From: Nate D Louwagie
To: Friedemann, Lora; Johnson, R. Scott; _Tennant Company/Oxygenator Water Technologies
Cc: OWT
Subject: RE: OWT v. Tennant
Date: Wednesday, August 25, 2021 1:35:41 PM
Attachments: ~WRD3536.jpg

[EXTERNAL E-MAIL]

Lora:

The fact that Tennant lost on claim construction does not prove good cause exists. OWT does not see how the Court's claim constructions gave rise to new written description defenses that Tennant could not have asserted from the beginning of the case. Moreover, it was entirely foreseeable that the Court might adopt OWT's contentions, and it was incumbent on Tennant to provide contentions in a timely fashion that addressed that possibility. Accordingly, during the meet and confer please be prepared to explain the good cause for Tennant to add written description arguments for these claim terms. In addition, it appears Tennant may have additional contentions it hopes to add that it has not yet identified. OWT cannot be expected to agree to any new contentions without knowing what they are. Thus, if there are other amendments Tennant is considering then Tennant must share those for OWT's consideration as part of the meet and confer process.

With respect to OWT's infringement contentions, OWT does not believe any amendments to its contentions are required. With respect to the "tubular housing" claims of the '415 patent, OWT suggests that Tennant review OWT's existing contentions where OWT sets forth its contentions for infringement by the Tennant e-cells under the doctrine of equivalents. With respect to claim 18, OWT has already alleged that "the water temperature is a factor for formation of the suspension" as construed by the Court in the Tennant process since Tennant instructs its user to use "clear ***cool*** water." With respect to claim 20, OWT is still in the process of analyzing the impact of the Court's claim construction. To the extent OWT decides an amendment is necessary and it has good cause to make such an amendment, it will raise that with Tennant. We are also considering whether we will be dropping this claim from the case with a reservation of rights to appeal the Court's construction of the relevant claim term.

We will be sending a separate email about Tennant's requested stay, but are available to meet and confer on both issues at 2 pm tomorrow.

Nate

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From: Friedemann, Lora <lfriedemann@fredlaw.com>
Sent: Wednesday, August 25, 2021 9:58 AM
To: Nate D Louwagie <NLouwagie@carlsoncaspers.com>; Johnson, R. Scott <RSJohnson@fredlaw.com>; _Tennant Company/Oxygenator Water Technologies <OWT@fredlaw.com>
Cc: OWT <OWT@carlsoncaspers.com>
Subject: RE: OWT v. Tennant

Nate,

We agree that the Scheduling Order contemplates supplementing contentions where the Court did not adopt the party's proposed construction. Tennant intends to supplement its contentions on claim terms Judge Tostrud construed differently than Tennant proposed, including "water," "conductivity…supports plant or animal life," "power source," and "first anode electrode portion that is non-parallel to a second anode electrode portion." Among other things, we will argue that those terms as construed lack written description.

In our view, OWT also needs to supplement its contentions. The contentions as they exist provide no basis for continuing to pursue infringement claims against Tennant's e-cells in light of the construction of "tubular housing." Similarly, there is no basis for continuing to allege infringement of claims 18 and 20 of the '415 patent in light of Judge Tostrud's constructions of the "temperature is a factor" and "two and ½ gallon aquarium reservoir container" terms. If OWT contends that it has a good faith basis for continuing to pursue those claims, we are entitled to contentions that provide the basis for OWT's position.

We disagree that the parties need to disclose their proposed contentions to have a meet and confer to discuss whether contentions will be supplemented and the timing for doing so. We propose a meet and confer Thursday at 11:00 a.m. to discuss supplementing contentions and Tennant's motion to stay pending IPR. If that time does not work for you, please provide an alternative before the end of business on Thursday.

We agree that it makes sense to extend the deadline for expert reports and will circulate a stipulation and proposed order later today.

Lora

From: Nate D Louwagie <NLouwagie@carlsoncaspers.com>
Sent: Tuesday, August 24, 2021 4:24 PM
To: Johnson, R. Scott <RSJohnson@fredlaw.com>; _Tennant Company/Oxygenator Water Technologies <OWT@fredlaw.com>; Friedemann, Lora <lfriedemann@fredlaw.com>
Cc: OWT <OWT@carlsoncaspers.com>
Subject: RE: OWT v. Tennant

[EXTERNAL E-MAIL]

Scott,

The Court's Scheduling Order is quite specific about amending contentions. First, the Order makes clear that amendments to infringement contentions *always* require good cause. Second, the Scheduling Order clearly does not provide for carte blanch supplementations. Instead, it identifies circumstances under which a claim construction order *might* provide good cause to supplement contentions. Such circumstances are limited to contentions "related to [a] particular term/phrase" for which the Court did not adopt the Defendants' construction. The Scheduling Order also makes clear that any such motion must be preceded by a meet and confer. See paragraph (2)(c)(iv) of Discovery Relating to Claim Construction. In order for Tennant to comply with this obligation, it must inform OWT of the specific contention(s) it seeks to supplement, including the implicated claim term and the reason good cause supports that supplementation. Please provide this information if Tennant intends to seek leave to amend its contentions.

On a different note, OWT is willing to agree to a four week extension of expert discovery and dispositive motion deadlines if Tennant believes such an extension is warranted.

Nate

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From: Johnson, R. Scott <RSJohnson@fredlaw.com>
Sent: Friday, August 20, 2021 2:02 PM
To: Nate D Louwagie <NLouwagie@carlsoncaspers.com>; _Tennant Company/Oxygenator Water Technologies <OWT@fredlaw.com>; Friedemann, Lora <lfriedemann@fredlaw.com>
Cc: OWT <OWT@carlsoncaspers.com>
Subject: RE: OWT v. Tennant

Nate,

I'll only address your third issue here. Tennant believes both parties should supplement their contentions prior to expert reports to account for the Court's claim constructions. The Court's recent order is good cause. Tennant is willing to meet and confer on these issues, but it makes no sense to meet and confer only after Tennant has gone to the work of supplementing its contentions only to have OWT then reject the notion of supplementation. Let us know if you are available to discuss a reasonable schedule for supplementation on Monday at 3:00.

We look forward to hearing from you.

-Scott

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From: Nate D Louwagie <NLouwagie@carlsoncaspers.com>
Sent: Friday, August 20, 2021 11:51 AM
To: _Tennant Company/Oxygenator Water Technologies <OWT@fredlaw.com>; Friedemann, Lora <lfriedemann@fredlaw.com>
Cc: OWT <OWT@carlsoncaspers.com>
Subject: OWT v. Tennant

[EXTERNAL E-MAIL]

Counsel,

There are a variety of emails going on between the parties that involve somewhat related issues. Rather than responding to all of them, I thought I would write a larger email to concentrate the issues.

First, Tennant has continued to refuse to produce its financial witness in a timely fashion despite OWT's request for this deposition in April. Since that time Tennant has continually said it would provide its witness, and on multiple occasions it even provided specific dates it would make the witness available, only to then tell OWT at the last minute that Tennant's witness was not prepared

for the deposition. Tennant is now offering its witness only 3 days before the expert report deadline. This is outrageous. As a result, OWT will need a two week extension to its deadline to serve its opening expert reports related to damages (and not any other expert reports as they are not implicated by this issue). Please promptly let us know if you oppose this extension, and if so, on what basis. If Tennant agrees to this extension, we will prepare a stipulation for your review.

Second, with respect to Tennant's attempts to curtail OWT's Rule 30(b)(6) deposition, the rules are clear. A 30(b)(6) deposition counts as a single deposition even if a corporation chooses numerous designees to represent it, and each designee may be deposed up to 7 hours. OWT's willingness to propose compromises does not somehow change those rules. Despite repeated requests, Tennant has not identified any authority for its improper interpretation of the rules. The three cases Tennant continues to cite do not address the issue, as we have already noted. Nevertheless, OWT believes it will be able to complete the Hemphill and Carlson depositions in about 2.5 hours and will endeavor to do so. But if additional time is required, we will be using it as the rules provide for us to do. OWT continues to believe this issue is not ripe as a result of Tennant's failure to provide its financial witness identified above. OWT also believes that if Tennant acts reasonably the parties will be able to complete the depositions without undue burden or Court involvement. But if Tennant intends to change the rules and stop the deposition at the exact end of 2.5 hours, it might be wise for Tennant to seek a Protective Order on that issue. In that regard, Tennant has never suggested that OWT has improperly used Rule 30(b)(6) deposition time to date, or that OWT does not have a legitimate basis to use its allotted time with future witnesses. Instead, it seems Tennant is trying to prevent OWT from obtaining discovery it needs and is entitled to receive (especially in view of Tennant's continued delays in providing a financial designee for months on end).

Third, Tennant has requested an alteration to the Scheduling Order to allow for the parties to supplement contentions. The Scheduling Order does not allow for a carte blanche supplementation of contentions after claim construction. If Tennant believes the claim construction order provides good cause to amend particular contentions, OWT is of course willing to meet and confer. To further that meet and confer, please specify Tennant's proposed amendment, the implicated claim construction, and the reason that good cause supports that amendment.

Fourth, Tennant has requested OWT remove claims from the case. The Scheduling Order identifies a date for OWT to remove additional claims from the case. OWT disagrees with Tennant's contention that it does not have a good faith basis to continue asserting claims 13 or 18 against all of Tennant's accused products.

Fifth, Tennant has requested that OWT supplement its response to Interrogatory No. 15. OWT will do so before Monday.

I look forward to Tennant's response on these issues.

Thank you.

Nate

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