

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. **EDCV 12-1341 JGB (SPx)**

Date **June 11, 2014**

Title ***Texchem Advanced Products Inc. Sdn. Bhd. v. e.PAK Int'l Inc.***

Present: The Honorable **JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE**

MAYNOR GALVEZ

Deputy Clerk

Not Reported

Court Reporter

Attorney(s) Present for Plaintiff(s):

None Present

Attorney(s) Present for Defendant(s):

None Present

Proceedings: Order re (1) e.PAK's Motion in Limine (Doc. No. 46); (2) Texchem's Motion in Limine (Doc. No. 47); (3) Texchem's Motion for leave to File a First Amended Complaint (Doc. No. 77); and (4) Texchem's Motion for Reconsideration (Doc. No. 115) (IN CHAMBERS)

Before the Court are (1) e.PAK's Motion in Limine (Doc. No. 46); (2) Texchem's Motion in Limine (Doc. No. 47); (3) Texchem's Motion for Leave to File a First Amended Complaint (Doc. No. 77); and (4) Texchem's Motion for Reconsideration (Doc. No. 115). The Court held a final pretrial conference, including argument on the Motions on June 9, 2014. After considering the papers in support of and in opposition to the Motions as well as the argument presented at the hearing, the Court enters the following rulings. A jury trial is scheduled to commence on August 5, 2014.

I. BACKGROUND

A. Procedural History

On August 13, 2012, Texchem Advanced Products, Incorporated Sdn. Bhd. ("Texchem") filed a Complaint against e.PAK International, Inc. ("e.PAK"). (Doc. No. 1.) The Complaint seeks declaratory judgment that Texchem does not infringe any valid claim of the United States Patent No. 6,988,620 ("620 patent"). (Compl. ¶ 1.) On September 10, 2012, e.PAK filed Answer and Counterclaim for patent infringement. (Doc. No. 10.) Texchem filed an Answer to e.PAK's Counterclaim on October 1, 2012, asserting affirmative defenses of non-infringement and invalidity. (Doc. No. 13.)

Texchem and e.PAK filed cross-motions for summary judgment on June 4, 2013. (Doc. Nos. 41, 42.) The Court granted Texchem's MSJ as to the invalidity of claims 9-12 and 15-17; denied Texchem's MSJ as to the invalidity of claims 13-14; denied Texchem's MSJ as to the non-infringement of claims 13-14; denied e.PAK's MSJ as to the validity of claim 14; and denied e.PAK's MSJ as to the infringement of claims 9, 13, and 14. (Doc. No. 84.)

On October 9, 2013, e.PAK filed a Motion for Relief from the Summary Judgment Order, requesting that the Court clarify its claim construction, remove extraneous limitations imported into the claims, or enter a judgment of non-infringement of claims 13 and 14. (Doc. No. 97.) The Court granted e.PAK's Motion for Relief and provided constructions for the terms second inside dimension, first inside dimension, and restraining portion. (Doc. No. 113.) On April 4, 2014, Texchem filed a Motion for Reconsideration re Order on Motion for Relief. (Doc. No. 115.) On May 19, 2014, e.PAK opposed Texchem's Motion for Reconsideration. (Doc. No. 117.) Texchem replied on May 26, 2014. (Doc. No. 118.)

On June 10, 2013, e.PAK filed a Motion in Limine to exclude the Pylant Application. (Doc. No. 46.) Texchem opposed the Motion on June 28, 2013. (Doc. No. 69.)

On June 10, 2013, Texchem filed a Motion in Limine to exclude: (1) the presumption of validity; (2) evidence or argument that the invention disclosure of e.PAK's patent includes vertical hinges; (3) evidence or argument that the agreement relied upon by e.PAK's damages witness is a comparable licensing agreement; and (4) expert testimony regarding e.PAK's lost profits.¹ (Doc. No. 47.) On June 28, 2013, e.PAK opposed Texchem's Motion in Limine. (Doc. No. 68.)

On July 23, 2013, Texchem filed a Motion for Leave to File a First Amended Complaint to include a specific claim for declaratory relief that the '620 patent is invalid. (Doc. No. 77.) On August 5, 2013, e.PAK opposed the Motion for Leave to File a First Amended Complaint (Doc. No. 82) and Texchem replied on August 12, 2013 (Doc. No. 83).

II. LEGAL STANDARD²

A. Motions in Limine

A party may use a motion in limine to exclude inadmissible or prejudicial evidence before it is actually offered at trial. See Luce v. United States, 469 U.S. 38, 40 n.2 (1984). A motion in limine is "an important tool available to the trial judge to ensure the expeditious and evenhanded management of the trial proceedings." Jonasson v. Lutheran Child & Family

¹ The Court notes that its Civil Trial Scheduling Order specifically states that "[m]otions [in limine] shall not be compound, i.e., each motion shall address only one item of evidence or witness." The Parties are directed to familiarize themselves with the Court's Standing Order and Civil Trial Scheduling Order to ensure that they are in compliance with the Court's Orders.

² Unless otherwise noted, all mentions of "Rule" refer to the Federal Rules of Evidence.

Services, 115 F.3d 436, 440 (7th Cir. 1997). It also reduces the likelihood that undue prejudicial evidence will ever reach the jury, thereby relieving the trial judge from the formidable task of neutralizing the taint of any prejudicial evidence. See Brodit v. Cabra, 350 F.3d 985, 1004-05 (9th Cir. 2003) (citation omitted).

Motions in limine that seek exclusion of broad and unspecific categories of evidence, however, are generally disfavored. Sperberg v. The Goodyear Tire and Rubber Co., 519 F.2d 708, 712 (6th Cir. 1975). Courts have recognized that it “is almost always better situated during the actual trial to assess the value and utility of evidence.” Wilkins v. Kmart Corp., 487 F. Supp. 2d 1216, 1218 (D. Kan. 2007). Therefore, when confronted with this situation, “a better practice is to deal with questions of admissibility of evidence as they arise [in actual trial]” as opposed to tackling the matter in a vacuum on a motion in limine. Sperberg, 519 F.2d at 712; see United States v. Marino, 200 F.3d 6, 11 (1st Cir. 1999) (recognizing that proffered evidence can be more accurately assessed in the context of other evidence).

Further, “a motion in limine should not be used to resolve factual disputes or weigh evidence.” C & E Services, Inc. v. Ashland Inc., 539 F. Supp. 2d 316, 323 (D.D.C. 2008). That is the province of the jury. See Reeves v. Sanderson Plumbing Products, 530 U.S. 133, 150 (2000). Nor should a motion in limine be used as a substitute for a motion for summary judgment. C & E Services, 539 F. Supp. 2d at 323.

Regardless of a court’s initial decision on a motion in limine, it may revisit the issue at trial. See Fed. R. Evid. 103, advisory committee’s note to 2000 Amendment (“Even where the court’s ruling is definitive, nothing in the amendment prohibits the court from revisiting its decision when the evidence is to be offered.”); Luce, 469 U.S. at 41-42 (“[E]ven if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous in limine ruling.”). “The Supreme Court has recognized that a ruling on a motion in limine is essentially a preliminary opinion that falls entirely within the discretion of the district court.” United States v. Bensimon, 172 F.3d 1121, 1127 (9th Cir. 1999) (citing Luce, 469 U.S. at 41-42). Rule 103 does not require a court to rule on a motion in limine. CFM Commc’ns, LLC v. Mitts Telecasting Co., 424 F. Supp. 2d 1229, 1233 (E.D. Cal. 2005) (citation omitted).

B. Motion for Leave to Amend

Generally, a court considers a motion for leave to amend pleadings pursuant to the permissive standard of Fed. R. Civ. P. 15(a). Martinez v. Newport Beach City, 125 F.3d 777, 785 (9th Cir. 1997). However, once the district court enters a scheduling order establishing a deadline for amending pleadings, Fed. R. Civ. P. 16(b) applies. Coleman v. Quaker Oats Co., 232 F.3d 1271, 1294 (9th Cir. 2000). This is because once a scheduling order is in place, the court must consider whether to modify the scheduling order to permit an amendment. Uddin v. Radio Shack, Inc., 2013 WL 1767963, at 2 (C.D. Cal. Apr. 22, 2013) (citing W. Schwarzer, A. Tashima & M. Wagstaffe, Federal Civil Procedure Before Trial (2006) § 8:405.).

Rule 16(b)(4) provides that a scheduling order shall be modified “only for good cause.” “Unlike Rule 15(a)’s liberal amendment policy which focuses on the bad faith of the party

seeking to interpose an amendment and the prejudice to the opposing party, Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the amendment." Johnson, 975 F.2d at 609. Accordingly, while the court may consider the "existence or degree of prejudice" to the opposing party, the focus of the court's inquiry is upon the moving party's explanation for failure to timely move for leave to amend. Id. "The pretrial schedule may be modified 'if it cannot reasonably be met despite the diligence of the party seeking the extension.'" Zivkovic v. S. Cal. Edison Co., 302 F.3d 1080, 1087 (9th Cir. 2002) (quoting Johnson, 975 F.2d at 609). Upon a showing of "good cause," the party seeking amendment must then demonstrate that amendment is proper under Rule 15(a). See Johnson, 975 F.2d at 607.

C. Motion for Reconsideration

In the Ninth Circuit, Federal Rule of Civil Procedure 60(b) "provides for reconsideration [from a judgment] only upon a showing of (1) mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) 'extraordinary circumstances' which would justify relief." Fuller v. M.G. Jewelry, 950 F.2d 1437, 1442 (9th Cir. 1991) (citing Backlund v. Barnhart, 778 F.2d 1386, 1388 (9th Cir. 1985)).

Subpart (6) of the rule, the "catch-all provision," is to be "used sparingly as an equitable remedy to prevent manifest injustice and is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." Harvest v. Castro, 531 F.3d 737, 749 (9th Cir. 2008) (quoting Latshaw v. Trainer Wortham & Co., Inc., 452 F.3d 1097, 1103 (9th Cir. 2006)). Further, a party seeking relief under this provision "must demonstrate both injury and circumstances beyond his control that prevented him from proceeding with the action in a proper fashion." Id. (quoting Latshaw, 452 F.3d at 1103).

A motion pursuant to Federal Rule of Civil Procedure 60(b) is a motion for reconsideration. See Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc., 5 F.3d 1255 (9th Cir. 1993); Backlund v. Barnhart, 778 F.2d 1386 (9th Cir. 1985).

Under Local Rule 7-18,

A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

III. DISCUSSION

A. E.PAK's Motion in Limine

E.PAK moves to exclude Texchem's patents or patent applications related to the accused products, specifically the Pylant application, on the grounds that the Pylant Application is irrelevant as it does not grant Texchem any rights and it is not available as prior art against the '620 patent. (e.PAK MiL at 4.) Texchem argues that the Pylant Application is relevant because it helps to illustrate the features of the accused products and demonstrate the steps and timeline of the development of the accused products. The Court agrees that the Pylant Application, which is the application for the accused products, is relevant to the issues of willfulness and to illustrate features of Texchem's accused products. Any potential prejudice may be mitigated by a proper limiting instruction.

Thus, the Court DENIES e.PAK's Motion in Limine, without prejudice. The Parties are ordered to, either jointly or separately, submit a proposed limiting instruction, which clarifies that the jury should assess whether Texchem's products, rather than the patent application itself, infringe.

B. Texchem's Motion in Limine

Texchem moves to exclude four categories of evidence, each of which is discussed below.

1. Presumption of Validity of Patents

First, Texchem argues that the Court should prohibit any evidence or argument regarding the presumption of validity of patents because (1) the presumption does not constitute evidence, and (2) the reference to the "presumption of validity" will confuse the jury and cause undue prejudice towards Defendants in light of the anticipated jury instruction regarding the "clear and convincing" evidentiary standard applicable to claims of patent invalidity. (Texchem MiL at 1-2.) The Court agrees with the courts which have held that the presumption of validity is linked to the burden of proving that a patent is invalid by clear and convincing evidence, and the presumption of validity is appropriate information for the jury. See WesternGeco L.L.C. v. ION Geophysical Corp., No. 09-1827, 2012 WL 2911968 (S.D. Tex. July 16, 2012) ("It is beyond dispute that patents-in-suit must be presumed valid. 35 U.S.C. § 282(a). This presumption is inextricably linked to Defendants' burden to prove invalidity by clear and convincing evidence. The Court finds that the presumption of validity is not only appropriate information for the jury, but that it is helpful."); Fleming v. Escort, Inc., No. 09-105, 2012 WL 1995069 (D. Idaho June 4, 2012) (denying motion in limine to preclude mentioning the statutory presumption of patent validity to the jury); Lighting Ballast Control, LLC v. Philips Electronics N. Am. Corp., 7:09-CV-29-O, 2011 WL 7575006 (N.D. Tex. June 10, 2011) (same); cf. Volterra Semiconductor Corp. v. Primarion, Inc., No. 08-05129, 2011 WL 4079223 (N.D. Cal. Sept. 12, 2011) ("In its instruction, the Court did not present the presumption of validity as a separate hurdle that must be met in addition to the clear and convincing standard. Rather, it explained that the clear and convincing standard 'is used because a patent is entitled to a statutory presumption of validity

until it is proven invalid by clear and convincing evidence.”); Duhn Oil Tool, Inc. v. Cameron Int'l Corp., 1:05-CV-01411 OWW, 2011 WL 121547 (E.D. Cal. Jan. 13, 2011) (stating that the court would instruct the jury on the presumption of validity and the parties could reference the presumption of validity in the patent tutorial).

Thus, the Court DENIES Texchem’s motion to exclude evidence or argument regarding the presumption of validity, without prejudice.

2. Vertical Hinges

Second, Texchem asserts that e.PAK should not be allowed to present evidence or argument that its invention disclosure includes vertical hinges for the restraining portion because the written disclosure does not describe or show a restraining portion having vertical hinges. (Texchem MiL at 2-3.) E.PAK does not dispute that the specification does not include a description of vertical hinges, but responds that the claims are inclusive of a vertically oriented hinge. (e.PAK Opp. at 3-4.) The Court agrees with e.PAK.

“It is a ‘bedrock principle’ of patent law that ‘the claims of a patent define the invention to which the patentee is entitled the right to exclude.’” Phillips v. AWH Corp., 415 F.3d 1303, 1312 (Fed. Cir. 2005) (quoting Innova/Pure Water, Inc. v. Safari Water Filtration Systems, Inc., 381 F.3d 1111, 1115 (Fed. Cir. 2004)). “The written description part of the specification itself does not delimit the right to exclude. That is the function and purpose of claims.” Markman v. Westview Instruments, Inc., 52 F.3d 967, 980 (Fed. Cir. 1995). Although claims are interpreted in light of the specification, this “does not mean that everything expressed in the specification must be read into all the claims.” Raytheon Co. v. Roper Corp., 724 F.2d 951, 957 (Fed. Cir. 1983). For instance, limitations from a preferred embodiment described in the specification generally should not be read into the claim language. See Comark, 156 F.3d at 1187. However, it is a fundamental rule that “claims must be construed so as to be consistent with the specification.” Phillips, 415 F.3d at 1316. Therefore, if the specification reveals an intentional disclaimer or disavowal of claim scope, the claims must be read consistently with that limitation. Id. While the specification of the ‘620 patent does not specifically describe or contain a figure showing a vertical hinge, Texchem has not pointed to any part of the ‘620 claim language or specification that limit the hinges to a horizontal hinge. The Court finds that evidence and argument regarding the vertical hinge is relevant.

Thus, the Court denies Texchem’s motion to exclude evidence or argument that its invention disclosure includes vertical hinges for the restraining portion, without prejudice.

3. Agreement Relied Upon by e.PAK’s Damages Expert Witness

Third, Texchem argues that e.PAK should be precluded from offering evidence that the agreement relied upon by Lawrence Simon, e.PAK’s damages expert, is a comparable license agreement for the purpose of calculating a reasonable royalty rate because the agreement relied upon is not comparable to any hypothetical negotiation at issue in the case. (Texchem MiL at 3-5.)

Upon a finding of infringement, the patentee is entitled to “damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer.” 35 U.S.C. 284; see also Lucent Techs., Inc. v. Gateway, Inc., 580 F.3d 1301, 1324 (Fed. Cir. 2009) (“Two alternative categories of infringement compensation are the patentee’s lost profits and the reasonable royalty he would have received through arms-length bargaining.”). A reasonable royalty typically is determined from the “hypothetical results of hypothetical negotiations between the patentee and infringer (both hypothetically willing) at the time infringement began.” Mahurkar v. C.R. Bard, Inc., 79 F.3d 1572, 1579 (Fed. Cir. 1996). “This hypothetical construct seeks the percentage of sales or profit likely to have induced the hypothetical negotiators to license use of the invention.” Minco, Inc. v. Combustion Eng’g, Inc., 95 F.3d 1109, 1119 (Fed. Cir. 1996). The hypothetical negotiation takes place “between the patentee and infringer . . . at the time infringement began.” Mahurkar, 79 F.3d at 1579. Additionally, “the license reached in the hypothetical negotiation must compensate the licensor for the actual infringement that took place—no more and no less.” Oracle Am., Inc. v. Google Inc., 798 F. Supp. 2d 1111, 1117 (N.D. Cal. 2011) (citing 35 U.S.C. 284; ResQNet.com, Inc. v. Lansa, Inc., 594 F.3d 869 (Fed. Cir. 2010)).

For a damages expert to rely on a prior license, “there must be a basis in fact to associate the royalty rates used in prior licenses to the particular hypothetical negotiation at issue in the case.” Uniloc USA, Inc. v. Microsoft Corp., 632 F.3d 1292, 1317 (Fed. Cir. 2011). Therefore, “licenses relied on by the patentee in proving damages [must be] sufficiently comparable to the hypothetical license at issue in suit.” Lucent Technologies, Inc. v. Gateway, Inc., 580 F.3d 1301, 1325 (Fed. Cir. 2009). A patentee may not rely on license agreements that are “radically different from the hypothetical agreement under consideration’ to determine a reasonable royalty.” Uniloc, 632 F.3d at 1316 (quoting Lucent, 580 F.3d at 1328); see e.g., Wordtech Sys. v. Integrated Networks Solutions, Inc., 609 F.3d 1308, 1320 (Fed. Cir. 2010) (declining to find licenses comparable because they “arose from divergent circumstances and covered different material”); ResQNet.com, 594 F.3d at 870 (criticizing damages expert for relying on licenses that showed no “discernible link to the claimed technology”). “The testimony of a damages expert in a patent suit who relies on non-comparable licenses in reaching his royalty rate should be excluded.” Multimedia Patent Trust v. Apple Inc., No. 10-2618, 2012 WL 5873711, at *7 (S.D. Cal. Nov. 20, 2012).

Here, Mr. Simon used a 2002 license agreement e.PAK has with a third-party licensor, Texas Instruments, to calculate the royalty rate. (“Texas Instruments Agreement,” Decl. of Kent M. Walker (“Walker Decl.”), Ex. E.) Texchem argues that the Texas Instruments Agreement is not comparable because the Agreement is not directed to the ‘620 patent or the products at issue, the status of the parties are not comparable to those in the Agreement, and Mr. Simon did not make a comparison of the terms in the Agreement to any potential reasonable royalty agreement between the Parties. (Texchem MiL at 5.) However, the Texas Instruments Agreement involves Texas Instruments granting e.PAK a license to make, use, sell, or offer for sale plastic semiconductor wafer shipping boxes. (Walker Decl., Ex. F.) The Court finds that the Texas Instruments Agreement is sufficiently comparable as not to be “radically different” from a hypothetical agreement in this case and Texchem’s arguments go to the weight of the evidence. See Apple Inc. v. Motorola, Inc., 2014 WL 1646435 (Fed. Cir. Apr. 25, 2014) (“[W]hether these licenses are sufficiently comparable such that Motorola’s calculation is a reasonable royalty goes to the weight of the evidence, not its admissibility.”); Gen-Probe Inc. v. Becton Dickinson &

Co., No. 09- 2319, 2012 WL 9335913 (S.D. Cal. Nov. 26, 2012) (“Gen–Probe’s concerns are appropriate fodder for cross-examination. . . . From a technological and economic standpoint, the licenses at issue are at least marginally comparable.”); Phillip M. Adams & Assoc., LLC v. Winbond Elecs. Corp., No. 05-64, 2010 WL 3743677, at *3 (D. Utah Sept. 20, 2010) (stating that disagreements about what licenses are comparable to the patents-in-suit are “properly developed in cross-examination”); Multimedia Patent Trust, 2012 WL 5873711, at *8 (“Defendants may disagree with Mr. Yurkerwich’s decision to rely on these nine licenses, but the proper recourse then is for Defendants to present contrary evidence and attack Mr. Yurkerwich’s testimony on cross-examination rather than for the Court to exclude Mr. Yurkerwich’s testimony.”).

Thus, the Court DENIES Texchem’s motion to exclude evidence that the Texas Instruments Agreement is a comparable license, without prejudice.

4. Expert Testimony Regarding e.PAK’s Purported Lost Profits

Finally, Texchem moves to exclude expert testimony regarding e.PAK’s lost profits because Mr. Simon did not opine on lost profits as a theory of e.PAK’s damages. (Texchem MiL at 5-6.) E.PAK states that it does not intend to offer Mr. Simon’s testimony on the issue of lost profits. (e.PAK Opp. at 7.)

Thus, the Court DENIES Texchem’s motion to exclude expert testimony regarding e.PAK’s lost profits as moot.

C. Motion for Leave to File a First Amended Complaint

Texchem moves to amend its complaint to include a specific claim for declaratory relief that the ‘620 patent is invalid. As discussed above, Rule 16(b) provides that “[a] schedule may be modified only for good cause and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4). Here, the Court issued the Scheduling Order on November 26, 2013 setting January 1, 2013 as the last date to move to amend the complaint. (See Doc. No. 23.) Thus, while amendment of pleadings is ordinarily liberally granted under Federal Rule of Civil Procedure 15(a), Texchem must demonstrate “good cause” to justify amendment under Federal Rule of Civil Procedure 16(b). Johnson, 975 F.2d at 606-607. The “good cause” standard “focuses on the diligence of the party seeking amendment.” Id. at 607 (citing Johnson, 975 F.2d at 609). “If the party seeking the modification was not diligent, the inquiry should end and the motion to modify should not be granted.” Zivkovic, 302 F.3d at 1087 (internal quotation marks omitted). In addition to a lack of diligence, “prejudice to the party opposing the modification” may supply additional reasons to deny modification. Johnson, 975 F.2d at 609.

Texchem argues that good cause exists to permit it to amend its Complaint because Texchem’s original complaint requires a determination of validity or invalidity of the ‘620 patent, and the proposed amendment only confirms and clarifies that Texchem seeks declaratory judgment of invalidity of the ‘620 patent. (See generally Texchem Motion for Leave to Amend.) The Court finds that Texchem has not been diligent in seeking amendment by moving to amend the Complaint almost a year after the initial Complaint was filed and less than two months before

the then scheduled trial date of September 17, 2013. (See Doc. No. 67.) Texchem has provided no reason that it could not have amended its Complaint to add a claim for declaratory relief that the '620 patent is invalid much earlier, particularly since it argues that the original complaint requires a determination of validity or invalidity.

Thus, Texchem has not met the good cause standard under Rule 16 and the Court DENIES the Motion for Leave to File a First Amended Complaint.

D. Motion for Reconsideration

Texchem moves the Court to reconsider the Order Granting e.PAK's Motion for Relief from Order re Summary Judgment and issue new constructions on the terms second inside dimension, first inside dimension, and restraining portion. (See generally Motion for Reconsideration.)

1. Court's Claim Construction in the Summary Judgment Order

Construction on Pages 21 and 22

On page 21 of the Summary Judgment Order, the Court construed the first element of claim 9, tracking the claim language:

a restraining portion having one end near the first endwall, the restraining portion establishing a first inside dimension near the first endwall and having a second, larger inside dimension near a second end of the restraining portion that is spaced from the first endwall when the container is in a first condition.

(MSJ Order at 21.)

Construction on Pages 23 and 24

The Court then went on to construe the some of the terms in the first element, including restraining portion, first inside dimension, and second inside dimension:

- **Second Inside Dimension:** the shortest distance from the restraining portion through the center to the restraining portion on the other side of the container, measured at the portion spaced away from the first endwall
- **First Inside Dimension:** the dimension measured through the center at the end of the restraining portion near the first endwall
- **Restraining Portion:** the structural features that provides a first inside dimension at one end and a larger second dimension at the other end, and provides for the restraining and absolute restriction of movement of the items inside, and prevents lateral movement between them.

(MSJ Order at 22-25.)

2. E.PAK's Motion for Relief

After considering the papers filed in support of an in opposition to e.PAK's Motion for Relief, the Court found good cause to modify its previous constructions of the terms second inside dimension, first inside dimension, and restraining portion and construed the terms as follows:

- **Second Inside Dimension:** a distance from the restraining portion through the center to the restraining portion on the other side of the container, measured at the portion spaced away from the first endwall
- **First Inside Dimension:** the dimension measured through the center near the end of the restraining portion near the first endwall
- **Restraining Portion:** the structural feature that provides a first inside dimension near one end and a larger second dimension near the other end, and provides for the restraining and limiting of the movement of the items inside, restricting the lateral movement between them

3. Texchem's Motion for Reconsideration

Texchem argues that the Court should reinstate the construction on pages 21, 23, and 24 of the Summary Judgment Order with the addition of the phrase "or near" in the construction of the term restraining portion.³ (Mot. for Reconsideration at 7.) Texchem primarily relies on the limitations in the specification and embodiment to support its proposed constructions. The Court is unconvinced by Texchem's arguments as the Federal Circuit has made clear that "limitations from the specification are not to be read into the claims." Teleflex, Inc. v. Ficoso N. Am. Corp., 299 F.3d 1313, 1326 (Fed. Cir. 2002).

Thus, the Court DENIES Texchem's Motion for Reconsideration.

IV. CONCLUSION

It is hereby ordered that:

1. E.PAK's Motion in Limine is DENIED, without prejudice;
2. Texchem's Motion in Limine is DENIED, without prejudice;
3. Texchem's Motion for Leave to File a First Amended Complaint is DENIED; and

³ Texchem proposes the following construction of the term restraining portion: the structural features that provides a first inside dimension at one end and a larger second dimension at or near the other end, and provides for the restraining of movement of the items inside.

4. Texchem's Motion for Reconsideration is DENIED.

IT IS SO ORDERED.