## IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

KEMIN FOODS, L.C., THE CATHOLIC UNIVERSITY OF AMERICA,

Plaintiffs,

No. 4:02-cv-40327

VS.

PIGMENTOS VEGETALES DEL CENTRO S.A. DE C.V.,

Defendant.

SUPPLEMENTAL ORDER ON PRELIMINARY INJUNCTION

This matter came on for telephone conference call hearing on January 6, 2003, at the request of Defendant. Plaintiff was represented in the conference by attorney Edmund Sease. Appearing for the Defendant were attorneys Brian Pingel and Michael Dee.

Defendant objects to the prior Order on Preliminary Injunction on the grounds that the order lacks the specificity required by Fed. R. Civ. P. 65(d). Defendant argues the injunction should further define and clarify the phase "purified lutein crystals from plant extracts" to indicate a purity level, indicate if the order only applies to lutein suitable for human consumption, and indicate whether the order applies to lutein for use as an analytical standard. The Court was advised that Defendant has halted its lutein related operations in response to the Court's prior order, including operations directed to poultry applications.

Plaintiff resists any change in the Court's prior order. Plaintiff argues the Defendant is now seeking what amounts to an advisory opinion.

The form and scope of an injunction is governed by Rule 65(d) of the Federal Rules of Civil Procedure, which provides, in pertinent part, as follows:

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained....

The language of the rule is designed to avoid unnecessary contempt litigation. See KSM Fastening Systems, Inc. V. H. A. Jones Co., Inc., 776 F.2d 1522, 1525-26 (Fed. Cir. 1985). "An enjoined party ought not be compelled to risk a contempt citation unless the proscription is clear." Square Liner 360o, Inc. v. Chisum, 691 F.2d 362, 378 (8th Cir. 1982). "An enjoined party is entitled to design around the claims of a patent without the threat of contempt proceedings with respect to every modified device although he bears the risk that the enjoining court may find changes to be too insubstantial to avoid contempt." KSM Fastening Systems, 776 F.2d at 1526. Thus, an enforceable injunction must satisfy the essential requirements of Rule 65(d). See Additive Controls & Measurements Sys. v. Flowdata, 986 F.2d 476, 479 (Fed. Cir. 1993).

The Court's prior order does set forth the reasons for issuance of the injunction in significant detail. The question before the Court is whether the prior order grants

injunctive relief that is "specific in terms" and describes "in reasonable detail" what is to be enjoined. Fed. R. Civ. P. 65(d).<sup>1</sup>

The Court's prior order noted that Plaintiff has not claimed infringement in regard to the Defendant's business that creates pigments for the poultry industry.

That order also recognized a basic, novel aspect of the '714 patent was that it provided for the creation of lutein suitable for human consumption. The analysis in the prior order accepts for purposes of the preliminary injunction that "substantially pure" lutein under the patent is 90 percent or greater. With these elements included in the prior order, together with the specificity ultimately obtained from the '714 patent itself, the Court found the order of injunction adequately complied with Rule 65(d).

The Court has reviewed the provisions of the prior order in response to the concerns expressed by counsel for the Defendant. No advance determination may be made that specific actions taken by the Defendant, or efforts by the Defendant to design around the restrictions, do or do not violate the injunction. That is beyond the scope of the current proceeding. Also, the Court finds its prior order, taken as a whole, to be significantly more specific than the injunction language at issue in Additive Controls & Measurements Sys. v. Flowdata, supra. However, on further review, the Court finds a good faith confusion might arise from focusing solely on the Court's

<sup>&</sup>lt;sup>1</sup> Rule 65(d) precludes reference to "the complaint or other document" in establishing the parameters of the injunction. In the specific context of a patent case, some reference to the patent document is inescapable because the nature and scope of that document lies at the heart of any ultimate determination of infringement.

language that the Defendant is "Restrained and Enjoined from continuing to infringe United States Patent No. 5,382,714, including by making, using, importing, or selling within the United States purified lutein crystals from plant extracts" (Order on Preliminary Injunction at 40).

The Court does not regard this review of the prior order to constitute an advisory opinion. While some arguments during the telephone conference addressed issues which could rise to the level of an advisory opinion, the Court regards the current proceeding as one to clarify the prior order and not to address the application of the injunction order to any proposed conduct of the Defendant.<sup>2</sup> Having considered the arguments of counsel and reviewed the prior Order on Preliminary Injunction, the Court finds the prior order should be amended and supplemented.

Therefore, the Court hereby amends and supplements the Order on Preliminary Injunction filed on January 2, 2003, and **ORDERS** that, pursuant to Fed. R. Civ. P. 65, Defendant, Pigmentos Vegetales Del Centro S.A. DE C.V., their officers, agents, servants, employees, and attorneys, and those in active concert or participation with them or Defendant, **ARE HEREBY RESTRAINED AND ENJOINED** from continuing to infringe United States Patent No. 5,382,714, including by making, importing, or selling within the United States lutein crystals from plant extracts with a

<sup>&</sup>lt;sup>2</sup> Defendant's reference to purified lutein as an analytical standard raises a specific application which may or may not collide with the injunction; but, that issue is beyond the scope of the current proceeding.

purity level of 90 percent or greater and/or suitable for human consumption. All other findings, terms, and provisions of the Court's January 2, 2003, Order on Preliminary Injunction remain in full force and effect.

## IT IS SO ORDERED.

Dated this 7th day of January, 2003.

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