IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CHEESE SYSTEMS, INC.,

Plaintiff,

v.

TETRA PAK CHEESE AND POWDER SYSTEMS, INC. and TETRA LAVAL HOLDINGS & FINANCE S.A.,

Defendants,

v.

CUSTOM FABRICATING & REPAIR, INC.

Third Party Defendant.

ORDER

11-cv-21-bbc

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This declaratory action brought under the Patent Act is scheduled for a damages trial on March 17, 2014, after the Court of Appeals for the Federal Circuit affirmed this court's judgment finding that plaintiff Cheese Systems, Inc.'s "high solids cheese vat" infringes claims 1 and 10 of United States Patent No. 5,985,347 (the '347 patent), which is owned by defendant Tetra Pak Cheese and Powder Systems, Inc. and licensed exclusively by defendant Tetra Laval Holdings and Finances, S.A. Now before the court is plaintiff's motion under Fed. R. Civ. P. 60 to vacate the judgment to find that the '347 patent is invalid for indefiniteness. Dkt. #121. In addition, plaintiff filed a motion for leave to file its Rule 60 motion one day after the deadline imposed by the court and defendants later

filed a motion for leave to file a surreply brief. Dkt. ##120 and 126. Because defendants do not oppose the motion for a one-day extension, I will grant it. I am denying the motion for leave to file a surreply brief because it makes no difference to the outcome of the Rule 60 motion.

With respect to the Rule 60 motion, plaintiff is seeking relief from the judgment because this court already determined before the appeal that the '347 is not indefinite. Dkt. #93 at 39. However, plaintiff did not appeal that aspect of the summary judgment opinion. As defendants point out, "[u]nder the doctrine of the law of the case, a ruling by the trial court, in an earlier stage of the case, that could have been but was not challenged on appeal is binding in subsequent stages of the case." Schering Corp. v. Illinois Antibiotics Co., 89 F.3d 357, 358 (7th Cir. 1996).

Plaintiff attempts to circumvent this well-established rule by arguing that the Court of the Appeals for the Federal Circuit created a new issue of indefiniteness when it altered this court's construction of the terms "a plurality of sharp cutting edges disposed in a generally common first plane" and "a plurality of blunt stirring edges disposed in a generally common second plane." In particular, the court of appeals rejected this court's construction of "generally common plane" to mean "on the whole flat":

> a requirement that the entire panel be "on the whole flat" is too restrictive because it requires far more than a plurality of edges in the same general plane. This court instead concludes that the claim language does not require the panel to have any particular shape beyond the requirement that more than two cutting and stirring edges lie in respective generally common planes.

Cheese Systems, Inc. v. Tetra Pak Cheese & Powder Systems, Inc., 725 F.3d 1341, 1348

(Fed. Cir. 2013). (The only practical result of the new construction is that the court of appeals concluded that plaintiff's vat infringes the '347 patent as a matter of literal infringement rather than under the doctrine of equivalents as I concluded.) In its motion, plaintiff argues that "the claims as construed by the Federal Circuit only require that a plurality of cutting or stirring edges intersect a generally common plane. Merely requiring that edges intersect a common plane places no meaningful restriction on the arrangement of the cutting or stirring edges, resulting in claims that are indefinite and invalid." Plt.'s Br., dkt. #122, at 6.

I am denying plaintiff's motion. To begin with, the fact that the court of appeals construed the claim terms suggests that it implicitly rejected an argument of indefiniteness. After all, "[o]nly claims 'not amenable to construction' or 'insolubly ambiguous' are indefinite." Source Search Technologies, LLC v. LendingTree, LLC, 588 F.3d 1063, 1076 (Fed. Cir. 2009).

In any event, I agree with defendants that plaintiff waived this issue by failing to raise it on appeal. Plaintiff argues that it did not appeal because it was willing to accept this court's construction of the terms and that it could not have predicted the court of appeals' new construction, but that argument is not persuasive. The test for indefiniteness is whether the *claim* is amenable to construction; it does not test the adequacy of a particular court's interpretation of the claim. In other words, a claim is either indefinite or it isn't. A court may not "save" an indefinite claim by giving it an arbitrary construction that makes it more precise. Id. at 1076-77 ("[T]his court measures indefiniteness according to an *objective*

measure.") (emphasis added). Thus, if plaintiff believed that the claims in the '347 patent were not amenable to construction, it should have raised that issue with the court of appeals, regardless of any ruling to the contrary by this court. To the extent that plaintiff's position is that it did not appeal because it was persuaded by this court's construction of the term, that is simply a concession that it disagrees with the construction of the court of appeals. Because I have no authority to question that construction, I cannot give plaintiff the relief it seeks.

ORDER

IT IS ORDERED that

1. Plaintiff Cheese Systems, Inc.'s motion for an extension of time, dkt. #120, is GRANTED.

2. The motion for leave to file a surreply brief filed by defendants Tetra Pak Cheese and Powder Systems, Inc. and Tetra Laval Holdings and Finances, S.A., dkt. #126, is DENIED as unnecessary.

3. Plaintiff's motion for relief from the judgment under Fed. R. Civ. P. 60, dkt. #121, is DENIED.

Entered this 10th day of January, 2014.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge