

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN KRILL OIL PRODUCTS AND
KRILL MEAL FOR PRODUCTION OF
KRILL OIL PRODUCTS**

Inv. No. 337-TA-1019

ORDER NO. 13: MARKMAN ORDER

(April 13, 2017)

A *Markman* hearing was held in this investigation on March 2, 2017. Counsel for Complainants Aker BioMarine Antarctic AS and Aker BioMarine Manufacturing, LLC and Respondents Olympic Holding AS, Rimfrost AS, Emerald Fisheries AS, Avoca, Inc., Rimfrost USA, LLC, Rimfrost New Zealand Limited, and Bioriginal Food & Science Corp. appeared at the hearing. In advance of the hearing, Complainants and Respondents filed initial and rebuttal *Markman* briefs.^{1,2}

¹ Complainants filed a corrected initial brief pursuant to Order No. 9 (Feb. 10, 2017).

² Complainants' initial and rebuttal briefs are referenced herein as "CIB" and "CRB," and Respondents' initial and rebuttal briefs are referenced herein as "RIB" and "RRB."

PUBLIC VERSION

Table of Contents

I. PROCEDURAL HISTORY 1

II. LEGAL STANDARD 1

III. ASSERTED PATENTS 3

IV. LEVEL OF ORDINARY SKILL IN THE ART 4

V. DISPUTED TERMS 5

A. “krill oil” 5

B. “polar krill oil” 10

C. “krill” and “*Euphausia superba*” 15

D. “denatured krill product” 16

E. “astaxanthin” 18

VI. CONCLUSION 26

PUBLIC VERSION

I. PROCEDURAL HISTORY

This investigation was instituted to determine whether there is a violation of section 337 of the Tariff Act of 1930, as amended, in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain krill oil products and krill meal for production of krill oil products by reason of infringement of certain claims of U.S. Patent No. 9,028,877 (the “’877 patent”); U.S. Patent No. 9,078,905 (the “’905 patent”); U.S. Patent No. 9,072,752 (the “’752 patent”); U.S. Patent No. 9,320,765 (the “’765 patent”); and U.S. Patent No. 9,375,453 (the “’453 patent”). Notice of Investigation, 81 Fed. Reg. 63805-06 (2016). Pursuant to Order No. 5, the ’905 patent was withdrawn from the investigation. Order No. 5 (Oct. 17, 2016), *not reviewed by Comm’n Notice* (Nov. 7, 2016).

The asserted claims in the four remaining patents are claims 1-4, 7-9, 11-13, and 16-18 of the ’877 patent; claims 1, 7, and 11-13 of the ’752 patent; claims 1-5, 7, 9-12, 14-15, 19-21, 23, 25-29, 31, 33-36, 38-39, 43-45, and 47 of the ’765 patent; and claims 1, 5-10, 12, 14-17, 19-20, 24-26, 28, 30-32, 33-36, 39-43, 46-49, 51-52, 56-58, and 60 of the ’453 patent. All of the asserted patents claim priority to the same parent application and share a common specification. The parties’ *Markman* briefing addresses six disputed claim terms, each of which appears in the claims of several of the asserted patents.

II. LEGAL STANDARD

“The construction of claims is simply a way of elaborating the normally terse claim language[] in order to understand and explain, but not to change, the scope of the claims.” *Embrex, Inc. v. Serv. Eng’g Corp.*, 216 F.3d 1343, 1347 (Fed. Cir. 2000) (alterations in original) (quoting *Scripps Clinic v. Genentech, Inc.*, 927 F.2d 1565, 1580 (Fed. Cir. 1991)). “[O]nly those [claim] terms need be construed that are in controversy, and only to the extent necessary to resolve the controversy.” *Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed.

PUBLIC VERSION

Cir. 1999).

Claim construction focuses mainly on the intrinsic evidence, which consists of the claims themselves, the specification, and the prosecution history. *See generally Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (*en banc*). The Federal Circuit in *Phillips* explained that, in construing terms, courts must analyze each of these components to determine the “ordinary and customary meaning of a claim term,” which is “the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention.” *Id.* at 1313.

“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.’” *Id.* at 1312. “Quite apart from the written description and the prosecution history, the claims themselves provide substantial guidance as to the meaning of particular claim terms.” *Id.* at 1314. For example, “the context in which a term is used in the asserted claim can be highly instructive,” and “[o]ther claims of the patent in question, both asserted and unasserted, can also be valuable sources of enlightenment as to the meaning of a claim term.” *Id.*

“[T]he 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.’” *Id.* at 1315 (quoting *Vitronics Corp. v. Conceptronic*, 90 F.3d 1576, 1582 (Fed. Cir. 1996)). “The longstanding difficulty is the contrasting nature of the axioms that (a) a claim must be read in view of the specification and (b) a court may not read a limitation into a claim from the specification.” *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1117 (Fed. Cir. 2004). The Federal Circuit has explained that there are certain instances when the specification may limit the meaning of the claim language. For example, “the specification may reveal a special definition given to a claim term by the patentee that differs from the

PUBLIC VERSION

meaning it would otherwise possess. In such cases, the inventor's lexicography governs." *Phillips*, 415 F.3d at 1316. The specification also "may reveal an intentional disclaimer, or disavowal, of claim scope by the inventor." *Id.* In such cases, "the inventor has dictated the correct claim scope, and the inventor's intention, as expressed in the specification, is regarded as dispositive." *Id.*

In addition to the claims and the specification, the prosecution history should be examined if in evidence. "The prosecution history . . . consists of the complete record of the proceedings before the PTO and includes the prior art cited during the examination of the patent. Like the specification, the prosecution history provides evidence of how the PTO and the inventor understood the patent." *Id.* at 1317. "[T]he prosecution history can often inform the meaning of the claim language by demonstrating how the inventor understood the invention and whether the inventor limited the invention in the course of prosecution, making the claim scope narrower than it would otherwise be." *Id.*

If the intrinsic evidence does not establish the meaning of a claim, then extrinsic evidence may be considered. Extrinsic evidence "consists of all evidence external to the patent and the prosecution history, including inventor and expert testimony, dictionaries, and learned treatises." *Id.* at 1317. Extrinsic evidence is generally viewed "as less reliable than the patent and its prosecution history in determining how to read claim terms." *Id.* at 1318. "The court may receive extrinsic evidence to educate itself about the invention and the relevant technology, but the court may not use extrinsic evidence to arrive at a claim construction that is clearly at odds with the construction mandated by the intrinsic evidence." *Elkay Mfg. Co. v. EbcO Mfg. Co.*, 192 F.3d 973, 977 (Fed. Cir. 1999).

III. ASSERTED PATENTS

The four asserted patents claim priority to the same parent application and share a

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