

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

BUERGOFOL GMBH,

Plaintiff,

vs.

OMEGA LINER COMPANY, INC.,

Defendant.

Civil Action No.: 22-cv-04112-KES

**BUERGOFOL'S INFRINGEMENT
CONTENTIONS**

According to paragraph 7 of the Court’s “Order Denying Motions For Scheduling Conference and Scheduling Order” (Dkt. 136), plaintiff Buergofol GmbH (“Buergofol”) shall serve infringement contentions on defendant Omega Liner Company, Inc. (“Omega”). The due date for serving those infringement contentions was extended multiple times by the Court from July 21, 2023 until May 7, 2024. (Dkt. 379) Paragraph 7 of the Scheduling Order is replicated below:

7. Disclosure of Infringement Contentions: By July 21, 2023, Buergofol shall serve on Omega “Infringement Contentions” containing the following information: (a) each claim of each patent it alleges is being infringed, (b) for each claim, each product, device, process, act, or method it alleges infringes (“Accused Product”), a chart identifying where specifically each element of each asserted claim listed is found in each product, device, process, act, or method, (d) the priority date to which each asserted claim allegedly is entitled, and (e) whether each element of each asserted claim is claimed to be literally present or present under the doctrine of equivalents. If Buergofol asserts that any element of any claim is present under the doctrine of equivalents, it must explain each function, way, and result that is equivalent and why any differences are not substantial.

In response to paragraph 7 of the Scheduling Order, Buergofol alleges that Omega has infringed U.S. Patent No. U.S. 8,794,269 (“the ‘269 Patent”) and U.S. Patent No. 9,657,882 (“the ‘882 Patent”). Buergofol provides the “information” required by paragraph 7 of the Scheduling Order below:

(a) “each claim of each patent it alleges is being infringed”

Buergofol alleges that Omega has infringed claims 1-3 and 5-8 of the ‘269 Patent in the past. To the extent that Omega is not currently making liner that includes inner film that Buergofol supplied to Omega in 2017-2018, Buergofol has no information that

Omega is currently making, using or selling, any product claimed by the '269 Patent currently without authorization of Buergofol, the owner of the '269 Patent.

Buergofol alleges that Omega has infringed claims 1, 3-5, 7 and 10-11 of the '882 Patent in the past. Buergofol believes, and therefore alleges and contends, that Omega is continuing to make, use, and sell products claimed by the '882 Patent without authorization of Buergofol, the owner of the '882 Patent, so Omega "is" infringing the '882 Patent.

(b) "for each claim, each product, device, process, act or method it alleges infringes ("Accused Product"), a chart identifying where specifically each element of each asserted claim listed is found in each product, device, process, act, or method"

The chart for the '269 Patent is provided below in the attached Exhibit A.

Buergofol contends that all liners made by Omega of diameter greater than 21 inches that were made using inner film made by Buergofol infringe claims 1-3 and 5-8 of the '269 Patent. Omega has evaded answering discovery requests and has obstructed discovery, and as a consequence Omega has failed to identify (for example, by wet out serial number or dry liner serial number) which of the liners Omega made were of diameter greater than 21 inches and included inner film made by Buergofol. Further discovery will therefore be required, such as for example court action to compel Omega to answer discovery requests, in order to force the infringer Omega to divulge the serial numbers of all the infringing liners, and Buergofol shall upon learning that information have good cause diligently to amend these infringement contentions to add the serial numbers. But the structures of all the infringing liners are known, and the claim charts for all such many hundreds of liners would be identical, so a representative claim chart is presented in Exhibit A.

The chart for the '882 Patent is provided below in the attached Exhibit B.

Buergofol contends that all liners made by Omega without using inner film or outer film from Buergofol infringe claims 1, 3-5, 7 and 10-11 of the '882 Patent to the extent that

the outer facing external side of the inner tubular film has a coating or covering of a migrating compound. Each such OMEGA LINER is an Accused Product. Omega has failed to produce a sample of each instance of OMEGA LINER responsive to Buergofol's discovery requests, and therefore Buergofol has not tested each Accused Product to confirm the presence of the recited "coating or covering" with a migrating compound. In addition, there is ongoing infringement, and Omega continues to make instances of OMEGA LINER that, if tested, would show the presence of a coating or covering of a migrating compound on the outer facing external side of the inner tubular film. Further discovery will therefore be required, such as for example court action to compel Omega to retain and produce liner samples in response to Buergofol's discovery requests, and Buergofol shall upon testing the liner samples have good cause diligently to amend these infringement contentions to add the serial numbers of those instances of OMEGA LINER that have a coating or covering of a migrating compound on the outer facing external side of the inner tubular film.

As of the date of these contentions, Omega has produced only eleven samples of OMEGA LINER identified as corresponding to a particular liner, such as by job number, dry liner serial number or wet out liner serial number. (A twelfth liner sample produced by Omega had no identifying markings linking it to any particular liner.) Four of the eleven samples, including the sample for liner WO-2023-010-1783, had a coating or covering of a migrating compound on the outer facing external side of the inner tubular film. Without testing the remaining instances of OMEGA LINER to confirm the presence of a coating or covering of a migrating compound, Buergofol is not able to determine which of the remaining instances of OMEGA LINER infringe claims 1, 3-5, 7 and 10-11 of the '882 Patent. Because Omega has spoliated evidence and failed to retain and produce liner samples in response to Buergofol's discovery requests, Buergofol seeks an adverse inference instruction order ordering that the fact finder be instructed that it may infer that for any instance of OMEGA LINER for which Omega did not retain and

produce a sample, a test of a sample of that unsampled instance of OMEGA LINER would have shown the presence of a coating or covering of a migrating compound.

(d) the priority date on which each asserted claim allegedly is entitled.

Priority Date For All Claims In The ‘269 Patent: June 15, 2009

Priority Date For All Claims In The ‘882 Patent: March 11, 2012

(e) whether each element of each asserted claim is claimed to be literally present or present under the doctrine of equivalents.

All elements of all asserted claims of the ‘269 Patent (claims 1-3 and 5-8) are now claimed by Buergofol to be literally present. Should the Court in the future interpret a claim element of one of the asserted claims of the ‘269 Patent such that that element is not literally present in the Omega accused products, then Buergofol alleges and will allege that that element is present under the doctrine of equivalents.

All elements of all asserted claims of the ‘882 Patent (claims 1, 3-5, 7 and 10-11) are now claimed by Buergofol to be literally present. Should the Court in the future interpret a claim element of one of the asserted claims of the ‘882 Patent such that that element is not literally present in the Accused Products, then Buergofol alleges and will allege that that element is present under the doctrine of equivalents. For example, if the Court interprets claim 1 of the ‘882 Patent not to cover an Accused Product because that product is not “for use in trenchless sewage pipe renovation” because the Accused Product is used to renovate culverts or storm drain pipes, then Buergofol will allege that the recited “insertion tube for use in trenchless sewage pipe renovation” is present under the doctrine of equivalents. Each of the function, way and result of an insertion tube used to renovate a culvert is substantially the same as the function, way and result of an insertion tube used to renovate a sewage pipe. There are no substantial differences.

Paragraph 7 of the Scheduling Order (Dkt. 136) describes the limited information (a), (b), (d) and (e) that Buergofol must include in its infringement contentions. Other

than the requirement of (e) to disclose whether infringement is asserted under the doctrine of equivalents, paragraph 7 does not require Buergofol to disclose its theories of infringement. Nevertheless, Buergofol states that Omega's making and selling of the Accused Products constitutes direct infringement of the '269 Patent and the '882 Patent. In addition, the sale by Omega of the Accused Products to Subsurface, Inc. and other customers induces them to use the Accused Products for the renovation of pipes and thereby induces Subsurface, Inc. and Omega's other customers to directly infringe the '269 Patent and the '882 Patent.

Dated this 7th day of May, 2024

IMPERIUM PATENT WORKS LLP

By /s/ Darien K. Wallace
Darien K. Wallace (*Pro Hac Vice*)
P.O. Box 607
Pleasanton, CA 94566
Phone (925) 550-5067
Fax (925) 835-5804
Email darien@imperiumpw.com

Attorney for Plaintiff Buergofol

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date indicated above, a true and correct copy of the foregoing document was served electronically using the CM/ECF system or email:

- Shannon R. Falon (shannon@denevanfalon.com), *Attorney for Defendant*
- Meghann Joyce (meghann@denevanfalon.com), *Attorney for Defendant*
- Michael Neustel (michael@neustel.com), *Attorney for Defendant*
- Michelle Breit (michelle@neustel.com), *Attorney for Defendant*
- Monte Bond (monte@neustel.com), *Attorney for Defendant*

/s/ Darien K. Wallace
Darien K. Wallace (*Pro Hac Vice*)
P.O. Box 607
315 Ray Street
Pleasanton, CA 94566
Phone (925) 550-5067
Fax (925) 835-5804
Email darien@imperiumpw.com

EXHIBIT A

In the claim chart for the ‘269 Patent below, the “LG21BIF Product” (“Liner with Greater than 21 Inches Buergofol Inner Film”) is all instances of “OMEGA LINER” that were made by Omega that were of a diameter greater than 21 inches and that were made using inner film made by Buergofol. Each instance of the LG21BIF Product is an Accused Product. All instances of Buergofol inner film of diameter greater than 21 inches that were supplied to Omega had a structure of either PE/AP/PA/AP/PA (5c structure) or PE/PE/PE/AP/PA/AP/PA (7a structure) (where PE denotes polyethylene, AP denotes adhesion promoter, and PA denotes polyamide), where the innermost PE layer included an amount of the “thermoplastic olefin homo- or copolymer” Ineos LL6208AF, and where the Ineos LL6208AF had a VICAT softening point of at least 100 degrees Celsius. Whether an instance of OMEGA LINER qualifies as a LG21BIF Product is independent of whether the outer film was made by Buergofol or Viaflex. The outer film made by both Buergofol and Viaflex constitutes the recited externally situated tubular film when used to make OMEGA LINER. All Buergofol outer film that was supplied by Buergofol to Omega had the same outer “5c” structure PE/AP/PA/AP/PE, where this outer “5c” structure included zinc oxide as a UV blocker, so all Buergofol outer film supplied to Omega reflected and/or absorbed more than 90% of UV radiation and/or short-wave visible light. All outer film made by Viaflex and used in “OMEGA LINER” has the structure PE/AP/PA/AP/PE and reflects and/or absorbs more than 90% of UV radiation and/or short-wave visible light. Buergofol contends that each instance of the LG21BIF Product includes the recited reactive synthetic resin because without resin the product would not be usable, and because each instance has a wet out liner serial number indicating that the product includes resin.

One exemplary instance of the G21BIF Product is the 48-inch diameter liner having a wet out liner serial number of WO-2017-011-005. In an answer dated 10/5/23 to Buergofol’s Request for Admission No. 17 (“RFA 17”), Omega admitted that the WO-

2017-011-005 liner had both an inner film and an outer film that were made by Buergofol. The chart below identifies where specifically each element of each of the asserted claims 1-3 and 5-8 is found in the G21BIF Product.

The following is an incomplete list of the wet-out liner serial numbers of instances of the LG21BIF Product. The list is taken from Omega's answer dated 9/28/23 to Buergofol's Interrogatory No. 7 (ROG 7) asking Omega to identify every OMEGA LINER made with Buergofol inner film and having a diameter of 24", 30", 36", 42", 48", 54" and 60". The list is not a complete list of Accused Products because Omega failed to respond completely and fully to ROG 7. For example, Omega's answer dated 9/28/23 to ROG 7 does not even include the 48-inch diameter G21BIF Product (WO-2017-011-005) that Omega admitted on 10/5/23 in response to RFA 17 was made with inner and outer film from Buergofol. Additional instances of Accused Products will be added to these preliminary Infringement Contentions after Omega has been compelled fully to comply with Buergofol's discovery requests. The incomplete list of Accused Products is:

WO-2023-010-1733, WO-2023-010-1724, WO-2023-010-1646, WO-2023-010-1786, WO-2023-010-1785, WO-2023-010-1811, WO-2023-010-1812, WO-2023-010-1798, WO-2017-012-0006, WO-2018-010-0011, WO-2018-010-0015, WO-2018-010-0027, WO-2018-010-0023, WO-2018-010-0028, WO-2018-010-0030, WO-2018-010-0031, WO-2018-010-0040, WO-2018-010-0039, WO-2018-010-0037, WO-2018-010-0043, WO-2018-010-0041, WO-2018-010-0054, WO-2018-010-0052, WO-2018-010-0050, WO-2018-010-0049, WO-2018-010-0053, WO-2018-010-0061, WO-2018-010-0060, WO-2018-010-0080, WO-2018-010-0063, WO-2018-010-0064, WO-2018-010-0082, WO-2018-010-0072, WO-2018-010-0087, WO-2018-010-0073, WO-2018-010-0094, WO-2018-010-0078, WO-2018-010-0109, WO-2018-010-0066, WO-2018-010-0107, WO-2018-010-0106, WO-2018-010-0108, WO-2018-010-0122, WO-2018-010-0125, WO-2018-010-0065, WO-2018-010-0063, WO-2018-010-0147, WO-2018-010-0170,

WO-2018-010-0142, WO-2018-010-0190, WO-2019-010-0336, WO-2022-010-1448, WO-2022-010-1477.

Claim of '269 Patent	Where The Element Is Found
1. An insertion tube suitable for the renovation of subterranean pipes, optionally subterranean sewer pipes, comprising	The LG21BIF Product is a liner for use in renovating subterraneous pipes, such as culverts.
an optionally nonconditioned multilayer film that is impermeable to liquids and that is at least to some extent permeable to UV radiation, comprising a layer sequence made of	The LG21BIF Product has an outer film (an externally situated film that reflects and/or absorbs UV radiation and/or short-wave visible light), an inner film, and a support material between the outer and inner film, where the support material is saturated with a UV curable synthetic resin. The inner film of the LG21BIF was made by Buergofol and is either a multilayer film of type "inner 5c" or of type "inner 7a." This "multilayer film" (inner film) is located on the inside of the liner, with the inner surface of the multilayer film serving as the inner surface of the overall liner. All Buergofol inner film of types 5c and 7a had either a PE/AP/PA/AP/PA structure, or a PE/PE/PE/AP/PA/AP/PA structure (where PE denotes polyethylene, AP denotes adhesion promoter, and PA denotes polyamide). (Decl. Boutrid, ¶¶4, 7, 8, BF13989-13990) The WO-2017-011-005 liner was a 48-inch diameter liner made by Omega that had an inner film made by Buergofol of type "5c". The inner film had five layers of the PE/AP/PA/AP/PA structure. In an answer dated 10/5/23 to Buergofol's RFA 17, Omega admitted that the WO-2017-001-005 liner had both an inner film and an outer film that were made by Buergofol.
(a) a layer (a) comprised of at least one thermoplastic olefin homo- or copolymer, as one of the external layers,	The LG21BIF Product has an inner film (inner film made by Buergofol of type "inner 5c" or type "inner 7a"), and this inner film had an inner most layer (a) comprising "at least one thermoplastic olefin homo- or copolymer." This "at least one thermoplastic olefin homo- or copolymer" is a polyethylene (PE), specifically the following type of PE: Ineos LL6208AF. The layer (a) that comprises this PE is located on the inside of the inner film, with the inside surface of the inner film serving as the inside surface of the liner.

(b) an adhesive-promoter layer (b),	The LG21BIF Product has an inner film (inner film made by Buergofol of type “inner 5c” or type “inner 7a”), and this inner film has an adhesive-promoter layer (b). This adhesion promoter layer is disposed between the inner most PE layer (layer (a)), and a PA layer (layer (c)).
(c) an internally situated layer (c) comprised of at least one homo- and/or copolyamide,	The LG21BIF Product has an inner film (inner film made by Buergofol of type “inner 5c” or type “inner 7a”), and this inner film had an internally situated layer (c) comprising polyamide (PA). This layer (c) of polyamide is disposed between the adhesive promoter layer (b) and another adhesive promoter layer (d).
(d) an adhesive-promoter layer (d), and	The LG21BIF Product has an inner film (inner film made by Buergofol of type “inner 5c” or type “inner 7a”), and this inner film had an adhesive-promoter layer (d). This adhesion promoter layer (d) is adjacent the PA layer (layer (c)). This adhesion promoter layer (d) is disposed between the PA (layer (c)) and another PA layer (e).
(e) a layer (e) comprised of at least one homo- and/or copolyamide, as one of the external layers,	The LG21BIF Product has an inner film (inner film made by Buergofol of type “inner 5c” or type “inner 7a”), and this inner film has a second layer of polyamide (PA) (layer (e)). This second PA layer is disposed on the outside of the inner film, with the outside surface of the PA layer (e) serving as the outer surface of the inner film.
in the form of a tubular film,	The LG21BIF Product layers (a), (b), (c), (d) and (e) together form parts of the internal tubular film (the inner film) of the insertion tube.
wherein the VICAT softening point of the thermoplastic olefin homo- or copolymer of the layer (a) is at least 100°C;	In the LG21BIF Product, the “at least one thermoplastic olefin homo- or copolymer” of layer (a) was Ineos LL6208AF. (Decl. Boutrid, ¶13, BF13992). Ineos LL6208AF had a VICAT softening point of at least 100 degrees Celsius.
as an internally situated tube, and	The layers (a), (b), (c), (d) and (e) together are parts of the internal tubular film of the liner.

an externally situated single- or multilayer tubular film which is impermeable to liquids, and which reflects and/or absorbs UV radiation and/or short-wave, visible light, as externally situated tube, and	The LG21BIF Product has an externally situated film (outer film) that is impermeable to liquids, and that reflects and/or absorbs UV radiation and/or short-wave, visible light. The outer film was either made by Buergofol or Viaflex, but in all cases the outer film is impermeable to liquids and reflects and/or absorbs UV radiation and/or short-wave, visible light. Omega has stated, “Omega has . . . only one supplier of outer film other than Buergofol, i.e., Viaflex.” (Dkt. 377, 3:23-4:2) The structure of all outer film supplied by Buergofol to Omega was of the structure PE/AP/PA/AP/PE, where the outer film includes zinc oxide that reflects and/or absorbs UV radiation and/or short-wave visible light. (Decl. Boutrid, ¶¶4,10, BF13989-13991). All outer film made by Viaflex has the structure PE/AP/PA/AP/PE and reflects and/or absorbs UV radiation and/or short-wave visible light. The WO-2017-011-005 instance of the G21BIF Product was a 48-inch diameter liner made by Omega that has an outer film made by Buergofol of type “5c” of PE/AP/PA/AP/PE. All Buergofol outer film that was supplied to Omega has a PE/AP/PA/AP/PE structure. (Decl. Boutrid, ¶¶4,10, BF13989-13991). The outer film includes zinc oxide that reflects and/or absorbs UV radiation and/or short-wave visible light. (Decl. Boutrid, ¶11, BF13991).
a support material situated therebetween and saturated with a reactive synthetic resin.	The LG21BIF Product has a support material that is saturated with UV curable resin and that is disposed between the inner film and the outer film. The WO-2017-011-005 instance of the G21BIF Product was a 48-inch diameter liner made by Omega that had a “wet out” liner serial number indicating that it had a wet UV curable resin. Each and every liner made by Omega that had a “wet out” liner serial number assigned to it by Omega that was then sold/supplied to a customer (such as Subsurface Inc., in the case of WO-2017-011-005) was made to include an amount of UV curable resin located between its inner film and its outer film.

2. The insertion tube as claimed in claim 1, wherein the thickness of the layer (a) is at least 40% of the total thickness of the multilayer film that is impermeable to liquids and at least to some extent permeable to UV radiation.	Buergofol contends that each instance of the LG21BIF Product that was made using a Buergofol “inner 7a” inner film was an insertion tube with an internally situated multilayer film that had a layer (a) that was at least 40% of the total thickness of the multilayer film.
3. The insertion tube as claimed in claim 1, wherein the layer (a) of the multilayer film that is impermeable to liquids and at least to some extent permeable to UV radiation is comprised of at least one ethylene homo- or copolymer and/or at least one propylene homo- or copolymer.	In the LG21BIF Product, the layer (a) is comprised of an amount of polyethylene.
5. The insertion tube as claimed in claim 1, wherein the layers (c) and (e) of the multilayer film that is impermeable to liquids and that is at least to some extent permeable to UV radiation have a different layer structure, optionally a different layer thickness, and/or different polyamide components, and/or a different composition.	For both of the inner film of types 5c and 7a of the LG21BIF Product, the layers (c) and (e) have different layer structures in which the layer thickness of layer (c) is different than that of layer (e). (Decl. Boutrid, ¶¶7-8, BF13990)
6. The insertion tube as claimed in claim 1, wherein the adhesive-promoter layers (b) and (d) of the multilayer film that is impermeable to liquids and that is at least to some extent permeable to UV radiation comprise respectively mutually independently at least one modified thermoplastic olefin homo- or copolymer, optionally respectively mutually independently at least one modified thermoplastic ethylene homo- or copolymer and/or at least one modified propylene homo- or copolymer.	In the LG21BIF Product, the layers adhesive-promoter layers (b) and (d) are impermeable to liquids, are at least to some extent permeable to UV radiation, and comprise an amount of a modified thermoplastic olefin polymer. The layers (b) and (d) comprise a linear low-density polyethylene (LLDPE). (Decl. Boutrid, ¶¶7-8, BF13990)
7. The insertion tube as claimed in claim 1, wherein the multilayer film that is impermeable to liquids and that is at least to some extent permeable to UV radiation consists of the layers (a)-(e).	Each instance of the LG21BIF Product that was made using a Buergofol “inner 5c” inner film as mentioned above with respect to claim 1 has an “internally situated tube” that consists of the five layers (a)-(e). (Decl. Boutrid, ¶7, BF13990)
8. The insertion tube as claimed in claim 1, wherein the multilayer film that is impermeable to liquids and that is at least to some extent permeable to UV radiation is permeable to an extent of at least 80% to UV radiation.	Each instance of the LG21BIF Product that was made using a Buergofol “inner 5c” or “inner 7a” inner film was an insertion tube that had a multilayer film as an “internally situated tube”, and the multilayer film was impermeable to liquids and at least to some extent was permeable to UV radiation in that at least 80% of UV radiation passed through it.

EXHIBIT B

Buergofol contends that each instance of “OMEGA LINER” that was made by Omega using inner film and outer film that was not made by Buergofol is an Accused Product to the extent that the outer facing external side of the inner tubular film has a coating or covering of a migrating compound. The claim chart below for the ‘882 Patent identifies where each element of each asserted claim is found in an exemplary instance of an Accused Product. The exemplary instance of an Accused Product is the 36-inch diameter OMEGA LINER identified by the wet out liner serial number WO-2023-010-1783 (corresponding to dry liner DL-2022-05-1031 and job number 1701031).

As of the date of these contentions, Omega has produced only eleven samples of OMEGA LINER identified by Omega as corresponding to any particular liner. Four of the eleven samples had a coating or covering of a migrating compound on the outer facing external side of the inner tubular film. One of the four samples that had a coating or covering was the exemplary instance of an Accused Product, the 36-inch diameter liner with the wet out liner serial number WO-2023-010-1783. Omega sometimes makes multiple wet liners from one dry liner, and thus one dry liner serial number can correspond to multiple wet out liner serial numbers. The second and third of the four samples that had a coating or covering correspond to the wet out liner serial numbers: WO-2022-010-1370, WO-2022-010-1410, WO-2022-010-1502, WO-2023-010-1827, WO-2023-010-1879. The fourth of the four samples that had a coating or covering corresponds to the job number 1701771, but Omega’s responses to Buergofol’s discovery requests were incomplete, and Omega failed to identify any wet-out or dry liner serial number that corresponds to the job number 1701771. A person of ordinary skill in the art would know that whether a coating or covering of a migrating compound exists on the outer facing external side of the inner tubular film of an insertion tube does not depend exclusively on the brand name and product number of the components used to make the inner tubular film.

Without testing the remaining instances of OMEGA LINER to determine whether a coating or covering of a migrating compound is present, Buergofol cannot conclusively state which of the remaining individual instances of OMEGA LINER infringe claims 1, 3-5, 7 and 10-11 of the '882 Patent. If Omega continues to obstruct discovery by refusing to retain and produce a sample of every dry liner Omega made after Buergofol's RFP 30 was served on June 19, 2023, and Buergofol is thereby prevented from testing the remaining instances of OMEGA LINER, then Buergofol contends that 4/11ths of all OMEGA LINERs made after June 19, 2023 have a coating or covering of a migrating compound and therefore infringe claims 1, 3-5, 7 and 10-11 of the '882 Patent.

There are multiple types of evidence that can point to the presence of a coating or covering of a migrating compound over the outer facing external side of the inner tubular film. Some of the multiple types of evidence that can point to the presence of the recited coating or covering with a migrating compound include testing with x-ray photoelectron spectroscopy (XPS), testing with atomic force microscopy (AFM), testing the release force required to remove a test adhesive tape (as described in the '882 Patent), and testing the elasticity until film break (as described in the '882 Patent). However, Buergofol as the patentee is not required to disclose evidence of infringement in these infringement contentions. *See, e.g., Finjan, Inc. v. Proofpoint, Inc.*, 13-cv-05808, 2015 BL 1932 (N.D. Cal. Jan. 05, 2015) (Patent L.R. Rule 3-1 does not require the patentee to disclose specific evidence or to prove its infringement case.); *AntiCancer, Inc. v. Pfizer, Inc.*, 769 F.3d 1323, 1338 (Fed. Cir. 2014) (a patentee's infringement contentions "do not need to include proof or direct evidence of infringement"); *DCG Sys. v. Checkpoint Techs., LLC*, 11-cv-03792, 2012 WL 1309161, 2012 BL 420630, at *2 (N.D. Cal. Apr. 16, 2012) ("These rules [Patent Local Rule 3-1] do not, as is sometimes misunderstood, require the disclosure of specific evidence nor do they require a plaintiff to prove its infringement case."); *EON Corp. IP Holdings, LLC v. Sensus USA Inc.*, 6:09-cv-116, 2010 WL 346218, 2010 BL 13650, at *2,4 (E.D. Tex. 2010) ("The Rules do not require the disclosure of

specific evidence nor do they require a plaintiff to prove its infringement case. . . . Patent Rule 3-1 does not require EON to marshal evidence or otherwise prove its infringement case.”); *Realtime Data, LLC v. Packeteer, Inc.*, 6:08-cv-144, 2009 WL 2590101, at *5, 2009 BL 175309 (E.D. Tex. Aug. 18, 2009) (“Infringement contentions are not intended to require a party to set forth a *prima facie* case of infringement and evidence in support thereof”); *Balsam Coffee Solutions Inc. v. Folgers Coffee Co.*, 6:09-cv-089, 2009 WL 4906860, at *3 n. 2 (E.D. Tex. Dec. 9, 2009) (“P.R. 3-1 does not require the disclosure of evidence and documents supporting infringement contentions”); *Samsung SDI Co. v. Matsushita Elec. Indus. Co.*, No. 05-cv-8493, 2006 WL 5097360, at *1 (C.D. Cal. June 5, 2006) (“The plaintiff is not . . . required to produce evidence of infringement . . . or to provide evidentiary support for its contentions”).

In the infringement contentions, a patentee need only disclose what in each Accused Product the patentee contends practices or embodies each limitation of each asserted claim. Buergofol contends that the outer facing external side of the inner tubular film of each instance of OMEGA LINER has a coating or covering of a migrating compound until it is shown that the recited coating or covering is not present.

Claim of ‘882 Patent	Where The Element Is Found
1. An insertion tube for use in trenchless sewage pipe renovation, comprising:	The exemplary instance WO-2023-010-1783 of OMEGA LINER and each other instance with a coating or covering of a migrating compound (each an Accused Product) is an insertion tube suitable for use in trenchless sewage pipe renovation.

an opaque external tubular film that is impermeable to liquids and at least partially reflects or absorbs UV radiation or visible light of short wavelengths;	Each Accused Product has an external film (outer film) that is impermeable to liquids and at least partially blocks UV radiation or visible light of short wavelengths. The outer film is made by either Buergofol or Viaflex, but in all cases the outer film is impermeable to liquids and at least partially reflects or absorbs UV radiation or visible light of short wavelengths. Omega has stated, “Omega has . . . only one supplier of outer film other than Buergofol, i.e., Viaflex.” (Dkt. 377, 3:23-4:2) The structure of all outer film supplied by Buergofol to Omega was of the structure PE/AP/PA/AP/PE, where the outer film included zinc oxide that reflected and/or absorbed UV radiation or visible light of short wavelengths. (Decl. Boutrid, ¶¶4,10, BF13989-13991). All outer film made by Viaflex has the structure PE/AP/PA/AP/PE and reflects or absorbs UV radiation or visible light of short wavelengths.
an inner tubular film;	Each Accused Product has an inner tubular film. Although the inner tubular film can have one or multiple layers, the exemplary instance WO-2023-010-1783 has an inner tubular film with at least the three layers PE/AP/PA (where PE denotes polyethylene, AP denotes adhesion promoter, and PA denotes polyamide).
a carrier material impregnated with a reactive plastic resin arranged between the external tubular film and the inner tubular film; and	Each Accused Product has a layer of carrier material disposed between the external tubular film and the inner tubular film, and this carrier material is impregnated with an amount of reactive plastic resin. The exemplary instance WO-2023-010-1783 has a “wet out” liner serial number indicating that it has a wet UV curable resin; the resin was added to the dry liner DL-2022-05-1031 to make the wet liner WO-2023-010-1783. Each and every liner made by Omega that has a “wet out” liner serial number assigned to it by Omega (such WO-2023-010-1783) was made to include an amount of reactive plastic resin arranged between the external tubular film and the inner tubular film. Buergofol contends that each Accused Product with a wet out liner serial number includes the recited reactive plastic resin because without resin the product would not be usable, and because the wet out liner serial number indicates that the product includes resin.

wherein the inner tubular film comprises: one or multiple layers an inner facing external side and an outer facing external side facing the carrier material; a coating of at least one of (1) a coating with a polysiloxane; or (2) a coating or covering with at least one migrating compound; and wherein the coating is applied over a section of or an entire circumferential area of the outer facing external side facing the carrier material.	The inner tubular film of each Accused Product has an external side that faces the carrier material and resin, and an external layer of the inner film includes a migrating compound that migrates to the external side forming a coating or covering over the external side facing the carrier material. The exemplary instance WO-2023-010-1783 has a migrating compound, specifically EBS wax, contained in an external PA layer of the inner film, and the migrating compound migrated to the external side of the PA layer forming a coating or covering over the entire circumferential area of the outer facing external side facing the carrier material. The following instances of Accused Products also have a coating or covering over the entire circumferential area of the outer facing external side facing the carrier material: WO-2022-010-1370, WO-2022-010-1410, WO-2022-010-1502, WO-2023-010-1827, WO-2023-010-1879. If Omega continues to obstruct discovery by refusing to retain and produce a sample of every liner made by Omega, and Buergofol is thereby prevented from testing every liner made by Omega, then Buergofol contends that 4/11ths of all liners made by Omega have a coating or covering with a migrating compound over the outer facing external side facing the carrier material.
3. The insertion tube according to claim 1, the inner tubular film further comprising a layer that contains a thermoplastic elastomer (TPE) within a range of more than 20% by weight up to 100% by weight.	Each Accused Product has an inner tubular film with multiple layers, one of the layers containing more than 20% by weight of a thermoplastic elastomer (TPE). The exemplary instance WO-2023-010-1783 has an inner tubular film with at least the three layers PE/AP/PA (where PE denotes polyethylene, AP denotes adhesion promoter, and PA denotes polyamide). The adhesion promoter is polyethylene based and is an olefin-based thermoplastic elastomer. The adhesion promoter layer contains 100% by weight the olefin-based thermoplastic elastomer.

4. The insertion tube according to claim 1, wherein the inner tubular film has a total thickness of between 10µm and 5000µm.	Each Accused Product has an inner tubular film having a total thickness of between 10µm and 5000µm. The exemplary instance WO-2023-010-1783 has an inner tubular film with a thickness of approximately 150µm, which is between 10µm and 5000µm. There is no evidence that any OMEGA LINER ever had an inner film with a thickness outside to the claimed range.
5. The insertion tube according to claim 1, the inner tubular film further comprising at least one internal layer in the form of an adhesion promoter layer, wherein at least one of the external layers comprising the coating, and wherein: one of the external layers has at least one homo- and/or copolyamide and the other external layer has at least one thermoplastic olefin homo- or copolymer with a proportion by weight expressed in percent of more than 25% by weight, or both external layers contain at least one thermoplastic olefin homo- or copolymer, and there is one internal layer containing a homo and/or copolyamide with a proportion by weight expressed in percent of more than 25% by weight.	Each Accused Product has an inner tubular film with multiple layers, one of the layers being an external layer of a homo- and/or copolyimide, another of the layers being an internal adhesion promoter layer, and another of the layers being an external layer of a thermoplastic olefin homo- or copolymer having a proportion by weight expressed in percent of more than 25% by weight. The exemplary instance WO-2023-010-1783 has an inner tubular film with at least the three layers PE/AP/PA (where PE denotes polyethylene, AP denotes adhesion promoter, and PA denotes polyamide). The PE layer is an external layer of a thermoplastic olefin homo- or copolymer having a proportion by weight expressed in percent of 100%. The AP layer is an internal layer. The PA layer is an external layer of a homo- and/or copolyamide and comprises the coating or covering of the migrating compound.
7. The insertion tube tubular film according to claim 5, wherein the coating has a thickness no more than 15µm.	The inner tubular film of each Accused Product has an external side that faces the carrier material and resin, and an external layer of the inner film includes a migrating compound that migrates to the external side forming a coating or covering over the external side facing the carrier material. In each instance of Accused Product, the coating has a thickness no more than 15µm. The exemplary instance WO-2023-010-1783 has a migrating compound that migrated to the external side of the PA layer forming a coating or covering over the outer facing external side, wherein the coating is no more than 15µm thick. The following instances of Accused Products also have a coating or covering over the outer facing external side, wherein the coating is no more than 15µm thick: WO-2022-010- 1370, WO-2022-010-1410, WO-2022-010-1502, WO-2023-010-1827, WO-2023-010-1879.

10. The insertion tube according to claim 1, wherein the coating is a coating or covering with at least one migrating compound, and the migrating compound is one of: (1) a lipophilic compound from the group of a wax, paraffin, fatty acid, or a fat, or (2) a hydrophilic compound from the group of a polyether, polyester, an alcohol with at least one hydroxyl group, ethylene glycol, polyethylene glycol, polypropylene glycol, propanediol, butanediol, pentanediol, hexanediol or glycerine.	The inner tubular film of each Accused Product has an external side that faces the carrier material and resin, and an external layer of the inner film includes a migrating compound that migrates to the external side forming a coating or covering over the external side facing the carrier material. In each instance of Accused Product, the coating is a coating or covering with a migrating compound that is a lipophilic compound, namely EBS wax. The exemplary instance WO-2023-010-1783 has a migrating compound that migrated to the external side of the PA layer forming a coating or covering over the outer facing external side, wherein the migrating compound is a lipophilic compound, namely EBS wax. The following instances of Accused Products also have a coating or covering that is a lipophilic compound, namely EBS wax: WO-2022-010-1370, WO-2022-010-1410, WO-2022-010-1502, WO-2023-010-1827, WO-2023-010-1879.
11. The insertion tube according to claim 10, wherein the migrating lipophilic or hydrophilic compound is added to an external side containing a thermoplastic olefin homo- or copolymer or a homo- or copolyamide.	Each Accused Product has an inner tubular film with at least the three layers PE/AP/PA (where PE denotes polyethylene, AP denotes adhesion promoter, and PA denotes polyamide). The inner film includes a migrating lipophilic compound that migrates to the external side of the inner film that faces the carrier material. The migrating compound is added to the external side containing the homo- or copolyimide. The exemplary instance WO-2023-010-1783 has an inner tubular film with at least the three layers PE/AP/PA. The inner film includes a migrating lipophilic compound that migrates to the external side of the inner film that faces the carrier material. The migrating compound is added to the external side containing the homo- or copolyimide. The following instances of Accused Products also have a migrating compound that is added to the external side containing the homo- or copolyimide: WO-2022-010-1370, WO-2022-010-1410, WO-2022-010-1502, WO-2023-010-1827, WO-2023-010-1879.

Additional instances of Accused Products will be added to these preliminary Infringement Contentions after Omega has been compelled fully to comply with Buergofol's discovery requests. An incomplete list of instances of OMEGA LINER that could be Accused Products if they are tested to have a coating or covering of a migrating compound on the outer facing external side of the inner tubular film is provided below. The list is incomplete for at least two reasons. First, infringement is ongoing and infringing liners are currently being made. So the list cannot include wet out liner serial numbers of OMEGA LINERS that have not yet been made. Second, the list is also incomplete because many wet out serial numbers for liners made in the past are missing due to Omega's failure to admit that the liners with the missing wet out serial numbers were ever made. Additional instances of Accused Products will be added to these preliminary Infringement Contentions after Omega has been compelled to comply fully with Buergofol's discovery requests. There appears to have been spoliation of a sample of each OMEGA LINER made after the date of the complaint. Thus, there appears to have been spoliation of evidence that could show the presence of the recited coating or covering in the instances of OMEGA LINER that Buergofol contends in these infringement contentions infringe claims of the '882 Patent. Buergofol will have good cause at a future date to amend and substantiate its infringement contentions. The incomplete list of instances of OMEGA LINER that could be Accused Products is provided below. In the absence of samples that can be tested, Buergofol contends that 4/11ths of the listed instances of OMEGA LINER infringe claims 1, 3-5, 7 and 10-11 of the '882 Patent.

WO-2017-010-0001, WO-2017-010-0002, WO-2017-010-0003, WO-2017-010-0004, WO-2017-010-0005, WO-2017-010-0006, WO-2017-010-0007, WO-2017-010-0008, WO-2017-010-0009, WO-2018-010-0012, WO-2018-010-0013, WO-2018-010-0014, WO-2018-010-0016, WO-2018-010-0017, WO-2018-010-0018,

WO-2018-010-0019, WO-2018-010-0020, WO-2018-010-0021, WO-2018-010-0022, WO-2018-010-0024,
WO-2018-010-0025, WO-2018-010-0026, WO-2018-010-0029, WO-2018-010-0032, WO-2018-010-0033,
WO-2018-010-0034, WO-2018-010-0035, WO-2018-010-0036, WO-2018-010-0038, WO-2018-010-0042,
WO-2018-010-0044, WO-2018-010-0045, WO-2018-010-0046, WO-2018-010-0047, WO-2018-010-0048,
WO-2018-010-0051, WO-2018-010-0055, WO-2018-010-0056, WO-2018-010-0057, WO-2018-010-0058,
WO-2018-010-0059, WO-2018-010-0062, WO-2018-010-0067, WO-2018-010-0068, WO-2018-010-0069,
WO-2018-010-0070, WO-2018-010-0071, WO-2018-010-0074, WO-2018-010-0075, WO-2018-010-0076,
WO-2018-010-0077, WO-2018-010-0079, WO-2018-010-0081, WO-2018-010-0083, WO-2018-010-0084,
WO-2018-010-0085, WO-2018-010-0086, WO-2018-010-0088, WO-2018-010-0089, WO-2018-010-0090,
WO-2018-010-0091, WO-2018-010-0092, WO-2018-010-0093, WO-2018-010-0095, WO-2018-010-0096,
WO-2018-010-0097, WO-2018-010-0098, WO-2018-010-0099, WO-2018-010-0100, WO-2018-010-0101,
WO-2018-010-0102, WO-2018-010-0103, WO-2018-010-0104, WO-2018-010-0105, WO-2018-010-0110,
WO-2018-010-0111, WO-2018-010-0112, WO-2018-010-0113, WO-2018-010-0114, WO-2018-010-0115,
WO-2018-010-0116, WO-2018-010-0117, WO-2018-010-0118, WO-2018-010-0119, WO-2018-010-0120,
WO-2018-010-0121, WO-2018-010-0123, WO-2018-010-0124, WO-2018-010-0126, WO-2018-010-0126,
WO-2018-010-0127, WO-2018-010-0128, WO-2018-010-0129, WO-2018-010-0130, WO-2018-010-0131,
WO-2018-010-0132, WO-2018-010-0133, WO-2018-010-0134, WO-2018-010-0135, WO-2018-010-0136,
WO-2018-010-0137, WO-2018-010-0138, WO-2018-010-0139, WO-2018-010-0140, WO-2018-010-0141,
WO-2018-010-0143, WO-2018-010-0144, WO-2018-010-0145, WO-2018-010-0146, WO-2018-010-0148,
WO-2018-010-0149, WO-2018-010-0150, WO-2018-010-0151, WO-2018-010-0152, WO-2018-010-0153,
WO-2018-010-0154, WO-2018-010-0155, WO-2018-010-0156, WO-2018-010-0157, WO-2018-010-0158,
WO-2018-010-0158-2, WO-2018-010-0159, WO-2018-010-0160, WO-2018-010-0161, WO-2018-010-0162,
WO-2018-010-0163, WO-2018-010-0164, WO-2018-010-0165, WO-2018-010-0166, WO-2018-010-0167,
WO-2018-010-0168, WO-2018-010-0168.1, WO-2018-010-0169, WO-2018-010-0171, WO-2018-010-0172,
WO-2018-010-0173, WO-2018-010-0174, WO-2018-010-0175, WO-2018-010-0176, WO-2018-010-0177,
WO-2018-010-0178, WO-2018-010-0179, WO-2018-010-0180, WO-2018-010-0181, WO-2018-010-0182,
WO-2018-010-0183, WO-2018-010-0184, WO-2018-010-0185, WO-2018-010-0186, WO-2018-010-0187,
WO-2018-010-0188, WO-2018-010-0188, WO-2018-010-0189, WO-2018-010-0191, WO-2018-010-0192,
WO-2018-010-0193, WO-2018-010-0194, WO-2018-010-0195, WO-2018-010-0196, WO-2018-010-0197,

WO-2018-010-0198, WO-2018-010-0199, WO-2018-010-0200, WO-2018-010-0201, WO-2018-010-0202, WO-2018-010-0203, WO-2018-010-0204, WO-2018-010-0205, WO-2018-010-0206, WO-2018-010-0207, WO-2018-010-0208, WO-2018-010-0209, WO-2018-010-0210, WO-2018-010-0211, WO-2018-010-0212, WO-2018-010-0213, WO-2018-010-0214, WO-2018-010-0215, WO-2018-010-0216, WO-2018-010-0217, WO-2018-010-0218, WO-2018-010-0219, WO-2018-010-0220, WO-2018-010-0221, WO-2018-010-0222, WO-2018-010-0223, WO-2018-010-0224, WO-2018-010-0225, WO-2018-010-0226, WO-2019-010-0227, WO-2019-010-0228, WO-2019-010-0229, WO-2019-010-0230, WO-2019-010-0231, WO-2019-010-0232, WO-2019-010-0233, WO-2019-010-0234, WO-2019-010-0235, WO-2019-010-0236, WO-2019-010-0237, WO-2019-010-0238, WO-2019-010-0239, WO-2019-010-0240, WO-2019-010-0241, WO-2019-010-0242, WO-2019-010-0243, WO-2019-010-0244, WO-2019-010-0245, WO-2019-010-0246, WO-2019-010-0247, WO-2019-010-0248, WO-2019-010-0249, WO-2019-010-0250, WO-2019-010-0251, WO-2019-010-0252, WO-2019-010-0253, WO-2019-010-0254, WO-2019-010-0255, WO-2019-010-0256, WO-2019-010-0257, WO-2019-010-0258, WO-2019-010-0259, WO-2019-010-0260, WO-2019-010-0261, WO-2019-010-0262, WO-2019-010-0263, WO-2019-010-0264, WO-2019-010-0265, WO-2019-010-0266, WO-2019-010-0267, WO-2019-010-0268, WO-2019-010-0269, WO-2019-010-0270, WO-2019-010-0271, WO-2019-010-0272, WO-2019-010-0273, WO-2019-010-0274, WO-2019-010-0275, WO-2019-010-0277, WO-2019-010-0278, WO-2019-010-0279, WO-2019-010-0280, WO-2019-010-0281, WO-2019-010-0282, WO-2019-010-0283, WO-2019-010-0284, WO-2019-010-0285, WO-2019-010-0286, WO-2019-010-0287, WO-2019-010-0288, WO-2019-010-0289, WO-2019-010-0290, WO-2019-010-0291, WO-2019-010-0292, WO-2019-010-0293, WO-2019-010-0294, WO-2019-010-0295, WO-2019-010-0296, WO-2019-010-0297, WO-2019-010-0298, WO-2019-010-0299, WO-2019-010-0300, WO-2019-010-0301, WO-2019-010-0302, WO-2019-010-0303, WO-2019-010-0304, WO-2019-010-0305, WO-2019-010-0306, WO-2019-010-0307, WO-2019-010-0308, WO-2019-010-0309, WO-2019-010-0310, WO-2019-010-0311, WO-2019-010-0312, WO-2019-010-0313, WO-2019-010-0314, WO-2019-010-0315, WO-2019-010-0316, WO-2019-010-0317, WO-2019-010-0318, WO-2019-010-0319, WO-2019-010-0320, WO-2019-010-0321, WO-2019-010-0322, WO-2019-010-0323, WO-2019-010-0324, WO-2019-010-0325, WO-2019-010-0326, WO-2019-010-0327, WO-2019-010-0328, WO-2019-010-0329, WO-2019-010-0330, WO-2019-010-0331, WO-2019-010-0332, WO-2019-010-0333, WO-2019-010-0334, WO-2019-010-0335, WO-2019-010-0337, WO-2019-010-0338, WO-2019-010-0339, WO-2019-010-0340, WO-2019-010-0341, WO-2019-010-0342, WO-2019-010-0343, WO-2019-010-0344, WO-2019-010-0345, WO-2019-010-0346, WO-2019-010-0347, WO-2019-010-0348, WO-2019-010-0349,

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WO-2019-010-0371, WO-2019-010-0372, WO-2019-010-0373, WO-2019-010-0374, WO-2019-010-0375,
WO-2019-010-0376, WO-2019-010-0377, WO-2019-010-0378, WO-2019-010-0379, WO-2019-010-0380,
WO-2019-010-0381, WO-2019-010-0382, WO-2019-010-0383, WO-2019-010-0384, WO-2019-010-0385,
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WO-2019-010-0396, WO-2019-010-0397, WO-2019-010-0398, WO-2019-010-0399, WO-2019-010-0400,
WO-2019-010-0401, WO-2019-010-0402, WO-2019-010-0403, WO-2019-010-0404, WO-2019-010-0405,
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WO-2019-010-0416, WO-2019-010-0417, WO-2019-010-0418, WO-2019-010-0419, WO-2019-010-0420,
WO-2019-010-0421, WO-2019-010-0422, WO-2019-010-0423, WO-2019-010-0424, WO-2019-010-0425,
WO-2019-010-0426, WO-2019-010-0427, WO-2019-010-0428, WO-2019-010-0429, WO-2019-010-0430,
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WO-2020-010-0474, WO-2020-010-0475, WO-2020-010-0476, WO-2020-010-0477, WO-2020-010-0478,
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