoky taste, rather than a process that imparts no taste at all. This strongly suggests that one of ordinary skill in the art at the time of the invention of the patent would have understood ***smoke*** taste to mean smoky taste and would have understood tastelessness to refer to an absence of smoky taste.

Finally, as shown by his Nov. 28, 1997 Amendment Under 37 C.F.R. 1.111, patentee specifically added the modifier ***smoke*** to several of the Kowalski Patent claims during the patenting process. This strongly suggests that the word was intended to effect a change in the meaning and scope of the patent claims; Defendants' proposed construction would render the impact of these amendments null.

At the Court's September 22 hearing on these motions, Defendants contended that these amendments impermissibly expanded the scope of the patent. However, this argument is circular, requiring the Court to assume that the Patentee originally intended to claim a process that imparts no taste whatsoever to treated fish. A more reasonable interpretation of the impact of these amendments is that they clarified the meaning and scope of the patent: a process for treating fish without imparting a traditional smoky or smoked taste.

**B. *EXTRINSIC EVIDENCE***

In circumstances where the "intrinsic evidence alone will resolve any ambiguity" as to the proper construction of claim terms, "it is improper to rely on extrinsic evidence." Vitronics, 90 F.3d at 1583. Here, the weight of the intrinsic evidence clearly favors Plaintiff's proposed construction of the contested claims language. Therefore, there is no need to resort to extrinsic evidence, indeed it would be improper to do so.

**C. *THE CLAIMS CONSTRUED***

Based on the foregoing evidence and analysis, the Court construes the adjective ***smoke*** as used to modify

the words odor, taste, flavor or flavoring in claims 1 and 67 to refer to a traditional smoked or smoky taste. Therefore, the Kowalski Patent is properly construed to claim a process that imparts no smoked or smoky taste to the treated seafood. The Court rejects the more narrow construction proposed by Defendants that would limit the claims of the Kowalski Patent to a process that imparts not taste whatsoever to the treated meat or seafood.

***INFRINGEMENT BY THE ORIGINAL DEFENDANTS***

Given the foregoing construction of the claims of the Kowalski Patent, the Court GRANTS Summary Judgment for Plaintiff on the issue of infringement. Original Defendants' opposition to the Summary Judgment on infringement is premised on their proposed construction of the patent claims. Original Defendants essentially concede that, under the construction adopted by the Court by this order, infringement has occurred.

Original Defendants argue that they do not infringe the Kowalski Patent because "they do not filter out all taste imparting components in the smoke." (Def. Memorandum Of Additional Briefing 12). However, this argument is predicated on Original Defendants' proposed construction of the Kowalski Patent claims. Original Defendants do not claim that their process imparts a smoky taste to the treated meat and seafood, which would take their process outside the claims of the Kowalski Patent as construed by this Court. The declarations of Original Defendants' own experts state that Original Defendants' process imparts no smoky taste to the treated meat and seafood. (Declaration of Seiji Kumagawa 4, "The King Tuna smoked tuna does not have a smoky smell or taste"; Declaration of Hidehiro Kumazawa 2, "This smoke flavor is not a traditional smoky flavor.") Given the Court's construction of the Kowalski Patent claims, Original Defendants' proffered evidence raises no issue of material fact sufficient to withstand summary judgment.

***INFRINGEMENT BY THE 25(c) DEFENDANTS***

Defendants MGTR, Inc., Integral, GJ Fresh, and Citra Mina Holdings were joined in this action under Fed.R.Civ.P. 25(c) as transferees of interest. Rule 25(c) provides in part, "If an interest is transferred, the action may be continued by, or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party." Joinder under 25(c) is proper "[w]hen the successor in interest voluntarily steps into the shoes of its predecessor, [ ] the court properly assumed jurisdiction over the predecessor and [ ]the predecessor is properly served...." Minn. Mining & Mfg. Co. V. Eco-Chem, Inc., 757 F.2d 1256, 1263 (Fed.Cir.1985). Application of the rule avoids the circumstance of a Defendant imposing on a Plaintiff "the immense burden of chasing the involved assets from courtroom to courtroom." *Id*.

Defendants argue that 25(c) Defendants are not parties as pertains to the merits of the case, and that Summary Judgment goes to the merits of the case. (Def.Opp.14). It is a well-established rule that "Rule 25(c) is not designed to create new relationships among parties" but "to allow the action to continue unabated when an interest in the lawsuit changes hands." *Educ*. Credit Mgmt. Corp. v. Bernal, 207 F.3d 595, 598 (9th Cir.2000) (citations omitted). However, Defendants' contention that parties joined via 25(c) are quasi parties is incorrect. *See* Wainwright v. Kraftco Corp., 58 F.R.D. 9, 13-14 n. 1 (N.D.Ga.1973)(allowing discovery by and of 25(c) party); Burka v. Aetna Life Ins. Co., 87 F.3d 478, 480 (D.C.Cir.1996)(upholding District Court's leave for 25(c) party to amend complaint and bring additional claim); Novo Industri A/S v. Travenol Labs. Et al., 677 F.2d 1202, 1211-12 (7th Cir.1982) (upholding District Court's consideration of actions by 25(c) party subsequent to transfer in calculating damages).

The Court finds the evidence offered by Plaintiff to show independent infringing conduct on the part of the 25(c) Defendants inadequate for Summary Judgment.FN5 The proof Plaintiff offers is really in the nature of showing that (1) interests were transferred from the Original Defendants to the 25(c) Defendants, and (2) that the interests transferred included the allegedly infringing business assets and activities that are the subject of this case. Under this theory, a ruling of independent infringement by the 25(c) Defendants is unnecessary to establish their potential liability should Plaintiff prevail against the Original Defendants in this case. Rule 25(c) "does not require that anything be done after an interest has been transferred" and indeed can be used to join a transferee after judgment is already entered. Natural Res. Def. Council, Inc., v. Texaco Refining and Mktg., Inc., 2 F.3d 493, 501 (3rd. Cir.1993)(quoting 7C C. Wright, A. Miller & M. Kane, Federal Practice and Procedure s. 1958, at 555 (2nd ed.1986)). The Court therefore DENIES Plaintiff's Motion for Partial Summary Judgment as to the 25(c) Defendants. However, to the extent that the interests transferred are the infringing business activities that are the subject of this case, any continuing infringing activity by the 25(c) Defendants subsequent to transfer may be relevant to the calculation of damages should Kowalski prevail against the original Defendants. Novo Industri A/S, 677 F.2d at 1211-12; *See also* Moody v. Albemarle Paper, 50 F.R.D. 494, 498 (E.D.N.C.1970)("Using the rule does not expand any federal jurisdiction, but only makes right what has the odorous property of being an unfair procedural obstacle.")

FN5. In the case of Citra Mina Holding, a real estate holding company that neither processes, imports, nor sells any fish, Plaintiff does not even hazzard to make the argument.

## ***CONCLUSION***

For the reasons stated above the Court: (1) CONSTRUES the adjectival modifier ***smoke*** in Claims 1 & 67 of the Kowalski Patent to refer to a traditional smoky or smoked taste; and (2) GRANTS in part and DENIES in part Plaintiff's Motion For Partial Summary Judgment on Infringement.

IT IS SO ORDERED.

D.Hawai'i,2008.
Kowalski v. Mommy Gina Tuna Resources

Produced by Sans Paper, LLC.