

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 13-60136-CIV-MIDDLEBROOKS/BRANNON

ODORSTAR TECHNOLOGY, LLC and
KINPAK, INC.,

Plaintiffs,

vs.

SMM DISTRIBUTORS, LLC d/b/a
BIOCIDE SYSTEMS and SMM
MANUFACTURING, INC.,

Defendants.

ORDER

THIS CAUSE comes before the Court upon the Parties' cross Motions for Summary Judgment (DEs 55, 60) and claim construction briefs (DEs 51, 62). The Court held oral arguments attended by both sides on January 24, 2014. I have reviewed the Motions, Responses, Replies, claim construction briefs, and record in this case, and, with the benefit of oral arguments, I am otherwise fully advised in the premises.

I. BACKGROUND

This patent case involves the alleged infringement of U.S. Patent No. 6,764,661 (the "'661 Patent") against Defendants SMM Distributors, LLC d/b/a Biocide Systems ("Biocide") and SMM Manufacturing, Inc.¹ In short, the '661 Patent claims a "device for producing an aqueous chlorine dioxide solution when placed in water." Plaintiff Odorstar Technology, LLC ("Plaintiff") is a Florida-based limited liability company engaged in the management and

¹ The action originally included claims against two individual defendants; however, the Court previously dismissed those defendants for lack of personal jurisdiction. (*See* DE 52).

treatment of odors and is the sole owner by assignment of the '661 Patent. Plaintiff Kinpak, Inc. ("Kinpak") is an Alabama corporation and the exclusive manufacturer for a line of deodorizing products sold under a license from the '661 Patent. One product Kinpak manufactures is a deodorizing product called "NOSGUARD," which deodorizes "by releasing a safe chlorine dioxide gas from a pouch containing dry material that releases gas when exposed to water." (DE 79 at 3-4).

The Complaint alleges that Biocide uses, sells, and offers to sell several odor-eliminating products called the "Room Shocker," "RV Shocker," "Marine Shocker," and "Auto Shocker" (collectively, the "Shocker Products"). Plaintiffs allege that Biocide has sold these products at least since January 2008, through the online marketplace, Amazon.com. It is these products that Plaintiffs allege infringe the '661 Patent. (*See* DE 79 at ¶ 28).

The Complaint² alleges that Biocide directly infringes one or more claims of the '661 Patent in violation of 35 U.S.C. § 271(a), with knowledge of the '661 Patent since at least as early as 2010. (DE 79 at ¶ 32). Specifically, Plaintiffs are asserting Claims 1, 3, and 8-12 of the '661 Patent.

Claim 1, the only independent claim, reads as follows:

1. A device for producing an aqueous chlorine dioxide solution when exposed to water comprising:

a membrane shell defining a compartment which includes one or more dry chemical components capable of producing chlorine dioxide gas when exposed to water; and

wick means connected to said membrane shell and extending into said compartment for absorbing water and transporting water into said compartment whereby when said device is exposed to water said wick means absorbs water and transports water into said compartment, said chemical component(s) dissolve in the water and produce

² The operative complaint is Plaintiffs' Second Amended Complaint (DE 79), filed on November 26, 2013.

chlorine dioxide gas in said compartment, and chlorine dioxide gas exits said compartment through said membrane shell.

(DE 60-1, col. 21, ll. 40-54).

Claim 3 reads: “The device of claim 1 wherein said membrane shell is substantially impervious to liquid and permeable to gas.” (*Id.*, col. 21, ll. 55-56).

Claim 8 reads: “The device of claim 1 wherein said compartment includes a metal chlorite component and an acid component whereby when water is transported into said compartment metal chlorite and acid in said compartment dissolve in the water and react to produce chlorine dioxide in said compartment.” (*Id.*, col. 22, ll. 3-8).

Claim 9 reads: “The device of claim 8 wherein said metal chlorite component comprises a metal chlorite selected from the group consisting of alkali metal chlorites and alkaline earth metal chlorites.” (*Id.*, col. 22, ll. 9-12).

Claim 10 reads: “The device of claim 9 wherein said metal chlorite component comprises a metal chlorite selected from a group consisting of sodium chlorite, potassium chlorite, barium chlorite, calcium chlorite and magnesium chlorite.” (*Id.*, col. 22, ll. 13-16).

Claim 11 reads: “The device of claim 10 wherein said metal chlorite component is sodium chlorite.” (*Id.*, col. 22, ll. 17-18).

Claim 12 reads: “The device of claim 8 wherein said acid component comprises an acid selected from the group consisting of citric acid, lactic acid, tartaric acid, maleic acid, malic acid, glutaric acid, adipic acid, acidic acid, sulfamic acid, formic acid, sulfuric acid, hydrochloric acid and phosphoric acid.” (*Id.*, col. 22, ll. 19-23).

There are six claim terms to be construed: (1) “membrane shell”; (2) “compartment”; (3) “wick means”; (4) “connected to”; (5) “extending into”; and (6) “transports.” Each of these disputed claim terms are found in Claim 1.

In their Motions, the Parties seek summary judgment on the issue of whether the accused products infringe the '661 Patent. The Parties agree that there are no genuine issues of material facts in this case, that this case necessarily turns on the Court's construction of the claim terms, and that this case is therefore best resolved by the Court. Thus, once the disputed claim terms are properly construed by the Court, without reference to the accused products, this case is ripe for adjudication on the Motions for Summary Judgment.

II. CLAIM CONSTRUCTION

A. Legal Standard

Claim construction is a question of law to be determined by the Court. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995) (en banc), *aff'd*, 517 U.S. 370 (1996). "It is well-settled that, in interpreting an asserted claim, the court should look first to the intrinsic evidence of record, i.e., the patent itself, including the claims, the specification and, if in evidence, the prosecution history." *Interactive Gift Express, Inc. v. Compuserve, Inc.*, 256 F.3d 1323, 1331 (Fed. Cir. 2001) (quoting *Vitronics Corp. v. Conceptoronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996)). "All intrinsic evidence is not equal however." *Id.*

Within the "intrinsic evidence," we first look to the words of the claims. *Teleflex, Inc. v. Ficosa N. Am. Corp.*, 299 F.3d 1313, 1324 (Fed. Cir. 2002); *Vitronics Corp.*, 90 F.3d at 1582. The words of the claims are "generally given their ordinary and customary meaning," which is "the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312-1313 (Fed. Cir. 2005) (en banc); *accord InterDigital Commc'ns, LLC v. Int'l Trade Comm'n*, 690 F.3d 1318, 1324 (Fed. Cir. 2012); *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1116 (Fed. Cir. 2004); *Vitronics*,

90 F.3d at 1582. The ordinary and customary meaning of a claim term may be determined solely by viewing the term within the context of the claim's overall language. *See Phillips*, 415 F.3d at 1314 (“[T]he use of a term within the claim provides a firm basis for construing the term.”). Moreover, the use of the term in other claims may provide guidance regarding its proper construction. *Id.* (“Other claims of the patent in question, both asserted and unasserted, can also be valuable sources of enlightenment as to the meaning of a claim term.”). Claims should be construed “without reference to the accused device [or product].” *SRI Int’l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1118 (Fed. Cir. 1985) (emphasis omitted).

A claim should also be construed in a manner that is consistent with the patent's specification. *See Markman*, 52 F.3d at 979 (“Claims must be read in view of the specification, of which they are a part.”). Typically, the specification is the best guide for construing the claims. *See Phillips*, 415 F.3d at 1315; *Vitronics*, 90 F.3d at 1582 (“[T]he specification is always highly relevant to the claim construction analysis. Usually, it is dispositive; it is the single best guide to the meaning of a disputed term.”). Precedent forbids, however, a construction of claim terms that imposes limitations not found in the claims or supported by an unambiguous restriction in the specification or prosecution history. *Laitram Corp. v. NEC Corp.*, 163 F.3d 1342, 1347 (Fed. Cir. 1998); *Comark Commc’ns, Inc. v. Harris Corp.*, 156 F.3d 1182, 1186 (Fed. Cir. 1998); *SRI Int’l*, 775 F.2d at 1121.

District courts may also consider “extrinsic evidence,” such as dictionaries or technical treatises, to help understand the underlying technology and the manner in which one skilled in the art might use claim terms. *Phillips*, 415 F.3d at 1318. Similarly, expert testimony may aid a court in understanding the underlying technology and determining the particular meaning of a term in the pertinent field, but an expert's conclusory, unsupported assertions as to a term's

definition is entirely unhelpful to a court. *Id.* Ultimately, however, “extrinsic evidence” is “less significant than the intrinsic record in determining the legally operative meaning of claim language,” *id.* at 1317 (quoting *C.R. Bard, Inc. v. U.S. Surgical Corp.*, 388 F.3d 858, 862 (Fed. Cir. 2004)) (internal quotations omitted), and a court should discount any extrinsic evidence “that is clearly at odds with the claim construction mandated by the claims themselves, the written description, and the prosecution history, in other words, with the written record of the patent.” *Id.* at 1318 (quoting *Key Pharm. v. Hercon Labs. Corp.*, 161 F.3d 709, 716 (Fed. Cir. 1998)) (internal quotations omitted).

Once the proper meaning of a term used in a claim has been determined, the term must have the same meaning for all claims in which it appears. *Id.* at 1314 (citations omitted); *Inverness Med. Switzerland GmbH v. Princeton Biomeditech Corp.*, 309 F.3d 1365, 1371 (Fed. Cir. 2002).

Keeping these legal standards in mind, the Court turns to the disputed claim terms.

B. “Membrane Shell”

The first term to be construed is “membrane shell,” which appears throughout the ’661 Patent’s claims and specification. Plaintiffs’ proposed construction is “a thin sheet of enveloping material.” Biocide’s position is that the term does not require construction beyond its plain and ordinary meaning.

In support of Plaintiffs’ proposed construction, Plaintiffs cite to the specification, the dictionary,³ and their expert, Dr. DeFilippi.⁴

³ In defining “membrane,” Plaintiffs cite to the “British & World English” version of the Oxford Dictionary. (See DE 51-1 at 10 & n.2). Plaintiffs’ cited definition for membrane (“a thin pliable sheet of material forming a barrier or lining”) was not included in the “US English” version of the Oxford Dictionary, which was cited for all other definitions in Plaintiffs’ brief.

⁴ The Court notes that Plaintiffs misrepresent Dr. DeFilippi’s construction. Plaintiffs purport that

In Claim 1, the device is comprised of “a membrane shell defining a compartment which includes one or more dry chemical components” When read in context, “membrane shell” does not need to be construed, as the term is readily understood. Plaintiffs’ proposed construction additionally seeks to inject a limitation (“enveloping”) to the term, which would render “defining a compartment” superfluous.

C. “Compartment”

Next, Plaintiffs propose the Court construe “compartment” to mean “an area in which something can be considered in isolation from other things,” whereas Biocide does not believe that this term requires construction beyond its plain and ordinary meaning. In support of their position, Plaintiffs rely only on the dictionary.

The Court is not persuaded that this term requires any construction. Plaintiffs’ proposed definition is but one of three Oxford Dictionary definitions that might be applicable, and Plaintiff has provided no reason why its chosen definition is any better than the others. Moreover, Plaintiff has not made an adequate showing that imposing a dictionary definition would be helpful or necessary to understand the term.

Accordingly, the Court declines to construe “compartment” beyond its plain and ordinary meaning.

Dr. DeFillipi concludes that “membrane shell” should be construed as:

a sheet or layer that is constructed or oriented such that the membrane makes up the shell or wall(s) of a compartment or chamber, that is, thin sheets or layers that act or function as walls, formed in the shape of an envelope, to create an enclosed space, a compartment.

(DE 51-1 at 11). However, a close review of Dr. DeFillipi’s expert report demonstrates that Dr. DeFillipi was not proposing a construction for “membrane shell,” but rather for “a membrane shell defining a compartment.” (See DE 51-3 at ¶ 20). This distinction is important because Plaintiffs are asking the Court to construe “membrane shell” as a “thin sheet of *enveloping* material.” Additionally, Plaintiffs’ expert admits that “the ’661 Patent does not contravene” his proposed interpretation. (*Id.*).

D. “Wick Means”

The next term to be construed is “wick means.” The Parties agree that this term qualifies as a “means-plus-function,” which places it under the purview of 35 U.S.C. § 112, ¶ 6. Section 112, ¶ 6 provides that a patent applicant may express an element of a claim “as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.” *Id.* Thus, “[i]n exchange for the ability to use a generic means expression for a claim limitation, ‘the applicant must indicate in the specification what structure constitutes the means.’” *Ergo Licensing, LLC v. CareFusion 303, Inc.*, 673 F.3d 1361, 1363 (Fed. Cir. 2012) (quoting *Biomedino, LLC v. Waters Techs. Corp.*, 490 F.3d 946, 948 (Fed. Cir. 2007)).

Construing a means-plus-function limitation is a two-step process. First, the Court must identify the particular claimed function using traditional tools of claim construction. *Med. Instrumentation & Diagnostcs Corp. v. Elekta AB*, 344 F.3d 1205, 1210 (Fed. Cir. 2003) (citations omitted); *Omega Eng’g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1330 (Fed. Cir. 2003). Second, the Court must “look to the specification and identify the corresponding structure for that function.” *Elekta AB*, 344 F.3d at 1210 (citations omitted).

As to the first part of the analysis, Plaintiffs suggest that the function of “wick means” is wicking – *i.e.*, absorbing water. Biocide asserts that the function claimed is not merely wicking, but rather absorbing water from outside the device and transporting that water into the device’s compartment.

The Court finds that Biocide’s proposed function properly reflects that which is in the specification. The specification states multiple times that the wick’s function is not only to

absorb water, but also to transport the absorbed water into the compartment. *See, e.g.*, '661 Patent, col. 3, ll. 30-34 (“Wick means are connected to the membrane shell and extend into the compartment for absorbing water and transporting water into the compartment whereby when the device is exposed to water the wick member absorbs water and transports water into the compartment”); col. 3, ll. 43-44 (“In a preferred embodiment . . . [t]he wick means quickly absorbs water and transports the water into the compartment.”); col. 6, ll. 24-27 (“The wick member functions as a wick in that it rapidly absorbs water from *outside* the device and transports the absorbed water into the compartment.”) (emphasis added); col. 9, ll. 29-32 (“in the preferred embodiment, the wick member can be made of virtually any material capable of quickly absorbing water and transporting the absorbed water into the device”); col. 13, ll. 12-14 (“The use of two wick members [] increases the wicking ability of the device [] resulting in faster absorption and transport of water into the compartment [].”); col. 17, ll. 35-38 (“The wick member (or members) carries out many important functions. First, it absorbs water and transports the water into the compartment(s) in the device in a controlled manner.”). Perhaps the most instructive language, however, comes from Claim 1 itself, which provides: “wick means connected to said membrane shell and extending into said compartment for absorbing water and transporting water into said compartment.” Thus, the Court concludes that the function of the “wick means” is to absorb water from outside the device and transport that water into the interior of the compartment.

As to the corresponding structure for this function, “[u]nder § 112, ¶ 6, the question is not what structures a person of ordinary skill in the art would know are capable of performing a given function, but what structures are specifically disclosed and tied to that function in the specification.” *Saffran v. Johnson & Johnson*, 712 F.3d 549, 563 (Fed. Cir. 2013). The

structures that are provided and depicted in the specification all identify a wick member that extends beyond the outermost edge of the shell, or, at the very least, is flush with the membrane shell but is nevertheless directly exposed to water on the outside of the shell.

E. “Connected to”

Next is the term “connected to.” Plaintiffs propose “bring together or into contact so that a real or notional link is established; or merely inserted within.” Biocide proposes “united, joined, or linked.”

Plaintiffs cite to the dictionary definition of “connected to” as “bring together or into contact so that a real or notional link is established.” For the “or merely inserted within” part of their construction, Plaintiffs cite to the specification, which provides: “The wick member 24 can be connected to the membrane shell 22 by being directly or indirectly fastened to a portion of the shell or by being merely inserted into the compartment 30.” Plaintiffs also cite to Dr. DeFillipi for their admittedly “expanded definition” of “connected to.” (DE 51-1 at 15). However, nothing in the sentence cited by Plaintiffs or the specification indicates that a wick means can be “within” the membrane. It is thus unclear how Dr. DeFillipi arrives at his position that the wick means “may be merely inserted into the compartment, such as a sponge fragment placed in an envelope.” (DE 51-3 at ¶ 27). It is similarly curious how this hypothetical sponge fragment would be “connected to” this envelope, if only placed in inside.

The Court is not persuaded by either side that “connected to” requires construction beyond the plain and ordinary meaning of the term. In context, the Court reads “connected to” as requiring the “wick means” to have some sort of link with the membrane shell. While the specification provides several embodiments for this connection, the Court does not see the need

to read these embodiments into the claims, as both Parties suggest.⁵ Additionally, the Court does not find merit to the position that the term “connected to” allows for the wick to be “merely inserted within.” The term “within” does not appear in the ’661 Patent, and the Court declines to broaden the list of possible connections to a breadth not necessarily claimed by the Patent.

F. “Extending into”

The next term is “extending into.” Plaintiffs propose “occupy a specified area,” whereas Biocide proposes “to stretch, draw, or arrange in a given direction, or so as to reach a particular point, as a cord, wall, or line of troops.” Plaintiffs arrive at their construction by citing to a dictionary definition; however, Biocide’s brief is unclear as to what source it relies on for its construction.

As above, “extending into” should be given its plain and ordinary meaning. It should also be read in the context in which it appears: “wick means connected to said membrane shell and extending into said compartment for absorbing water and transporting water into said compartment” The specification and claims themselves describe each and every embodiment of the ’661 Patent as containing a wick with one end that extends out of (or is flush with) the membrane shell and another end “extending into” or sticking into the compartment through the membrane shell. Plaintiffs’ proposed construction would overly broaden the term in a manner not considered by the ’661 Patent.

G. “Transports”

The final term to construe is “transports.” Plaintiffs propose “take or carry something from one place to another.” Biocide proposes “to carry, move, or convey from one place to

⁵ At oral arguments, Biocide suggested that the “connection” requires the wick means to be held in place, as the specification’s proposed embodiments all describe a wick that is held in place. Biocide noted that the invention would not be feasible if the wick were moving around and/or falling out of the membrane shell.

another.” The Court does not see any distinction between the two constructions, and the Court will follow the plain and ordinary meaning of the term.

III. SUMMARY JUDGMENT

A. Summary Judgment Standard

Summary judgment shall be rendered “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). In making its assessment of summary judgment, the Court “must view all the evidence and [reasonably draw] all factual inferences . . . from the evidence in the light most favorable to the nonmoving party.” *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285 (11th Cir. 1997). Additionally, the Court “must resolve all reasonable doubts about the facts in favor of the non-movant.” *United of Omaha Life Ins. Co. v. Sun Life Ins. Co. of America*, 894 F.2d 1555, 1558 (11th Cir. 1990).

“By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (emphasis in original). “As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Id.* at 248. Likewise, a dispute about a material fact is a “genuine” issue “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

The moving party “always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Summary judgment is proper “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Id.* at 322. In those cases, there is no genuine issue of material fact “since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Id.* at 323.

B. Infringement

a. *Literal Infringement*

“To prove literal infringement, a plaintiff must show that the accused device contains each and every limitation of the asserted claims.” *Presidio Components, Inc. v. Am. Technical Ceramics Corp.*, 702 F.3d 1351, 1358 (Fed. Cir. 2012) (citing *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1301 (Fed. Cir. 2011)). This may be done with direct or circumstantial evidence, and a patentee need not present direct evidence of infringement. *O2 Micro Int’l Ltd. v. Beyond Innovation Tech. Co., Ltd.*, 449 F. App’x 923, 928 (Fed. Cir. 2011) (citing *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1318 (Fed. Cir. 2009); *Symantec Corp. v. Computer Assocs. Int’l, Inc.*, 522 F.3d 1279, 1293 (Fed. Cir. 2008)). Further, it is improper to compare the accused product with a preferred embodiment in the Examples of the patent, instead of with the claims. See *SRI Int’l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1121 (Fed. Cir. 1985)

(citations omitted). “If any claim limitation is absent from the accused device, there is no literal infringement as a matter of law.” *Id.* (quoting *Bayer AG*, 212 F.3d at 1247).

b. The Doctrine of Equivalents

An accused product that does not literally infringe a claim may still infringe under the doctrine of equivalents if each limitation of the claim is met in the accused product either literally or equivalently. *Cyber Corp.*, 138 F.3d at 1459 (citations omitted). “The doctrine of equivalents allows the patentee to claim those insubstantial alterations that were not captured in drafting the original patent claim but which could be created through trivial changes.” *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 535 U.S. 722, 733 (2002).

To find infringement under the doctrine of equivalents, there must be “a showing that the difference between the claimed invention and the accused product was insubstantial.” *Crown Packaging Tech., Inc. v. Rexam Beverage Can Co.*, 559 F.3d 1308, 1312 (Fed. Cir. 2009) (citation omitted). A plaintiff may do so “by showing on a limitation by limitation basis that the accused product performs substantially the same function in substantially the same way with substantially the same result as each claim limitation of the patented product.” *Id.* (citing *Warner-Jenkinson Co., Inc. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 39-40 (1997)). Indeed, infringement may exist under this doctrine where similar chemicals are used to achieve similar results. *See Atlas Powder Co. v. E.I. du Pont De Nemours & Co.*, 750 F.2d 1569, 1579-80 (Fed. Cir. 1984); *Wm. Wrigley Jr. Co. v. Cadbury Adams USA LLC*, 631 F. Supp. 2d 1010, 1041 (N.D. Ill. 2009); *Glaxo Wellcome, Inc. v. Pharmadyne Corp.*, 32 F. Supp. 2d 265, 291 (D. Md. 1998) (“The use of chemical substitutes for patented ingredients that are from the same family of chemicals may constitute infringement under the doctrine of equivalents.”).

C. Discussion

After considering the arguments by both sides and the evidence presented, in conjunction with the Court's claim term constructions, the Court finds that Biocide is entitled to summary judgment in its favor, as the accused product does not infringe – either directly or by the doctrine of equivalents – the '661 Patent's claims.

The accused product contains a “tea bag” or “pouch” that is permeable to water and chlorine dioxide gas. There are no apparent openings or holes in this tea bag. The tea bag contains compressed cellulose “sponges” or “pellets”⁶ that are wholly and loosely encased within the pouch. When water is poured over the pouch, it penetrates the pouch's lining, comes into contact with chlorine dioxide crystals in the pouch, and creates a chlorine dioxide gas that emanates through the pouch's lining and into the atmosphere to extinguish odors. When the water enters the pouch, it is absorbed by the cellulose pellets in a sponge-like manner. According to Biocide, this absorption serves the function of deterring spillage of potentially harmful or destructive liquids that are created.⁷

a. *Literal Infringement*

The accused Shocker Products do not literally infringe the '661 Patent. First, Biocide's products do not have a “wick means” as required by Claim 1. In order to find literal infringement of a means-plus-function claim limitation, the relevant structure in the accused device must perform the identical function recited in the claim and be identical or equivalent to the corresponding structure in the specification. *Applied Med. Resources Corp. v. U.S. Surgical*

⁶ Plaintiffs prefer “sponge” whereas Biocide uses “pellet” to describe the cellulose blocks in Biocide's product.

⁷ Biocide's products are used in boats, cars, and living quarters. Absorbing the liquid is important because the liquids in the Shocker Products could otherwise spill, and potentially stain or damage certain surfaces, for example, a car's interior.

Corp., 448 F.3d 1324, 1333 (Fed. Cir. 2006) (citing *Lockheed Martin Corp. v. Space Sys./Loral, Inc.*, 324 F.3d 1308, 1320 (Fed. Cir. 2003)). “Once the relevant structure in the accused device has been identified, a party may prove it is equivalent to the disclosed structure by showing that the two perform the identical function in substantially the same way, with substantially the same result.” *Id.* (citing *Kemco Sales, Inc. v. Control Papers Co.*, 208 F.3d 1352, 1364 (Fed. Cir. 2000)).

As noted above, the function of the wick means is to absorb water from outside the device and transport that water into the interior of the compartment. Here, the relevant structure in Biocide’s products are the cellulose pellets. Plaintiffs admit that the pellets “absorb water from the inside of the permeable tea bag pouch.” (Statement of Material Facts, ¶ 12). Thus, the function of the wick means in the ’661 Patent and the cellulose pellets are not identical for purposes of infringement because the pellets do not absorb water *outside* of the shell and transport the water *into* the shell. When the pellets absorb water, the water has already penetrated the membrane shell. The pellets therefore do not transport the water from the outside to the inside – or take the water from one place to another. Thus, a finding of infringement is precluded on this ground alone. An additional function of the pellets is to absorb water so that liquids do not spill out of the accused device. This additional function is not considered in the ’661 Patent.

Notwithstanding the differing functions, Biocide’s product still does not infringe. The defining feature of the ’661 Patent’s invention is a wick that extends from outside of the membrane shell and into the compartment. Biocide’s product does not contain this sort of structure, as its membrane shell is fully enclosed and does not have any sort of wick that extends out of the compartment and through the membrane shell.

Additionally, these cellulose pellets are not “connected to” the membrane shell in Biocide’s products. It is true that the pellets may come into contact with the tea bag’s lining; however, it cannot be said that the pellets are “connected to” the membrane shell under the plain and ordinary meaning of the term. A finding that the pellets are “connected to” the membrane shell would be comparable to saying that the lipstick in a handbag is “connected to” the purse. Thus, the accused product does not have wick means that are “connected to” the membrane shell.

Nor are the cellulose pellets “extending into” the compartment. The pellets are completely encased within the compartment, and there is nothing to indicate that they are “extending into” or sticking into the compartment as required by Claim 1. For this additional reason, the accused products do not infringe.

For these reasons, there is no literal infringement.

b. Doctrine of Equivalents

The Court similarly finds that there is no infringement under the doctrine of equivalents. As discussed above, the function of the wick means in the ’661 Patent and the cellulose pellets in the accused products are markedly different. Thus, for this reason alone, there is no infringement under the doctrine of equivalents. Additionally, Plaintiffs have failed to show that each claim limitation is substantially met in the accused products. For example, the accused product’s cellulose sponges are completely within the tea bag and do not transport water from outside the tea bag to inside the tea bag.

IV. CONCLUSION

For the foregoing reasons, summary judgment is due to be entered in favor of Defendants and against Plaintiffs. Judgment shall be entered by separate order. Further, the Court notes that

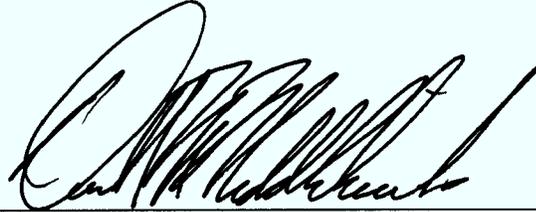
because Defendants do not infringe, the Court need not consider the Parties' ancillary arguments as to damages.

Accordingly, it is hereby

ORDERED AND ADJUDGED as follows:

1. Plaintiffs' Motion for Summary Judgment (DE 55) is **DENIED**;
2. Defendants' Motion for Summary Judgment (DE 57) is **DENIED** as moot; and
3. Defendants' Corrected Motion for Summary Judgment (DE 60) is **GRANTED**.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 27 day of January, 2014.



DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record