

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

DDROPS COMPANY, REINHOLD VIETH and)
ELAINE VEITH,)
Plaintiffs,) Case No:
v.) 22-332-GBW
MOM ENTERPRISES, LLC, d/b/a MOMMY'S)
BLISS,)
Defendants.)

- - - -
Wilmington, Delaware
Thursday, June 1, 2023
Markman Hearing
- - - -

BEFORE: HONORABLE GREGORY B. WILLIAMS
UNITED STATES DISTRICT COURT JUDGE

- - - -
VIETH EXHIBIT - 2010
MOM Enterprises, LLC, v. ELAINE AND REINHOLD W.
VIETH
IPR2023-00726

Michele L. Rolfe, RPR, CRR

1 **APPEARANCES:**

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3 **CONNELLY GALLAGHER**
4 **BY: ALAN SILVERSTEIN, ESQ.**

5 **-and-**

6 **ALAN ANDERSON FIRM**
7 **BY: ALAN ANDERSON, ESQ.**

8 **For the Plaintiff**

9 **FISH & RICHARDSON**
10 **BY: JEREMY ANDERSON, ESQ.**

11 **For the Defendant**

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P R O C E E D I N G S

(REPORTER'S NOTE: The following Markman was held in
Courtroom 6B, beginning at 1:00 p.m.)

THE COURT: Good afternoon.

All right. So we're here for the *Markman*
hearing in Ddrops Company versus MOM Enterprises, Civil
Action No. 22-332.

Let's have counsel start by putting your
appearances on the record.

MR. SILVERSTEIN: Good afternoon, Your Honor,
Alan Silverstein of Connelly Gallagher for plaintiffs. With
me today is Alan Anderson from the Alan Anderson Law Firm
who will be presenting argument on the claim construction.

Your Honor, I have extra paper copies of the
slide presentation we e-mailed to you, would you like extra
copies?

THE COURT: I have it.

MR. SILVERSTEIN: Okay.

MR. JEREMY ANDERSON: Good afternoon, Your
Honor. Jeremy Anderson from Fish & Richardson on behalf of
the defendant, MOM Enterprises.

THE COURT: All right. Good afternoon.

So to start, just so that it's clear that the
parties are in agreement and we're not just kicking the can

1 down the road, the parties agreed to plain and ordinary
2 meaning with respect to four or five terms. And I just
3 wanted to clarify and put on the record just to make sure
4 that we're all on the same page and that we don't have an 02
5 *Micro* issue what the plain and ordinary meaning is with
6 respect to those terms.

7 So first being "one drop of composition
8 consisting of," and my understanding is that the parties are
9 in agreement that "one drop of C6-C12 liquid fatty esters of
10 glycerol sufficient to administer a nutritional or
11 therapeutically effective dose of Vitamin D."

12 Is that right?

13 MR. ANDERSON: Yes, Your Honor.

14 MR. JEREMY ANDERSON: Yes.

15 THE COURT: All right. And that the claimed
16 term "a nutritional or therapeutic effective amount..."
17 means the amount of Vitamin D in the composition of use in
18 the practice of the invention may be readily selected to be
19 that amount which provides suitable effects on the
20 circulating concentration of 25-hydroxyvitamin D."

21 Is that correct?

22 MR. ANDERSON: Yes, Your Honor.

23 MR. JEREMY ANDERSON: Yes, Your Honor.

24 THE COURT: And the claimed term "liquid
25 triglyceride of 6 to 12 carbon chain length..." means, as

1 used in claims 1, 3 and 4 "C6-C12 liquid fatty acid esters
2 of glycerol including 'medium claim triglycerides' which can
3 be a mixture of 2-4 (C6-C12) fatty acids/glycerol esters."

4 Is that correct?

5 MR. ANDERSON: Yes, Your Honor.

6 MR. JEREMY ANDERSON: Yes.

7 THE COURT: And the term "liquid triglycerides
8 of 6 to 12 carbon chain length..." means, as used in claim
9 5 "(C6-C12) liquid fatty acid esters of glycerol, including
10 'median chain triglycerides, which can be a mixture of 2-4
11 (C6-C12) fatty acids/glycerol esters, where not less than
12 95 percent of the fatty acids have 8 to 10 carbon atoms."

13 Is that correct?

14 MR. ANDERSON: Yes, Your Honor.

15 MR. JEREMY ANDERSON: Yes.

16 THE COURT: And that the claimed term "wherein
17 said drop adheres to the surface of said object;" means,
18 "the drop is sufficiently viscous so that one drop does not
19 immediately drip or roll away from the object that enters
20 the mouth, so that no portion would drip off the object and
21 surface. The drop does not coat or adhere to the object so
22 as to prevent efficient removal of the drop from the
23 object."

24 Is that correct?

25 MR. ANDERSON: Yes, Your Honor.

1 MR. JEREMY ANDERSON: Yes, Your Honor.

2 THE COURT: All right. So since we're all clear
3 on the plain and ordinary meaning of those terms, my
4 understanding is that there remains dispute with respect to
5 "Vitamin D." The term "Vitamin D" as used in claims 1, 3, 4
6 and 5 of the '958 patent. And the dispute centers around
7 whether Vitamin D refers to either D2 or Vitamin D3 forms or
8 whether Vitamin D refers to Vitamin D2 and Vitamin D3 forms;
9 is that the crux of the dispute?

10 MR. ANDERSON: I think so.

11 THE COURT: All right. My understanding is that
12 the parties both agree -- the parties agree that the
13 definition includes the language (5Z-7E) through the D2,
14 which is in paren period.

15 There is a dispute as to the next sentence,
16 which is: "Vitamin D refers to either Vitamin D2 or Vitamin
17 D3 forms," should be included. But the crux of that dispute
18 is whether or not the meaning is going to -- whether Vitamin
19 D is referring to Vitamin D2 and Vitamin D3 or Vitamin D2 or
20 Vitamin D3.

21 Is that an accurate description of what remains
22 in dispute?

23 MR. ANDERSON: I think so, sort of.

24 THE COURT: All right. So let me hear from
25 plaintiff as to what its understanding of the dispute is,

1 and then I'll hear from defendant as to what its
2 understanding of the dispute is.

3 MR. ANDERSON: Thank you, Your Honor. I'm
4 not -- I'm really not sure why we're here. In the Court's
5 order of May 30th, you asked a straightforward question:
6 Whether the defendant adopts the plaintiff's claim
7 construction in light of our joint letter, which was docket
8 entry 68. A simple question.

9 In yesterday's filing, docket entry 71, the
10 defendant states in the first line of their portion of what
11 they added in, quote, Defendant agrees to plaintiff's
12 proposed construction of Vitamin D3. But then it goes on
13 and it asks, it says: Well the plaintiff needs to clarify
14 it. Well, first off, I'm not sure why what I think it is
15 matters one bit. They think that there's something
16 ambiguous in what the inventors clearly defined Vitamin D3
17 to be.

18 Here's the two proposals. And what the
19 defendants want to do is they want to add in this last
20 sentence: Vitamin D3 refers to either Vitamin D2 or Vitamin
21 D3. But that's not what -- how the inventors defined
22 Vitamin D3.

23 THE COURT: But that's in the specification as
24 well.

25 MR. ANDERSON: Well, it's in the background of

1 the invention, but it is not in the summary of the
2 invention.

3 In the summary of the invention, straightaway,
4 column 3, lines 53-56, the inventor said: In this
5 specification and claims, the compound Vitamin D3 means...
6 and then there's a -- I'm not going to repeat it, Your Honor
7 did, the long description of the compound.

8 And then it says: Also having the trivial names
9 cholecalciferol or calciol D3; and ergocalciferol D2.

10 Now, in their letter yesterday, the defendants
11 said that, well, we don't know whether this was a mixture or
12 it could be a mixture. I mean, what they said was they
13 claim that it's ambiguous and that it could be a -- that it
14 suggests that Vitamin D3 must be a mixture. I don't see how
15 a person of ordinary skill in the art, a person in the
16 ordinary skill in the art would not view this as ambiguous
17 and a mixture.

18 The inventor said here's what Vitamin D3 means.
19 And from the first paren, you know, (5Z-7E) all the way to
20 3-ol, that's what it means.

21 The inventors then said that's got two trivial
22 names, two trivial names: Cholecalciferol or calciol, D3;
23 ergocalciferol, D2. It doesn't mean that there's a mixture.
24 It doesn't mean that it's got to be both. It's here's the
25 compound and you got two trivial names for it: D3 and D2.

1 I mean, it's a semicolon. It's not saying it's D3 mixed
2 with D2. It's not saying D3 and D2. It's D3; D2.

3 THE COURT: So I take that to mean D3 or D2.

4 MR. ANDERSON: Sure. I mean, I think that --
5 yes, I think a person of ordinary skill in the art would
6 read this exactly as it is.

7 What I'm concerned about is when they want to
8 add in this D2 refers to either Vitamin D3 -- or Vitamin D3
9 refers to either D2 or Vitamin D3 form, they're -- you know,
10 there's all sorts of, as you saw from our appendix,
11 metabolites Vitamin D3.

12 The definition given by the inventors is that
13 first part prior to the word "also." And they say that's
14 known as two different things: D3 and D2. It's clear, I
15 don't want them -- you know, my concern is when the
16 inventors say in this specification and claim, you know,
17 it's not in the background of the invention, it is not when
18 they are -- because in the background they are talking about
19 here's the prior art, here's how we're making it better,
20 here's how we are improving it.

21 They set out in the summary of the invention,
22 straightaway, in this specification of claims compound
23 Vitamin D3 means, that's the construction, Your Honor,
24 that's all it is. And a person of ordinary skill in the art
25 would read that and understand, which is the defendants

1 alleged concern in their letter yesterday that it could be a
2 mixture of different Vitamin D3 forms. I don't know how you
3 get a mixture out of that given its construction.

4 They say here it is, it's got trivial names --
5 actually, there's three trivial names given:
6 Cholecalciferol or calciol, which are (D3); and
7 ergocalciferol (D2). I don't know that a person of ordinary
8 skill in the art would read this and say well, it could be a
9 mixture, or a mixture is required, which I think is what the
10 defendant is alleging in their filing yesterday. And that's
11 the point.

12 There's no reason -- in fact, I think it would
13 be erroneous for the Court to incorporate something stated
14 in the background of the invention and tack on a gloss to
15 this when the inventors have very clearly stated as
16 concisely as you possibly -- as I think they could, in this
17 specification claims, the compound Vitamin D3 means...

18 I think it's clear.

19 And asking the plaintiff to put a gloss on it, I
20 mean, you could just say -- I could say well, my gloss on it
21 is it's exactly what the defendant has in their product.
22 I'd rather have that gloss if Your Honor wishes to put that
23 on, but I don't think that would be correct. I'm saying
24 that factitiously obviously.

25 I mean, this is one of those, I think, where the

1 specification -- I mean, I can't recall an instance where
2 the inventors have made it more clear or stated more clearly
3 how they -- what they mean by a claimed term.

4 THE COURT: So you're not contending that that
5 language means D2 and D3; you believe that a person in the
6 ordinary skill in the art would construe that language to
7 mean D2 or D3?

8 MR. ANDERSON: Yeah. Well, it says -- because
9 there's a semicolon. There's a semicolon after D3. It's
10 got -- they say here's what it is, this -- they give the
11 long descriptor, you know, the compound Vitamin D3 is that
12 5Z blah, blah, blah to 3-ol. And then it says, at -- in
13 effect, trivial names, cholecalciferol or calciol, which are
14 D3, and it's got the trivial name ergocalciferol, which is
15 D2. It's -- I mean, their concern -- and this is what I, I
16 just can't just grasp how it is their concern, at least as
17 they said yesterday, it means it has to be a mixture. I
18 don't see how it could be a mixture.

19 THE COURT: Well, I think they are saying the
20 "and" before ergocalciferol can be misconstrued to mean
21 D2 -- D3 and D2 as opposed to what I'm hearing you say that
22 a person of ordinary skill in the art would understand that
23 to mean D3 or D2.

24 MR. ANDERSON: It's the way it's structured. I
25 mean, there's the semicolon.

1 THE COURT: So you guys may not be in
2 disagreement as to the ultimate definition.

3 MR. ANDERSON: Yeah, I just don't want them
4 to -- I don't want the Court to tack on a phrase that
5 doesn't belong there. There's the semicolon. And what they
6 are saying is the "and," despite the semicolon, that a
7 person of ordinary skill in the art would construe, would
8 mean, would understand the word "and" to be a mixture or
9 both. That's what I think they are trying to say.

10 I don't know how a person ordinary skill in the
11 art or for that matter anybody reading this would take oh,
12 where it says D3 semicolon and ergocalciferol, especially
13 when it says having the trivial names, plural, that,
14 therefore, it's both or a mixture.

15 That's what I think they are saying, but I don't
16 think that that is an ambiguity that exists, I think that's
17 what I would call a defendants, counsels, you know, effort
18 to...

19 THE COURT: So is Ddrops willing to agree that a
20 person of ordinary skill in the art would construe the
21 meaning of that to mean D3 or D2?

22 MR. ANDERSON: Or, you know, I think it's got --
23 they would construe it as it's this compound blah, blah,
24 blah, and it's got trivial names, cholecalciferol or
25 calciol, and it has a trivial name of ergocalciferol. They

1 aren't going to construe it as a mixture -- as requiring --
2 which I think the defendant is saying that it is a mixture
3 or you got to have both.

4 THE COURT: Okay. So, again, answer my
5 question: Are you willing to agree, Ddrops, that a person
6 of ordinary skill in the art would construe that language to
7 mean D3 or D2?

8 MR. ANDERSON: A person of ordinary skill in the
9 art would understand that to mean that Vitamin D3 is that --
10 and I'm sorry I'm not directly answering your question, but
11 I'm trying to be as precise as possible. That it is this
12 description and it's either D3 -- it's known as either D3 or
13 it's known as D2.

14 THE COURT: Okay.

15 MR. ANDERSON: But certainly there's no
16 requirement that there be a mixture, there's no requirement
17 that it be both.

18 THE COURT: Okay.

19 MR. ANDERSON: Anything like that.

20 THE COURT: Okay. I understand.

21 All right. Let me hear from defendant.

22 MR. ANDERSON: Thank you, Your Honor.

23 MR. JEREMY ANDERSON: Your Honor, we don't have
24 a dispute. We believe that term should be construed either
25 D3 or D2.

1 THE COURT: Okay.

2 MR. JEREMY ANDERSON: We think the language and
3 the semicolon they added could be ambiguous. It could
4 include a mixture. We don't think it should be construed
5 that way, so we're saying the same thing.

6 THE COURT: So it sounds like you guys agree
7 that it should be D2 or D3.

8 All right. The Court will adopt --

9 MR. ANDERSON: I'm just --

10 THE COURT: The Court will adopt the language
11 that plaintiff Ddrops proposes, but make the record clear
12 that the parties agree that a person of ordinary skill in
13 the art would construe that to mean Vitamin D3 or Vitamin
14 D2. And it's not "and," it's not Vitamin D3 and Vitamin D2.
15 And it does not require a mixture.

16 MR. ANDERSON: And by the same token it doesn't
17 preclude a mixture, because I don't know enough of the
18 chemistry. I supposed you can have some D3 or some D2 as
19 long as it meets the more specific limitations that we
20 agreed on the claims as to the carbon chain lengths.

21 What I understood the defendants concern was
22 that this construction required both. It does not require
23 both.

24 MR. JEREMY ANDERSON: No, that's not correct,
25 Your Honor. We want a simple construction. This Vitamin D3

1 means either Vitamin D3 or Vitamin D2. It's a very simple
2 construction. It's in the specification. That's how we
3 would like it construed.

4 THE COURT: All right. So both sides agree that
5 it's either Vitamin D2 or Vitamin D3?

6 MR. ANDERSON: What I think Your Honor said
7 originally, yes, which is our construction and then making
8 the record clear that a person of ordinary skill in the art
9 would understand this to mean what you said.

10 THE COURT: Okay. So, again, for clarity
11 purposes: The Court will adopt the language that starts
12 with the (5Z-7E) and goes through after the semicolon and
13 ergocalciferol (D2).

14 The Court is going to adopt that language
15 proposed by plaintiff, Ddrops. But the record will reflect
16 that the parties agree that that language to a person of
17 ordinary skill in the art means Vitamin D3 refers to either
18 Vitamin D2 or Vitamin D3 as opposed to Vitamin D2 and
19 vitamin D3.

20 MR. JEREMY ANDERSON: I don't know that we need
21 the second part of that at all. I think the either or.
22 It's either Vitamin D2 or Vitamin D3.

23 THE COURT: Okay.

24 MR. JEREMY ANDERSON: Period.

25 MR. ANDERSON: What I don't want to -- because I

1 don't think the definition in the specification precludes
2 this, is that you can still -- you could have both D3 and
3 D2.

4 MR. JEREMY ANDERSON: I think that this is a new
5 argument.

6 MR. ANDERSON: The specification doesn't say
7 that you can only have one. That it has to be
8 cholecalciferol or calciol D3.

9 THE COURT: So --

10 MR. ANDERSON: It can be -- in other words, it
11 can be D3 or D2 or it could be both. There's no requirement
12 that -- there's nothing in the specification that makes
13 it -- that requires it to be --

14 THE COURT: Now, see, you're trying to get --
15 that's -- that was the dispute.

16 MR. ANDERSON: Well, but that's --

17 THE COURT: That's the dispute.

18 MR. ANDERSON: That's not what I understand.

19 See, this is why -- we've been kind of two ships passing in
20 the night, I think.

21 THE COURT: But that's why --

22 MR. ANDERSON: But they --

23 THE COURT: That's why I tried to clarify it.
24 That's the dispute.

25 MR. ANDERSON: I understood them to be saying

1 it's got to be -- it has to be that they are concerned that
2 it says -- and this is what they say in their filing
3 yesterday that D3 must be a mixture. And the answer to that
4 is no.

5 MR. JEREMY ANDERSON: That is incorrect, Your
6 Honor.

7 MR. ANDERSON: That's what it says.

8 MR. JEREMY ANDERSON: That's not what we are
9 saying at all. He's misconstruing that. So we're saying
10 it's ambiguous the way it currently is.

11 THE COURT: I understand what your dispute was.
12 You are saying it doesn't answer whether it's Vitamin D3 or
13 -- Vitamin D3 or Vitamin D2 or Vitamin D3 and Vitamin D2.

14 MR. JEREMY ANDERSON: Yeah. The way it's
15 currently written there's ambiguity, and ambiguity requires
16 the Court to construe claims, right. That's ambiguous. We
17 think that the way it's written it could be a mixture. We
18 don't think that's the case. We don't think there's a
19 mixture at all involved here. I think it's either Vitamin
20 D3 or Vitamin D2 that should be the construction.

21 THE COURT: And that -- so that was the reason
22 for the request of the additional sentence. So what I
23 understood you, Mr. Silverstein, to initially say is that
24 Ddrops agreed that that language through, you know, the D2,
25 that a person of ordinary skill in the art would understand

1 that to mean Vitamin D refers to either Vitamin D2 or
2 Vitamin D3. But now you seem to be saying that you want it
3 to be Vitamin D2 and/or Vitamin D3.

4 MR. ANDERSON: No, not exactly. What I'm
5 concerned about is that the -- I mean, we think -- I'm
6 sorry, we think the definition, the construction in the
7 specification is clear on its face regardless of what they
8 say. However, I think we're in agreement that you don't
9 have to have both of them -- there's no requirement that you
10 must have both. And I think that's what they were concerned
11 about as I read their defendant's position from the filing
12 yesterday.

13 MR. JEREMY ANDERSON: That's just not true.

14 THE COURT: All right.

15 MR. ANDERSON: But --

16 THE COURT: The defendants want Vitamin D3 to
17 refer to Vitamin D2 or Vitamin D3.

18 MR. JEREMY ANDERSON: Exactly.

19 MR. ANDERSON: All I can refer Your Honor to is
20 their filing yesterday where they say --

21 THE COURT: Mr. Anderson is here now.

22 MR. ANDERSON: I know.

23 THE COURT: And he's explaining his position.

24 MR. ANDERSON: I -- all I want to be clear on is
25 that the gloss in the record that Your Honor is saying,

1 because I don't know how these things work chemically. And
2 I don't think there's anything in the specification that
3 says it has to be 100 percent pure D3 or 100 percent pure
4 D2.

5 THE COURT: Well, again, you know, there are two
6 references from the specification: One is in the background
7 section, one is in the summary of the invention section.

8 One has an "and" in it, which initially you said
9 despite that "and" you still believe it referred to -- that
10 a person of ordinary skill in the art would refer to Vitamin
11 D3 as Vitamin D2 or Vitamin D3, and they wouldn't understand
12 it to mean Vitamin D2 and Vitamin D3.

13 And defendants are saying we agree with that, we
14 just want -- we want it clear that it's Vitamin D2 or
15 Vitamin D3. And it's not a mixture.

16 MR. ANDERSON: I guess my -- you know, my
17 concern, Your Honor, is that the definition in the summary
18 of the invention says "Vitamin D3 means..." and it gives
19 the name and then it says it's got these trivial names.

20 THE COURT: Okay.

21 MR. ANDERSON: And you can have -- it can be
22 called cholecalciferol or calciol or it can be called
23 ergocalciferol. And it lists those trivial names.

24 THE COURT: From 5Z-7E through the
25 cholestatrien-3-ol, tell me what each one of those words or

1 phrases mean; does one mean D2 and one mean D3?

2 MR. ANDERSON: No, it is my understanding it is
3 one description of the compound, so it's a single
4 description of the compound.

5 The inventors then say that has, in effect,
6 three trivial names: Cholecalciferol, calciol and
7 ergocalciferol. Because it says also having the trivial
8 names. So I believe that that description from (5Z)
9 through 3-ol is called cholecalciferol, it's called calciol
10 and it is called ergocalciferol.

11 THE COURT: Which in common use is referred to
12 as D2 or D3?

13 MR. ANDERSON: Correct.

14 THE COURT: All right. So I'm going to go back
15 to my original construction, which is: I will adopt the
16 language of Ddrops that starts with the (5Z-7E) and ends
17 with the ergocalciferol (D2), but the record will reflect
18 that a person of ordinary skill in the art would understand
19 that language to refer to either Vitamin D2 or Vitamin D3.

20 MR. JEREMY ANDERSON: That works for me.

21 MR. ANDERSON: Okay.

22 THE COURT: All right. So with that, anything
23 else for the Court?

24 Anything else from plaintiff?

25 MR. ANDERSON: No, Your Honor.

1 THE COURT: All right. Anything from
2 defendants?

3 MR. JEREMY ANDERSON: Thank you, Your Honor. I
4 appreciate your time.

5 THE COURT: All right.

6 We're adjourned.

7 (Whereupon, the following proceeding concluded
8 at 1:35 p.m.)

9 I hereby certify the foregoing is a true
10 and accurate transcript from my stenographic notes in the
11 proceeding.

12 /s/ Michele L. Rolfe, RPR, CRR
13 U.S. District Court
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