IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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THE FIRST YEARS, INC. and
LEARNING CURVE BRANDS, INC.,

Plaintiffs,

v.

MUNCHKIN, INC.,

Defendant.

OPINION and ORDER

07-cv-558-bbc

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In this civil case for patent infringement, plaintiffs The First Years, Inc. and Learning Curve Brands, Inc. allege that defendant Munchkin, Inc. is infringing two of plaintiffs' "sippy cup" patents, U.S. Patents Nos. 6,976,604 (the '604 patent) and 7,185,784 (the '784 patent). In an order dated April 15, 2008, I determined that the term "fresh water" in claims 1, 33 and 58 of the '604 patent is too indefinite to be construed. Order, dkt. #37. I concluded that the amount of solid content in "fresh water" would affect the tests described in claims 1, 33 and 58, but that the patent provided insufficient guidance regarding the allowable range of solid content in "fresh water" and therefore the term was indefinite.

Plaintiffs have filed a motion for reconsideration of the determination that the term

"fresh water" is indefinite, contending that the evidence did not support a conclusion that the amount of solid content in water has an effect on the tests described in the claims and urging the court to adopt their proposed construction. Although I remain convinced that plaintiffs' proposed construction is inadequate and that a proper definition of "fresh water" requires an allowable range of solid content, I am persuaded that it was error to conclude that "fresh water" is too indefinite because plaintiffs' dictionary definitions demonstrate that the term "fresh water" as used in the '604 patent, means "water containing no more than 500 milligrams per liter of dissolved solids." Therefore, I will grant plaintiffs' motion for reconsideration in part and amend the claim construction order in accordance with this opinion.

OPINION

Plaintiffs contend that it was error to conclude that the term "fresh water" required a set range of solid content because the supporting evidence was "speculative and inconsistent" and because plaintiffs did not have a full opportunity to respond to defendant's expert's position. Plaintiffs contend that I should have discredited defendant's expert's testimony regarding the importance of surface tension to the "three-drop" rule because he later asserted that surface tension plays an extremely small part in the three-drop test. However, the importance of surface tension to the three-drop rule is asserted in the

specification, which touts surface tension as key to the invention's use of small holes alone to resist sippy cup leakage. '604 pat., col. 5, lns. 16-18. Moreover, even now plaintiffs do not dispute defendant's expert's *general* explanation of how solid content affects surface tension:

> Briefly, it's important to understand that surface tension results from an imbalance in the attraction of the molecules within the liquid surrounded by other water molecules versus those along the boundary in which one side is contacting the water and one side is contacting the air. So if I have a boundary that's just 100% pure water, I get an attraction to each other that is one volume, nominally about 72 millimeters per meter. If then I add salt or calcium deposits or other residues that we typically have here in Madison, for instance, those molecules tend to congregate near the surface and may disrupt those bonds, and the attraction between those molecules changing the surface tension and the concentration, the types of molecules, whether they are polar or not, affect the surface tension. So the content of the water itself is important in knowing what the surface tension is, and as taught in these patents, the surface tension is very important to meeting the three-drop rule.

Tr., dkt. #36, at 101, ln. 9-102, ln. 2. Because solid content has an effect on surface tension and surface tension is supposed to be crucial to the tests described in the claims, the definition of "fresh water" should set an allowable range of solid content. This conclusion is supported by the language in the claims, which requires the tests to be performed using "fresh water," not "water." As plaintiffs concede, the term "fresh water" is commonly defined as water containing a limited range of solid content. Nothing in plaintiffs' arguments convinces me that it was error to conclude that the fresh water tests performed in the '604 patent require fresh water to be defined in terms of an allowable range of solid content. Moreover, plaintiffs' contention that it did not have a full opportunity to contest

this issue is unpersuasive, in light of their chance to address defendant's position in their briefs, at the claim construction hearing and during cross-examination of defendant's expert. Even now, plaintiffs have not attempted to supplement their motion for reconsideration with any evidence opposing defendant's expert's position.

In light of this conclusion, it is easy to see the defects in plaintiffs' proposed construction: "water suitable for drinking [that] does not contain appreciable levels of salts or dissolved solids." Plaintiffs' definition simply restates the requirement that "fresh water" requires an allowable range of solid content by noting that it must not "contain appreciable levels" of salts or solids. Such a definition is too vague to be helpful.

Next, plaintiffs contend that it was error to reject their cited dictionary definitions as a proper source to determine the range of solid content allowable in "fresh water." I rejected the definitions because they appeared inconsistent and it was not clear why the definitions would apply in the context of the '604 patent. In their motion for reconsideration, plaintiffs have reconciled their definitions, explaining that most definitions simply use different language to set an upper limit of 1,000 milligrams per liter of dissolved solids for "fresh water" and 500 milligrams per liter of dissolved solids for "fresh water" suitable for drinking. In addition, plaintiffs have explained that the dictionary definitions defined in terms of water "suitable for drinking" are appropriate in the context of the '604 patent because the patent has as its subject matter drinking cups for children. Although I

am not so sure that any of the dictionary definitions are directed at "drinking cups for children," several definitions, ranging in discipline from hydrology to geological surveys to lake water management, define *drinkable* fresh water as water having no more than 500 milligrams per liter of dissolved solids. I find this sufficient evidence that a person of ordinary skill in the art would understand "fresh water" in the context of the '604 patent as water having no more than 500 milligrams per liter of dissolved solids.

In light of the clear upper limit of "drinkable fresh water" suggested in plaintiffs' dictionary definitions and the need to restrict the term "fresh water" to define the testing required in the claims, it is not clear why plaintiffs stick to their vague proposed construction. Indeed, defendant's chief criticism of plaintiffs' dictionary definitions is that "[p]laintiffs did not propose" a fixed number based on their definitions but instead sought a vague construction. No matter; it is the court's duty to construe the meaning of disputed claim terms, "even though the task may be formidable and the conclusion may be one over which reasonable persons will disagree." Halliburton Energy Services, Inc. v. M-I LLC, 514 F.3d 1244, 1249 (Fed. Cir. 2008) (quoting Exxon Research & Engineering Co. v. United States, 265 F.3d 1371, 1375 (Fed. Cir. 2001)). Accordingly, I conclude that the term "fresh water" is not too indefinite to be construed because acceptable dictionary definitions of "fresh water" suggest an upper limit to solid content proper in the context of the '604 patent. I construe the term "fresh water" to mean "water containing no more than 500 milligrams

per liter of dissolved solids." I will grant plaintiffs' motion for reconsideration and amend the claim construction opinion accordingly.

ORDER

IT IS ORDERED that plaintiffs The First Years, Inc.'s and Learning Curve Brands, Inc.'s motion for reconsideration is GRANTED and the opinion and order dated April. 15, 2008 (dkt. #37) is AMENDED as follows:

1. In the order section, the bullet point stating "fresh water" is DELETED.

2. In the order section, following the bullet point stating "quasi-static conditions," the following phrase is ADDED in a separate bullet point: "the term 'fresh water' means 'water containing no more than 500 milligrams per liter of dissolved solids.'"

Entered this 13th day of May, 2008.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge