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## Federal Circuit Patent Updates - February 2007

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***AquaTex Industries, Inc. v. Techniche Solutions* (No. 2006-1407) (Rader, Dyk, Whyte)**

February 27, 2007 11:00 AM

(Dyk) Affirming summary judgment of noninfringement under the doctrine of equivalents where the patentee did not present particularized evidence of equivalent infringement, which typically requires expert testimony.

***Hakim v. Cannon Avent Group, PLC, et al.* (No. 2005-1398) (Michel, Newman, Rader)**

February 23, 2007 3:20 PM

(Newman) Affirming summary judgment of non-infringement and invalidity of patents directed to no-spill drinking cups. Claim limitation "opening" was construed to require a "slit." In a parent application, patentee prosecuted claims expressly reciting a "slit" and argued patentability based on that limitation. Patentee then filed a continuation application in which the limitation "slit" was changed to "opening," and notified the examiner that it was seeking broadened claims. The district court did not err in holding that the examiner's allowance of the continuation claims was based on the prosecution argument made in the parent or in construing the "opening" claims to require a "slit."

***Sevenson Environmental Services, Inc. v. Shaw Environmental, Inc.* (No. 2006-1391, -1408) (Linn, Dyk)**

February 21, 2007 3:18 PM

(Linn) Affirming summary judgment that suit was barred by government contractor immunity. Defendant's use of alternate method would have breached its contract with the government. Patentee's proper remedy is by action against the United States in the United States Court of Federal Claims.

***MyMail, Ltd. v. America Online, Inc., et al.* (No. 06-1147, -1172) (Newman, Schall, Bryson)**

February 20, 2007 2:01 PM

(Bryson) Affirming summary judgment of non-infringement and affirming ruling that plaintiff had standing to assert infringement. Plaintiff's chain of title included acquisition through state court foreclosure action on a promissory note secured by the patent application. Assertions that the promissory note is fraudulent go to ownership, not enforceability.

***RFR Indus. v. Century Steps* (2005-1610, 2006-1285) (Michel, Schall, Prost)**

February 16, 2007 1:58 PM

(Prost) Vacating grant of judgment on the pleadings and reversing grant of attorney fees. Plaintiff's voluntary dismissal without prejudice did not bestow "prevailing party" status upon the defendant. Since defendant was not a prevailing party, it was not entitled to attorney fees.

***Mukherjee v. Chu* (No. 2006-1450, Interference No. 105, 281) (Michel, Rader, Schall)**

February 15, 2007 3:23 PM

(Michel) Affirming board decision holding claims involved in an interference invalid for failure to comply with the written description requirement. The patent application disclosed electric batteries in which the cathode contains ETMC. The applicant was not in possession of an invention that excludes ETMC and claims omitting ETMC are invalid.

***Regents of the Univ. of California v. Dako North America* (No. 842) (Lourie, Clevenger, Moore)**

February 14, 2007 1:49 PM

(Lourie) Granting petition to appeal an interlocutory summary judgment order involving claim construction issues. The Court characterized the circumstances of this case as unusual. Claim construction issues arising from the summary judgment order are intertwined with claim construction issues already before the Court in connection with appeal of a denied motion for preliminary injunction.

***Cargill v. Cambra Foods* (No. 2006-1265, -1302) (Linn, Prost, Jordan)**

February 14, 2007 1:39 PM

(Jordan) Affirming judgment of invalidity and unenforceability of patents directed to various forms of canola oil. Some patents unenforceable due to patentee's failure to cite test data to the patent office. Other patents invalid due to on-sale bar.

***Dippin' Dots, Inc., et al. v. Mosey, et al. v. Esty, Jr., et al.* (No. 05-1330) (Mayer, Rader, Gajarsa)**

February 9, 2007 2:32 PM

In case involving method of making ice cream product, affirming judgment of non-infringement, obviousness and inequitable conduct, but reversing antitrust judgment. "Comprising" in a claim does not permit a party to "reach into each of the" steps in a claim to render each step open-ended.

On obviousness, the fact that sales were to determine marketability for commercial purposes, rather than improve the invention technically, made them non-experimental. Motivation to make the claimed invention was demonstrated by the problem to be solved. Strong evidence of materiality could be balanced with relatively weak evidence of intent to find inequitable conduct. However, the weak evidence of intent was not sufficient to sustain a Walker Process antitrust claim.

***Voda, M.D. v. Cordis Corporation (No. 05-1238) (Newman, Gajarsa, Prost)***

February 1, 2007 2:29 PM

(Gajarsa) Accepting interlocutory appeal and holding that district court did not have supplemental jurisdiction over claims of infringement of foreign patents. Newman dissented.