Federal Court  Cour fédérale

Date: 20200526

Docket: T-1288-18

Citation: 2020 FC 644

Ottawa, Ontario, May 26, 2020

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

GEMAK TRUST BY ITS TRUSTEES GERALD THOMAS HINTON AND ELIZABETH JANE HINTON

Plaintiff

and

JEMPAK CORPORATION, JEMPAK GK INC.

Defendants

PUBLIC AMENDED JUDGMENT AND REASONS

[1] The underlying proceeding is a patent infringement action brought by the Plaintiff, Gemak Trust [Gemak], against the Defendants, Jempak Corporation and Jempak GK Inc. [collectively, Jempak].

I. Overview

[2] Gemak alleges that Jempak has infringed certain claims in Canadian Patent Nos. 2,276,428 [‘428 Patent] and 2,337,069 [‘069 Patent], collectively referred to as “the Patents”. The asserted claims relate generally to an encapsulated percarbonate granule or a dishwashing detergent composition with encapsulated percarbonate granules. Two independent asserted claims require that the percarbonate be “encapsulated” by a “blend” comprising carboxymethyl cellulose [CMC] and two other ingredients.

[3] Jempak submits that once the terms “encapsulating” or “encapsulates” and “blend” are properly construed, it is uncontested that Jempak’s products do not contain CMC in the blend that encapsulates the percarbonate and that there is no infringement. It therefore brings the present motion for summary judgment to dismiss Gemak’s action. In the alternative, it seeks an order directing a summary trial on the issue of non-infringement.

[4] This Court has been generally reluctant to grant summary judgment in patent infringement actions, largely because such proceedings depend on the assessment of expert evidence and the credibility of the expert witnesses. However, in this case, there is no substantial conflict of opinion evidence. Jempak’s expert is the only witness who provides an informed and purposive claim construction of the terms at issue from the perspective of a skilled person. Her evidence on the common general knowledge is also uncontested.

[5] The Patents teach the person of ordinary skill in the art [skilled person] to encapsulate the percarbonate before its addition to the detergent composition. Jempak has adduced evidence that the coated percarbonate it purchases and uses does not contain CMC. Although the timing of the encapsulation of the percarbonate by a blend of ingredients is key, none of Gemak's experts construed the term "encapsulate" or even considered the Patents in preparing their responding affidavits. Gemak chose instead to hide behind arguments about Jempak not meeting its burden.

[6] Gemak was required to set out specific facts and adduce evidence showing that there is a genuine issue for trial. It failed to do so. In the circumstances, I conclude that the motion for summary judgment is granted.

II. Background

A. *The Parties*

[7] Gemak Trust is established under the laws of New Zealand with an address in the United Kingdom. Mr. Gerald Thomas Hinton and Ms. Elizabeth Jane Hinton are trustees with the power to act on its behalf.

[8] Jempak Corporation is incorporated and subsists under the laws of Ontario having a place of business in Concord, Ontario. Jempak GK Inc. is a company which has operated during the last six years but is now amalgamated into Jempak Corporation. Jempak Corporation is the legal successor of Jempak GK Inc and is now owned by Henkel Canada Corporation.

[9] Jempak manufactures and sells monodose dishwashing detergent products in the form of pods of powder blends. These single-dose pods are made of a dishwashing powder sealed within a water-soluble film.

[10] Jempak's products include |||||||||||||||||||||||||||||| ||||||||||||||||||||||||||||||, manufactured for ||| |||, and |||||||||||||||||||||| ||||||||||||||||||||||, manufactured for |||| ||||. These products are sold under private label and are not marked as being manufactured by Jempak.

B. *The '069 and '428 Patents*

[11] Gemak is the owner of the Patents and Mr. Hinton is the sole inventor of the inventions claimed in both patents. Gemak does not practice or license the claimed inventions of the Patents, but has given permission to an entity privately held by Mr. Hinton to practice the inventions under corresponding patents in the United Kingdom.

[12] Both of the Patents relate to laundering and dishwashing products capable of incorporation into a single compartment water-soluble film sachet, otherwise referred to as a monodose detergent pod.

[13] The '069 Patent has 13 claims. Claim 1 is the only independent claim. The remainder of the claims are either directly or indirectly dependent on Claim 1, which reads as follows:

> A detergent composition comprising a granulated percarbonate and a blend which encapsulates the percarbonate, the blend comprising a sulphate, carboxymethyl cellulose and a nonionic surfactant, wherein the composition comprises between 1% and 15% percarbonate, and wherein the detergent composition further

> comprises sodium metasilicate and does not include a zeolite, a perborate or a phosphate, said composition formulated for storage in a water soluble PVA film packaging for at least nine months.
>
> [Emphasis added.]

[14] The ‘428 Patent has 13 claims, and similarly relates to laundering and dishwashing products capable of being incorporated into single compartment water-soluble film sachets. Gemak only asserts Claims 10 to 13 of the ‘428 Patent, of which Claim 10 is the only independent claim. Claims 11, 12, and 13 are either directly or indirectly dependent on Claim 10, which reads as follows:

> An encapsulated percarbonate granule for use in detergent products storeable in PVA film packaging, the granule comprising a percarbonate and a blend encapsulating the percarbonate, wherein the blend comprises a sulphate, carboxymethyl cellulose and a non-ionic surfactant.
>
> [Emphasis added.]

C. *Gemak’s Patent Infringement Action against Jempak*

[15] On July 3, 2018, Gemak commenced the patent infringement action against Jempak. In its Further Amended Statement of Claim filed September 28, 2018, Gemak claims that Jempak has engaged in the knowing manufacture and sale in Canada of monodose detergent products that incorporate Gemak’s patented technology and rely on such technology as a fundamental aspect of their design, manufacture, and use.

[16] In its Statement of Defence and Counterclaim filed October 12, 2018, Jempak denies that its products infringe the asserted claims of the Patents. Jempak further alleges that all of the asserted claims of the Patents are invalid.

[17] As stated above, Jempak brought the present motion for summary judgment based on non-infringement. Jempak submits that on a proper construction of the terms "blend" and "encapsulates" or "encapsulating" as used in Claim 1 of the '069 Patent and Claim 10 of the '428 Patent, its products do not infringe, and hence there is no genuine issue for trial. More specifically, Jempak asserts that the blend encapsulating the percarbonate used in its products does not contain CMC.

III. Summary Judgment

[18] The main issue in this motion is whether the Court should grant summary judgment in favour of Jempak based on non-infringement of the Patents.

[19] The principles applicable to a motion for summary judgment brought pursuant to Rules 213, 214 and 215 of the *Federal Courts Rules*, SOR/98-106 [*Rules*] were concisely summarized by Madam Justice Anne Mactavish in *Milano Pizza Ltd v 6034799 Canada Inc*, 2018 FC 1112 at paragraphs 33 to 40, and need not be repeated.

[20] In short, the Court may grant summary judgment if the Court is satisfied that there is no genuine issue for trial. The test is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial.

[21] The onus is on the moving party to establish that there is no genuine issue for trial. There is no genuine issue for trial if the record (i) allows the judge to make the necessary findings of fact; (ii) allows the judge to apply the law to the facts; and (iii) that this is a proportionate, expeditious, and less expensive way to proceed.

[22] Issues of credibility ought not to be decided on motions for summary judgment. However, the mere existence of apparent conflict in the evidence does not preclude summary judgment—judges should take a "hard look" at the merits of the case.

[23] Moreover, the responding party is required to "put its best foot forward". It cannot rely upon what might be adduced as evidence at a later stage in the proceeding—it must set out specific facts and adduce evidence showing that there is a genuine issue for trial. This requirement has been described as necessitating that the respondent "lead trump or risk losing".

[24] In support of the summary judgment motion, Jempak filed the affidavits of Dr. Heliana Kola, Mr. Nihat Elbi, and Mr. ||||| ||||| J|| ||. Gemak responded with the affidavits of Dr. Gayle Frankenbach, Dr. Patrick A. Tishmack, and Dr. Colin Nuckolls.

[25] All the deponents, other than Mr. J|| ||, were cross-examined on their respective affidavits. Their evidence is summarized below.

IV. Evidence on the Motion

A. *Jempak's Witnesses*

(1) Mr. Nihat Elbi

[26] Mr. Elbi is the Senior Vice President of Research and Development and Quality Assurance at Jempak. Mr. Elbi was asked to provide information regarding the formulation of Jempak's monodose powder dishwashing detergent products and the composition of those products as made and sold by Jempak in Canada since July 2012.

[27] Mr. Elbi states that Jempak makes and sells three formulations of monodose powder dishwasher detergents: premium, standard, and environmentally friendly. All three formulations use percarbonate as the bleaching agent. Since 2012, Jempak has purchased the percarbonate used in these formulations from two sources: |||||||||||||||||||||||||||||||||||| |||||||||||||||||||||||||||||||||||| |||||||||||||||||||| ||||||||||||||||||||. Since 2018, Jempak has used | | as its sole source of percarbonate. According to its testing and quality control analysis, Jempak considers the percarbonate sourced from | | and |||||| |||||| to be interchangeable with each other.

[28] Mr. Elbi states that once a percarbonate source has been approved, each batch that Jempak purchases is accompanied by a certificate of analysis demonstrating that the batch meets the required specifications. A bundle of certificates of analysis are attached as exhibits to his affidavit.

[29] Jempak was informed by [redacted] that it sources its percarbonate from [redacted] manufacturers. Attached to Mr. Elbi’s affidavit are letters from [redacted] and [redacted] manufacturers stating that CMC is not used in manufacturing their percarbonate products.

[30] Jempak was informed by [redacted] that its percarbonate formulation does not contain CMC. Attached to Mr. Elbi’s affidavit is a letter from [redacted], including a certification sheet listing the ingredients in the percarbonate source material, [redacted]. The certification sheet confirms that CMC is not present in the percarbonate formulation.

[31] Mr. Elbi declares that Jempak’s premium and standard formulations contain two other coated materials: [redacted] and enzymes. The [redacted] used in these formulations is coated with a blend that includes CMC. Jempak’s environmentally friendly formulation does not contain [redacted].

[32] According to Mr. Elbi, Jempak makes all of its formulations by [redacted]. Jempak uses [redacted].

[33] Mr. Elbi states that formulations of the premium, standard and environmentally friendly powder dishwashing detergent products, which are representative of those made and sold by Jempak since July 2012, were tested from February 19 to 21, 2019.

(2) Mr. J

[34] Mr. J is president at , Jempak's supplier of percarbonate. Attached to Mr. J affidavit is a copy of the chemical formulation sheets of percarbonate products (). According to Mr. J, at no time in the has percarbonate products contained CMC in the formulation.

(3) Dr. Heliana Kola

[35] Dr. Kola is a consultant with a Ph.D. in Chemistry from Geneva University who has worked in the field of detergents for twenty years. Her career experience includes designing and carrying out analytical procedures for the formulation and de-formulation of detergent products.

[36] Dr. Kola was asked to review the Patents and provide her opinion on the skilled person of the Patents, the common general knowledge of the skilled person, the skilled person's understanding of the teachings of the Patents, and the skilled person's understanding of certain terms used in the claims of the Patents.

[37] On the basis of this review, Dr. Kola was asked to develop a test methodology, and to direct tests based on that test methodology, to determine whether or not Jempak's percarbonate sourced materials and its detergent formulations include a "blend which encapsulates the percarbonate" that comprises "carboxymethyl cellulose" as claimed in the '428 and '069 Patents.

[38] In terms of common general knowledge, Dr. Kola states that since the late 1980s, percarbonate has been used as a bleaching agent for automatic dishwashing detergents. Percarbonate requires alkaline conditions and high washing temperatures to be an effective bleaching agent. When wash temperatures drop, the bleaching efficiency of percarbonate decreases. This inefficiency is overcome by the introduction of activators, such as TAED, which generates peracid bleaching compounds that function efficiently at lower washing temperatures.

[39] Dr. Kola states that TAED is a very sensitive compound and degrades rapidly when mixed with the solid ingredients of a detergent. Encapsulation separates TAED physically from its environment and protects it from degradation when mixed with percarbonate in a detergent formulation. According to Dr. Kola, commercially available TAED is always encapsulated.

[40] Percarbonate is similarly susceptible to decomposition by moisture. As a powder, percarbonate is inert when coated and is activated when it is dissolved in water. The coating layer protects percarbonate from water coming from the environment and/or the detergent moisture and reduces its decomposition rate. When activated, such as being mixed with water, percarbonate breaks down to form hydrogen peroxide (a bleaching agent) and sodium carbonate (a builder). Builders work with surfactants to provide alkalinity (to increase the pH of the detergent environment) and enhance the cleaning effect of surfactants by dispersing the soil in the washing solution and preventing its re-deposition on the cleaning surface.

[41] Dr. Kola was asked to provide information regarding the formulation of Jempak’s monodose powder dishwashing detergent products and the composition of those products as

made and sold by Jempak in Canada since July 2012. She carried out testing at Jempak's laboratory to determine the presence of CMC in Jempak's source percarbonate beads and the finished Jempak monodose pods. The percarbonate samples tested by Dr. Kola were representative of the percarbonate raw materials sourced by Jempak since July 2012.

[42] Using the "Anthrone method", Dr. Kola prepared standard curves in order to quantify the amount of CMC in various test samples. Using this method, Dr. Kola concluded there is no CMC detectable in the coated percarbonate beads purchased by Jempak from both of its suppliers for use in its detergent pods.

[43] The Anthrone method detected CMC in the finished Jempak monodose pods; however, Dr. Kola attributed this to CMC present in other ingredients in the detergent, namely ||||||| ||||||| ||||||||| |||||||||. In Dr. Kola's opinion, the detection of CMC in the detergent samples is not indicative of CMC present in the blend coating the percarbonate.

[44] A summary of Dr. Kola's opinion is set out at paragraph 11 of her affidavit as follows:

> a) Each of the asserted patent claims requires as an essential element that there be a blend encapsulating the percarbonate that includes carboxymethyl cellulose.
>
> b) The coating encapsulating the percarbonate source material used by Jempak in its automatic dishwashing detergents does not comprise carboxymethyl cellulose.
>
> c) The automatic dishwashing detergent formulations made by Jempak do not include a blend encapsulating the percarbonate that comprises carboxymethyl cellulose.
>
> d) The only carboxymethyl cellulose present in the automatic dishwashing detergents made by Jempak is as a result of the coating on |||||||||||| ||||||||||||. The carboxymethyl cellulose in the

> coating of the [redacted] does not disassociate from the [redacted] during preparation of the detergent formulations and does not encapsulate the percarbonate in the formulations.

B. *Gemak's Expert Witnesses*

(1) Dr. Gayle Frankenbach

[45] Dr. Frankenbach is a scientist with a Ph.D. degree in Physical-Organic Chemistry from the University of Minnesota and twenty-seven years of experience in the detergent industry. Prior to swearing her affidavit, Dr. Frankenbach reviewed the affidavits of Dr. Kola, Mr. Elbi, and Mr. J[redacted].

[46] Gemak asked Dr. Frankenbach to provide her opinion on: the skilled person with respect to the Patents, the common general knowledge of the skilled person, and the skilled person's understanding of the meaning of the asserted claims.

[47] Dr. Frankenbach was also asked to analyze the evidence put forward by Jempak. She hypothesized that [redacted] could be sufficient to bind CMC present in other ingredients in the bulk mix to the blend encapsulating the percarbonate.

[48] At paragraph 65 of her affidavit, she states:

> As the industry literature acknowledges, sodium percarbonate is known to breakdown after being exposed to moisture. [redacted], a person of skill would understand that [redacted]

[redacted].

[49] Dr. Frankenbach opines that Jempak's monodose detergent products contain CMC and that CMC may be found encapsulating the sodium percarbonate contained in those products. Dr. Frankenbach identifies mechanisms by which, given Jempak's manufacturing process, CMC could be incorporated into the percarbonate's encapsulating blend. She points out that the [redacted] used in Jempak's products contains CMC and that the CMC transfers from the [redacted] to the sodium percarbonate as a result of Jempak's manufacturing. She relies on Jempak's own internal manufacturing documents that show that Jempak's sodium percarbonate is [redacted], and thus, [redacted] which allows the transfer of CMC to occur.

[50] Dr. Frankenbach conducted a "proof of concept" experiment that involved exposing [redacted] and sodium percarbonate to [redacted] and then mixing the particles. Dr. Frankenbach concluded that in the presence of [redacted], [redacted] transfer and adhere to the sodium percarbonate.

[51] As for Jempak's environmentally friendly products which are said not to contain [redacted], Dr. Frankenbach posits the CMC in these products could be coming from a variety of sources, including from [redacted].

[52] In Dr. Frankenbach's opinion:

(i) The CMC on Jempak's percarbonate beads begins to transfer to those beads during Jempak's manufacturing process, from either ‖ contained in Jempak's products or from some other source of CMC contained in other components of Jempak's formulation.

(ii) Detergent products do not degrade at any point in the detergent products' manufacturing or distribution.

(iii) Jempak failed to provide any evidence proving that the ||||| ||||| used in Jempak's Jempak failed to provide any evidence that the ‖ used in Jempak's detergent products do not degrade at any points in the detergent products' manufacturing or distribution.

(iv) Jempak failed to provide sufficient evidence providing that the CMC in the coating of the |||||||||| |||||||||| does not transfer to the blend encapsulating the sodium percarbonate.

(v) Given Jempak's manufacturing processes, the particles in Jempak's detergent products become ‖ during manufacturing, and CMC transfers from other particles in the detergent product to the encapsulated sodium percarbonate.

(vi) CMC transfers from other particles in Jempak's bulk detergent to the blend encapsulating the sodium percarbonate.

[53] Dr. Frankenbach concludes her affidavit, at paragraph 74, with the following statement:

> Given the foregoing reasons, it is my opinion that the sodium percarbonate granules in Jempak's detergent products contains an encapsulating blend which includes CMC.

(2) Dr. Patrick A. Tishmack

[54] Dr. Tishmack is the General Manager and Site Head for the West Lafayette, Indiana site of AMRI SSCI LLC [AMRI]. His responsibilities in this position include overseeing site operations, including solid state chemistry, analytical testing, method development and

validation, and advanced characterization of both solid and non-solid materials. He holds a Ph.D degree in Chemistry-Biochemistry from Purdue University.

[55] Prior to swearing his affidavit, Dr. Tishmack reviewed the affidavits of Dr. Kola, Mr. Elbi, and Mr. J|| ||, and observed the testing performed by Dr. Kola at Jempak's laboratory.

[56] Dr. Tishmack recreated and expanded on Dr. Kola's testing of CMC standards using the Anthrone method at the AMRI laboratory in West Lafayette. However, he did not test any of Jempak's products or percarbonate source materials.

[57] Dr. Tishmack's affidavit provides an analytical critique of the Anthrone method, and criticizes Dr. Kola's methods and conclusions.

(3) Dr. Colin Nuckolls

[58] Dr. Nuckolls is a Professor of Chemistry at Columbia University in New York, New York. He holds a Ph.D. degree in Chemistry from Columbia University.

[59] Prior to swearing his affidavit, Dr. Nuckolls reviewed the affidavits of Dr. Kola, Mr. Elbi, and Mr. J|| ||, as well as the affidavits of Dr. Frankenbach and Dr. Tishmack. For the purposes of the affidavit, Gemak asked Dr. Nuckolls to develop a method to identify percarbonate beads contained in Jempak's monodose dishwasher detergent products, and analyze these beads to determine whether CMC surrounds the percarbonate core.

[60] Dr. Nuckolls identified coated percarbonate beads within Jempak's monodose detergent pods using Raman spectroscopy. Dr. Nuckolls cut open the detergent pods to access the bulk detergent, separated individual granules, cut open the individual granules, and tested with Raman spectroscopy to confirm that the bead contained a percarbonate core.

[61] Beads confirmed to contain a percarbonate core were pooled to create samples for testing by Ultra-High Performance Liquid Chromatography with Mass Spectrometry [UPLC/MS]. UPLC/MS combines two techniques: UPLC for the separation of the components of a mixture, and MS for determining the characteristic molecular weight to charge ratio (m/z) associated with each separate component.

[62] Dr. Nuckolls tested a CMC standard solution to establish the expected retention time and m/z ratio for CMC. Dr. Nuckolls then tested coated percarbonate beads removed from Jempak's monodose detergent pods.

[63] In Dr. Nuckolls' opinion, the results of these tests show that CMC is present on the percarbonate beads contained in each of Jempak's commercial products.

V. Preliminary Issue: Admissibility of Prosecution History

[64] Jempak sought leave on the eve of the hearing to admit written representations in reply and the affidavit of a legal assistant, Ms. Wendy Reilly [Reilly Affidavit]. The Reilly Affidavit simply identifies and attaches copies of the following documents as exhibits:

- US Patent No 6,787,514 [the US ‘514 Patent];
- January 15, 2003 Action issued by the United States Patent and Trademark Office [USPTO] against the application for the US ‘514 Patent [USPTO Action];
- January 17, 2003 response to the USPTO Action;
- September 9, 2005 Examiner’s Requisition issued by the Canadian Patent Office against the ‘428 Patent, and a copy of the pending claims prior to this Examiner’s Requisition; and
- March 9, 2006 response to the Canadian Examiner’s Requisition.

[65] The reply submissions and Reilly Affidavit concern arguments made by Gemak in its Memorandum of Fact and Law about the construction of the asserted claims in the ‘428 Patent. Gemak argues for a construction that does not require that encapsulation of the percarbonate occur before and separately from mixing in the detergent as a whole. It maintains that the claims are silent as to how or when encapsulated percarbonate is formed. Jempak submits that these arguments stand in stark contrast to submissions made by the applicant, Mr. Hinton, in 2003 during the prosecution of the US ‘514 Patent, a patent related to the ‘428 Patent that shares similar claims.

[66] Independent Claim 1 of the US ‘514 Patent reads as follows:

> A granulated percarbonate compound for use in detergent products storable in PVA film packaging, the compound comprising a percarbonate and a blend encapsulating the percarbonate wherein the blend comprises a sulfate, carboxymethyl cellulose and a non-ionic surfactant.

[67] Documents obtained by Jempak from the “Image File Wrapper” section of USPTO’s online information retrieval tool [US File Wrapper] show that Claims 1 to 4 of the US ‘514

Patent were initially rejected as being anticipated by an earlier publication, Le Nigen (FR 2,666,348 A1):

> Specifically, see Example 1 on pages 21-22 of Le Nigen, which discloses a solid detergent composition comprising 3% by weight of... a non-ionic surfactant..., per the requirements of instant claim 1, 1% by weight of carboxymethyl cellulose, per the requirements of instant claim 1, 20.0% by weight of sodium percarbonate, per the requirements of instant claims 1 and 2, and 24.45% by weight of sodium sulfate... Furthermore, note that Le Nigen discloses that the solid detergent composition of Example 1 is made by dry mixing the various ingredients, followed by pulverizing the surfactant system to form an encapsulated sodium percarbonate detergent composition.

[68] Mr. Hinton requested that the rejection be reconsidered. In his remarks to the USPTO, Mr. Hinton emphasized that Claim 1 defines a granulated percarbonate compound wherein the compound comprises a percarbonate and a blend "*encapsulating*" the percarbonate. He asserted that the blend provides the percarbonate with a barrier to moisture, thereby reducing the propensity of the percarbonate to absorb moisture from the surrounding environment during storage, and that encapsulation of the percarbonate by the blend segregates the percarbonate from other ingredients in the detergent composition "permitting efficient bleaching action by the detergent composition, while not [affecting] its stability during storage."

[69] Mr. Hinton also remarked that "encapsulation" of the percarbonate would be clearly understood by the skilled person to mean "the percarbonate is enclosed or surrounded by the blend of sulfate, carboxymethyl cellulose and non-ionic surfactant" and that this construction is different from "merely mixing" the percarbonate with the other ingredients.

[70] Mr. Hinton's remarks were accepted by the USPTO and the US '514 Patent was subsequently issued.

[71] Documents obtained from the Canadian Intellectual Property Office show that in 2005, a Canadian examiner cited "Le Nigel (sic)" against pending Claim 14 of the '428 Patent. Claim 14 was directed to a blend for encapsulating percarbonate, as opposed to the "encapsulated percarbonate granule" of the asserted claims. The examiner noted that Le Nigen disclosed the claimed subject matter—a composition comprising a non-ionic surfactant, carboxymethyl cellulose and sodium sulfate suitable to encapsulate a percarbonate granule—before the claim date. Gemak deleted the claim at issue, and did not make any further submission concerning Le Nigen.

[72] The parties were invited to make submissions on the admissibility of the additional affidavit evidence in general, and more specifically the admissibility of the foreign prosecution file history. The Reilly Affidavit was accepted for filing at the hearing for the purpose of argument; however, the question of the ultimate admissibility of the evidence was taken under reserve.

[73] Having considered the parties' arguments, I conclude that the Reilly Affidavit should not be admitted and that the reply submissions should not be entertained.

[74] Rule 84(2) of the *Rules* provides that a party who has cross-examined the deponent of an affidavit filed in a motion may not subsequently file an affidavit in that motion, except with the consent of all other parties or with leave of the Court.

[75] The test for granting leave to file additional evidence after having cross-examined the opposite parties' deponents is summarized in *Janssen-Ortho Inc v Canada (Health)*, 2009 FC 1179 at paragraph 9. The moving party must establish that the proposed evidence could not have been adduced at an earlier date, the relevance of the proposed evidence, the absence of prejudice to the opposing party, and how the proposed evidence would be of assistance to the Court in disposing of the motion. None of the criteria have been met in this case.

[76] Claim construction has always been at the heart of the present motion. The views of the experts from both parties on claim construction were well known after the parties exchanged affidavits and well before cross-examinations took place. In fact, the matter was thoroughly canvassed by counsel for Jempak during the cross-examination of Dr. Frankenbach.

[77] Jempak has not adduced any evidence to explain when it became aware of the prosecution histories or otherwise establish that it acted with due diligence in seeking leave to rely on them. Given that the prosecution histories appear to have been readily available online, it is unclear why they could not have been filed earlier or at the very least put to the Gemak's witnesses in cross-examination. The fact that Gemak has raised an argument in its written submissions is not a proper basis to re-open the evidentiary record.

[78] Moreover, Jempak has failed to explain how the additional evidence will assist the Court. The French reference, Le Nigen, upon which Jempak relies, is not in evidence. Without this reference or the entire context of the prosecution history, the statements made by Mr. Hinton in 2003 cannot be properly assessed. The same can be said about Gemak's decision to delete Claim 14 of the '428 Patent in 2005.

[79] In any event, leave to adduce the documents from US File Wrapper would be denied in light of the decision of the Supreme Court of Canada in *Free World Trust v Électro Santé Inc*, [2000] 2 SCR 1024 [*Free World Trust*]. In that decision, the Court effectively closed the door to the use of extrinsic evidence, such as the file history, as an aid to construction. The Court concluded at paragraph 66 that allowing such evidence for the purpose of defining the monopoly "would undermine the public notice function of the claims, and increase uncertainty as well as fuelling the already overheated engines of patent litigation."

[80] As a result of the *Free World Trust* decision, patent owners were no longer bound, when enforcing their patent, to what they had said to a patent office about its scope. This did not stop this Court from expressing dismay that such tactics continued to be employed. In *Pollard Banknote Limited v BABN Technologies Corp*, 2016 FC 883, Mr. Justice George Locke commented at paragraph 235 that "it is remarkable" that the position taken by a patentee in an infringement action concerning construction is "is quite different" from that taken during the prosecution of the patent application. However, Justice Locke's hands were tied and he did not consider any aspects of the prosecution history either in construing the claims or in considering invalidity allegations.

[81] A recent amendment to the *Patent Act*, RSC 1985, c P-4 [*Patent Act*] cracked open the door to the use of extrinsic evidence to prevent patentees from asserting a larger reach for their patent in court than they had initially asserted in their application. Section 53.1 now permits the admission of the prosecution file of a patent application to rebut a patentee's re-characterization of its claims:

Admissible in evidence	**Admissibilité en preuve**
53.1 (1) In any action or proceeding respecting a patent, a written communication, or any part of such a communication, may be admitted into evidence to rebut any representation made by the patentee in the action or proceeding as to the construction of a claim in the patent if	**53.1 (1)** Dans toute action ou procédure relative à un brevet, toute communication écrite ou partie de celle-ci peut être admise en preuve pour réfuter une déclaration faite, dans le cadre de l'action ou de la procédure, par le titulaire du brevet relativement à l'interprétation des revendications se rapportant au brevet si les conditions suivantes sont réunies :
(a) it is prepared in respect of **(i)** the prosecution of the application for the patent, **(ii)** a disclaimer made in respect of the patent, or **(iii)** a request for re-examination, or a re-examination proceeding, in respect of the patent; and	**a)** elle est produite dans le cadre de la poursuite de la demande du brevet ou, à l'égard de ce brevet, d'une renonciation ou d'une demande ou procédure de réexamen;
(b) it is between (i) the applicant for the patent or the patentee; and (ii) the Commissioner, an officer or employee of the Patent Office or a member of a	**b)** elle est faite entre, d'une part, le demandeur ou le titulaire du brevet, et d'autre part, le commissaire, un membre du personnel du Bureau des brevets ou un conseiller du conseil de réexamen.

re-examination board.

Divisional application **(2)** For the purposes of this section, the prosecution of a divisional application is deemed to include the prosecution of the original application before that divisional application is filed.	**Demande divisionnaire** **(2)** Pour l'application du présent article, la poursuite de toute demande divisionnaire est réputée comprendre la poursuite de la demande originale avant le dépôt de cette demande divisionnaire.
Reissued patent **(3)** For the purposes of this section, a written communication is deemed to be prepared in respect of the prosecution of the application for a reissued patent if it is prepared in respect of	**Brevet redélivré** **(3)** Pour l'application du présent article, les communications écrites ci-après sont réputées être produites dans le cadre de la poursuite de la demande de brevet redélivré :
(a) the prosecution of the application for the patent that was surrendered and from which the reissued patent results; or	**a)** celles produites dans le cadre de la poursuite de la demande du brevet qui a été abandonné et qui est à l'origine du brevet redélivré;
(b) the application for reissuance.	**b)** celles produites dans le cadre de la demande de redélivrance.

[82] Jempak submits that while, on its face, section 53.1 is applicable only to representations made in the Canadian Patent Office, the language is non-limiting, in that it does not prohibit consideration of foreign prosecution files. I disagree.

[83] Subsection 53.1(1) provides that the prosecution history may be admitted into evidence in an action to rebut any representation made by the patentee regarding claim construction, but only when specific conditions are met. In particular, subparagraph 53.1(1)(b)(ii) provides that the

communication must be between the applicant and "the Commissioner, an officer or employee of the Patent Office or a member of a re-examination board."

[84] The definition of "Commissioner" is set out in section 2 of the *Patent Act* as meaning the Commissioner of Patents, who is appointed by the Governor in Council and exercises the powers and performs the duties conferred and imposed on that officer by or pursuant to the *Patent Act*. The Patent Office described in section 3 as an office attached to the Department of Industry, or to such other department of the Government of Canada as may be determined by the Governor in Council.

[85] There is a presumption when interpreting statutes that the legislature did not use superfluous or meaningless words in drafting legislation. It is difficult to see how this Court could endorse an interpretation that would render paragraph 53.1(1)(b) completely superfluous or even contradict its plain reading.

[86] There is a further presumption against the legislature impliedly changing established law, particularly the common law. If Parliament had intended that communications prepared in respect of the prosecution of the application for a foreign patent could be admitted, clearer language would be required to effect that result. In the circumstances, I conclude that section 53.1 did not change the existing rule, as enunciated in *Free World Trust*, that foreign prosecution history is inadmissible.

VI. Issues to be Determined

[87] The issues raised for adjudication in the motion for summary judgment are the following:

1) What is the meaning to be ascribed to the terms "a blend which encapsulates the percarbonate" and "a blend encapsulating the percarbonate"?

2) Is there a genuine issue for trial concerning whether a blend containing CMC encapsulates the percarbonate granules employed in Jempak's detergent products?

[88] Claim construction is antecedent to consideration of infringement issues: *Whirlpool Corp v Camco Inc*, 2000 SCC 67 *[Whirlpool*] at para 43. Therefore, a determination must first be made whether there is genuine issue for trial related to the construction of the asserted claims before turning to the non-infringement claims.

VII. Construction of the Asserted Claims

A. *Legal Principles*

[89] Claim construction is a matter of law for the judge. If the Court is satisfied that the only genuine issue is a question of law, the Court may determine the question and grant summary judgment accordingly: *Rules*, r 215(2).

[90] The principles of claim construction in Canadian patent law were laid out by the Supreme Court of Canada in *Whirlpool* at paragraphs 49 to 55 and *Free World Trust* at paragraphs 44 to 54. Jempak sets out a useful summary of the legal principles in its memorandum. For ease of reference, they are reproduced below with the footnotes omitted:

> 40. Claim construction is not a results-oriented approach, and should be undertaken without regard to either infringement or

validity. However, the claims should not be construed without knowing where disputes between the parties lie, or "where the shoe pinches".

41. As stated by [Roger T Hughes, *Hughes and Woodley on Patents*, looseleaf (Toronto: LexisNexis, 2019) at §28],

> In construing a patent, the claims are the starting point. The claims alone define the statutory monopoly and the patentee has a statutory duty to state, in the claims, what the invention is for which protection is sought.

42. Patent protection is often said to rest on the concept of a bargain between the inventor and the public, designed to advance research and development and to encourage broader economic activity. Thus, it is important that the patent system—and in particular, the scope of patent protection—be fair as well as predictable in its operation.

43. As noted by Justice Binnie in *Free World Trust*:

> Too much elasticity in the interpretation of the scope of the claims creates uncertainty and stifles competition. Too little protection robs inventors of the benefit they were promised in exchange for making a full and complete disclosure of the fruits of their ingenuity.

44. Thus, there has been tension among the courts in trying to balance the competing interests between a *literal* reading of the claims against a more *substantive* approach. To resolve this tension, the Supreme Court affirmed the primacy of the *claims language*, explaining that: "Predictability is achieved by tying the patentee to its claims; fairness is achieved by interpreting those claims in an *informed and purposive wa*y."

45. An "informed" interpretation of a patent is carried out in light of the common knowledge shared by competent ordinary workers in the art (the skilled person or persons) having the skills required to practice the invention.

46. A "purposive" construction gives meaning to the words of the claims with regard to the intention of the inventor, as disclosed in the patent. The analysis identifies the particular words or phrases in the claims that describe what the inventor considers to be the "essential" elements of the invention.

47. The elements of a claim are presumed to be essential. For an element to be considered non-essential, sufficient evidence must

> establish that the person skilled in the art would understand that the omission or substitution of the specific element would have no effect on the way the invention worked.
>
> 48. In other words, claim construction is an objective question of law, concerned with what a reasonable skilled person would have understood the author (inventor) to mean. The question is not what the inventor might have intended but rather what the addressee understands the inventor to mean. The relevant date to assess such understanding is that on which the patent was published.
>
> 49. The person of skill in the art, whom may comprise a team, is the notional person through whose eyes and mind a patent is to be construed and the prior art is to be considered. The skilled person is unimaginative and uninventive, but is reasonably diligent in keeping up with developments in the area. The skilled person is not the lowest common denominator of the group, but the ordinary or average person.
>
> 50. "Common general knowledge" is the knowledge generally known by the skilled person at the relevant time, and includes what the skilled person may reasonably be expected to know and be able to find out. Common general knowledge can be derived from the practical question of what would in fact be known to the skilled person. Although it is not the same as "public knowledge" or the "state of the art", it may include repeated references and teachings in prior art patents.
>
> [Emphasis in original.]

B. *The Asserted Claims*

[91] The only terms appearing in the asserted claims that require construction for the purpose of Jempak's summary judgment motion are "a blend encapsulating a percarbonate" and "a blend which encapsulates the percarbonate." Dr. Kola and Dr. Frankenbach both agree that CMC in the blend encapsulating the percarbonate is essential to the working of the invention in the Patents and an essential element of all the asserted claims.

[92] With respect to the meaning of these terms, the parties agree that:

> The skilled person would understand the terms ‘a blend encapsulating a percarbonate’ and ‘a blend which encapsulates the percarbonate’ (these terms are given the same meaning and are hereinafter used interchangeably), to be referring to a blend that coats and protects the percarbonate and prevents it from breaking down when added to a detergent composition and before it is activated in the dishwasher.

[93] Where the judge can construe the patent claims as it would be understood by a skilled person, expert evidence is not required: *Canmar Foods Ltd v TA Foods Ltd,* 2019 FC 1233 at para 80. In the present case, I was assisted by expert evidence in understanding the nature of the problem to be solved in the art with the use of percarbonate as an oxidizing agent in detergents, the common general knowledge at the relevant time, and what a skilled person would have understood the inventor to mean by the asserted claims in the Patents.

C. *Skilled Person*

[94] In Dr. Kola’s opinion, the skilled person for both of the Patents would be someone with a chemical background with at least a Bachelor of Science [B.Sc.] in Chemistry who has practical experience with detergent formulations. The skilled would have knowledge of the ingredients used in the compositions claimed, their use, and the amounts of these ingredients required for a detergent composition.

[95] In Dr. Frankenbach’s opinion, the skilled person would be a person with at least a B.Sc. in Chemistry with two to three years of practical experience in detergent formulations.

Alternatively, the skilled person could be someone with at least eight years of practical experience with detergent formulations.

[96] There is no meaningful dispute between the parties over the definition of the skilled person. I would find that the skilled person is a person with at least a B.Sc. in Chemistry and two to three years of practical experience in detergent formulations, or a person with at least eight years of experience with detergent formulations. In any event, neither choice of definition results in any change to the conclusions of these experts on this motion.

D. *Common General Knowledge*

[97] Common general knowledge is the knowledge generally known by the skilled person at the relevant time, and includes what the skilled person may reasonably be expected to know and be able to find out. The Court must assess what knowledge the skilled person would have obtained through a diligent search conducted using the means available at the relevant time: *Uponor AB v Heatlink Group Inc*, 2016 FC 320 at para 46.

[98] Dr. Kola opined that the common general knowledge of the skilled includes background knowledge of surfactants, builders, bleaching agents, enzymes, and fillers—all ingredients used in automatic dishwashing detergents.

[99] In her affidavit, Dr. Kola explained that percarbonate is a bleaching agent that has been used in automatic dishwashing detergents since the late 1980s. Percarbonate is susceptible to decomposition when exposed to moisture. As a powder, percarbonate is inert when coated, and is

activated when dissolved in water. To protect the percarbonate from moisture contained in other detergent ingredients, it is often encapsulated in a coating layer.

[100] Dr. Kola stated that in her opinion, the skilled person would understand that encapsulating the percarbonate in the manner described by the Patents requires an encapsulating process, and could not be achieved by merely dry mixing the percarbonate and encapsulating ingredients. On the contrary, encapsulation of an ingredient requires a physical reaction enabled by binders or wetting agents, performed in the presence of the encapsulating blend and said ingredient only.

[101] Gemak did not cross-examine Dr. Kola on her evidence of the common general knowledge, so her evidence on this issue is uncontested.

E. *Expert Evidence on Claim Construction*

[102] While both Dr. Kola and Dr. Frankenbach have the necessary background and experience to provide expert opinion to assist the Court, only Dr. Kola did so from the perspective of a skilled person. She provided rational, science-based and helpful evidence as to how a skilled person would understand the asserted claims, as well as what the common general knowledge was available to the skilled person at the date of publication. These matters were addressed extensively in Dr. Kola's affidavit and her expert opinion on claim construction was left unchallenged by Gemak on cross-examination.

[103] The same cannot be said about Dr. Frankenbach's evidence. Despite her strong background and expertise, I found her evidence to be wanting and problematic in many respects.

[104] Dr. Frankenbach was required to attend twice for cross-examination. During her first attendance, the ability of Jempak's counsel to conduct an effective cross-examination of Dr. Frankenbach was seriously impaired by numerous and repeated objections from Gemak's counsel and what can best be described as evasive and defiant responses from Dr. Frankenbach.

[105] Dr. Frankenbach challenged Jempak's counsel throughout the cross-examination, debating about the form or propriety of questions posed notwithstanding that they were plainly worded and clearly relevant. The cross-examination was ultimately adjourned after the following exchange between Jempak's counsel, Dr. Frankenbach and Gemak's counsel:

> BY MR. DIMOCK:
>
> 79 Q. You were asked by Brian Gray and John Goetz to interpret the claim language, correct?
>
> A. Yes, I was asked to interpret it. But I wasn't asked to say anything about it.
>
> 80 Q. On what basis did you interpret the claim language? What did you consider?
>
> A. I was advised that it wasn't time to start analyzing prior art.
>
> 81 Q. What did you use to construe the claims then?
>
> A. I used the patent.
>
> 82 Q. And that's it?
>
> A. I was advised that it wasn't time to start an in-depth analysis of the claim structure.

83 Q. And so you didn't consider the common general knowledge?

A. I answered your question, I believe.

84 Q. I asked a specific question. Did you consider the common general knowledge?

A. I believe I answered the question.

85 Q. Does the patent in suit, the '428, describe or disclose a problem to solve with the instability of percarbonate for use in powder detergents?

REF MR. GRAY:

Don't answer

MR. DIMOCK:

All right. We are going to have to adjourn this cross-examination. I am not going to give her any more heads-up as to where I am going with my cross-examination.

You have objected to my asking questions about the patent disclosure. You have objected to my asking questions about the common general knowledge. And as such, I am going to go to the Court and ask for a direction that her affidavit either be thrown out entirely for her failure to answer my questions in cross-examination today, or that she return immediately for cross-examination on the common general knowledge in what the patents disclose.

MR. GRAY:

What we refused is on the record. We believe these are not relevant to the issues that you brought in this motion.

[106] Two days later, the parties agreed to resume the cross-examination on the understanding that Gemak was not waiving its right to object to the relevance of Jempak's line of questioning.

While Dr. Frankenbach agreed to answer some questions, she continued to obfuscate matters and refused to concede the obvious.

[107] Dr. Frankenbach acknowledged on cross-examination that she did not take into account the common general knowledge when considering the claim language and only looked at the Patents. This leads one to question how she would have acquired the knowledge to opine on how a skilled person would understand the claims.

[108] It also undermines Dr. Frankenbach's penultimate opinion in her affidavit that the sodium percarbonate granules in Jempak's detergent products "contains an encapsulating blend which includes CMC." On cross-examination, she admitted that she had not construed the meaning of encapsulate. The following excerpt from the transcript of her cross-examination is quite telling.

> 208 Q. Did you not read the patent with that mind set when you were meant to look at what was meant by claim 10 of the patent, which says "an encapsulated percarbonate granule"? Didn't you have to understand what that meant?
>
> A. So encapsulation is a fuzzy term, and I'm not -- you can't always be certain what an inventor means by a fuzzy term. So I would rather not put my own opinion on it, since it is not an industry standard term.
>
> 209 Q Well, there is an understanding in the art, the well known art, that the solution to solving a problem of instability of percarbonate is to coat it with a protective coating, right?
>
> A. Coating is a word that has been used. Encapsulation is a word that has been used. There are no industry standard terms to define these words.

210 Q. I am not talking about a standard. Those words were well known in the art as it related to solving a problem of instability of the percarbonate, to coat or encapsulate, right?

A. The words are known. The definitions are not known. I am trying to serve the court, Mr. Dimock, and I think that in order to serve the court, I wouldn't want to put an opinion on terminology that is fuzzy, as far as the industry is concerned.

211 Q. Certainly the art that we reviewed this morning was not fuzzy as to what was meant by coating or encapsulating, was it?

A. I would not say that it was very well defined.

212 Q. But the patentee doesn't define encapsulation, does it?

A. I would have to read through the patent again to see if I ...

213 Q. Let me suggest to you, Dr. Frankenbach -- and you can read it at the break if you would like. But I thought you had read it more than ...

A. I have read it.

214 Q Several times?

A. I have read it several times.

215 Q. And have you noted that there was any definition given to encapsulation in the patent?

A. Again, encapsulation is a fuzzy term. So if I am going to construct a definition from another inventor, I would want to read the invention with the idea in mind that I have to construct that definition from their patent.

216 Q. But you said you did. You did read the patent to construe the claims?

A. I said I read the patent. I did not say I constructed a definition.

217 Q. All right. So up until this very moment, you have not constructed a definition of encapsulation for our purposes?

A. That is correct.

[109] According to Dr. Frankenbach, encapsulation was a "fuzzy" term that she could not define. This is a surprising statement coming from an expert who apparently had no difficulty expressing a definitive opinion about encapsulation when dealing with the issue infringement by Jempak.

[110] From my perspective, Dr. Frankenbach misapprehended her role as an independent witness. She conducted herself like an advocate instead of a neutral objective expert attempting to assist the Court. I am left with the conclusion that Dr. Frankenbach failed to provide fair, objective and non-partisan opinions, which ended up tainting her entire evidence. As a result, I have ascribed little or no weight to her testimony.

[111] I am therefore left with the opinion evidence of Dr. Kola.

F. *Construction of the Asserted Terms*

[112] The independent claims of the Patents require that the percarbonate granule (or granulated percarbonate) be encapsulated with a blend containing CMC.

[113] Dr. Kola did not advance any special meaning for the term “blend.” The parties agree that the term refers to a “mixture”. The term mixture is defined by the Oxford English dictionary as “a substance made by mixing other substances together.”

[114] The Patents do not define the terms “encapsulates” or “encapsulating”. It is therefore important to consider the context in which these terms are used.

[115] The instability of percarbonate in the presence of moisture was common general knowledge and is taught in numerous prior art publications. It is acknowledged in the Patents that percarbonate was known to be unstable when combined with other ingredients of a high moisture content.

[116] The common general knowledge included solutions to this problem of percarbonate instability by “encapsulating”, “encasing” or “coating” the percarbonate with an encapsulating material before allowing the percarbonate to come into contact with the detergent ingredients.

[117] Dr. Kola opined that the skilled person would understand the term “encapsulate” or “encapsulating” to refer to a blend that coats and protects the percarbonate and prevents it from breaking down before it is activated in the dishwasher. Dr. Frankenbach agreed that the skilled person would understand the term “encapsulate” or “encapsulating” to mean a blend that “protects the percarbonate and prevents it from breaking down before it is activated in the dishwasher,” but she disagreed with usage of the term “coats.” She stated that the encapsulating mixture need not be a uniform, full-coverage barrier around the sodium percarbonate.

[118] While Dr. Frankenbach did not propose her own specific meaning for the term “encapsulate” or “encapsulating” on cross-examination she acknowledged that she was aware that encasing percarbonate in a protective layer prior to adding it to a detergent composition was a known process. She further acknowledged that she was not aware of a reference or process describing stabilization of percarbonate in a detergent composition by merely dry mixing uncoated percarbonate with other detergent ingredients.

[119] Dr. Kola stated that CMC is an essential element of the blend encapsulating the percarbonate. Dr. Frankenbach was more reserved in her approach, but she did state that for the purpose of her affidavit, she would assume that CMC in the encapsulating blend was an essential element. In my view, this is sufficient to establish that a skilled person would understand from the claims that the presence of CMC in the encapsulating blend is an essential element of the asserted independent claims.

[120] Gemak proposed the following construction for the terms at issue:

> A mixture of substances that coats and protects the percarbonate and prevents it from breaking down before it is activated in the washer.

[121] In Gemak’s view, this construction of the claims covers the incorporation of CMC into a pre-existing percarbonate coating. In other words, Gemak submits that the claims cover a percarbonate granule without any CMC in the protective coating that is subsequently mixed into a detergent formulation with CMC present as a component of other ingredients, where the CMC then combines with, adheres to or surrounds the percarbonate granule.

[122] I do not find Gemak's proposed construction compelling. The disclosure of the '428 Patent states that the invention provides a granulated percarbonate compound suitable for use in cleaning products wherein the percarbonate compound has been mixed with an encapsulating blend: '428 Patent, page 2, lines 26-29. Contrary to Gemak's submission, the language of the claims and the disclosure of the '428 Patent suggest that encapsulation of the percarbonate occurs prior to the addition of the encapsulated percarbonate to the bulk detergent mixture. The encapsulating blend, therefore, is a single mixture, rather than ingredients added to protect or coat the percarbonate at various stages in the detergent formulation process.

[123] I conclude that the construction proposed by Jempak of the terms at issue is common sense and correct. The person of ordinary skill in the art would understand that encapsulating the percarbonate in the manner contemplated by the '428 Patent and '069 Patent requires thorough blending or mixing of the encapsulating ingredients in an encapsulating process. The skilled person would also understand that encapsulation cannot be achieved through dry-mixing of raw ingredients and requires a physical reaction enabled by binders or wetting agents that is performed only in the presence of the encapsulating blend and the granule to be encapsulated. In other words, encapsulation refers to a protective coating (a blend) that is applied to the percarbonate during its manufacture to maintain the stability of the percarbonate and to prevent it from decomposing prematurely before use.

G. *Evidence of Non-infringement*

[124] Once the Court construes the claims, the party alleging infringement must show that the allegedly infringing product falls within the scope of the asserted claims, as properly construed.

Infringement only occurs if the product in question includes all the essential elements of the claim. If an essential element is omitted or substituted in the product in question, the product does not infringe the asserted claim: *Free World Trust* at para 31. That said, on this motion for summary judgment, Jempak bears the burden of establishing there is no genuine issue of infringement of Claim 1 of the ‘069 Patent and Claim 10 of the ‘428 Patent that should be determined at trial.

[125] To support its non-infringement claims, Jempak adduced evidence from three different sources to establish that there is no CMC in the coating of the percarbonate when supplied to Jempak.

[126] First, Mr. J|| ||, the affiant from one of Jempak’s sodium percarbonate suppliers, states that the coated percarbonate products Jempak sourced from | | do not contain CMC in the coating or otherwise in the formulation. Gemak declined to cross-examine Mr. J|| ||, leaving his sworn evidence uncontested.

[127] Second, Jempak submitted the results of testing by its expert, Dr. Kola, showing that there was no CMC in the percarbonate prior to its further processing by Jempak and its incorporation into Jempak’s products.

[128] Dr. Tishmack critiques Dr. Kola’s use of the Anthrone method, and challenges her conclusion that there is no “detectable CMC in the coated percarbonate raw materials sourced by Jempak”. Dr. Tishmack states that lack of sensitivity below the detection limit—the point at

which the test results no longer reliably indicate the presence of a compound—prevents any absolute conclusions about the absence of CMC.

[129] I agree with Jempak that the critiques of Dr. Kola's methodologies are unfounded and based on his exacting experience as an analytical chemist for clients in the pharmaceutical industry. Moreover, Dr. Tishmack has no experience with detergent formulations and did not provide an opinion from the perspective of the skilled person of the Patents.

[130] Dr. Nuckolls also tested percarbonate beads taken from Jempak's commercial products. He opined that Jempak's monodose dishwasher detergent products "contain sodium percarbonate beads which have carboxymethyl cellulose surrounding the percarbonate core." I am satisfied Dr. Nuckolls' UPLC/MS testing method identified CMC; however, the conclusion he reaches based on this testing, following separating individual percarbonate granules from the bulk detergent mixture, is that CMC is present *on* the percarbonate granules. Dr. Nuckolls conceded on cross-examination that his testing analysis separates the components of the samples before they are identified. Once the samples were dissolved there is no basis to conclude where any CMC detected was positioned on the sample. Dr. Nuckolls' evidence merely establishes that CMC was present on or around the percarbonate granule, and based on the proper construction of the asserted claims, this does not establish the presence of CMC *in* the encapsulating blend.

[131] Gemak asserts it is irrelevant that Dr. Nuckolls did not test the sodium percarbonate purchased by Jempak. I disagree. Had Dr. Nuckolls conducted this testing, Gemak would have

had some evidence of the composition of the encapsulating blend surrounding the percarbonate—specifically whether the encapsulating blend contained CMC.

[132] Third, Jempak produced through Mr. Elbi letters from ||||| ||||| and ||| |||| |||| manufacturers stating that CMC is not used in manufacturing their percarbonate products. This evidence arguably constitutes hearsay evidence. Rule 81 of the *Rules* precludes hearsay evidence on motions for summary judgment and permits the Court to draw an adverse inference from the failure of a party to provide evidence of persons having personal knowledge of material facts. However, in this case, the hearsay evidence is not critical and has been corroborated by the testing conducted by Dr. Kola. In *Society of Composers, Authors and Music Publishers of Canada v Maple Leaf Sports & Entertainment*, 2010 FC 731 at paragraph 19, Mr. Justice Michael Phelan held that it would be contrary to the intent of the summary judgment rules to preclude all hearsay evidence, particularly where that evidence may be admissible at trial.

[133] Gemak argues that the burden of establishing that there is no genuine issue for trial is a heavy one, and that summary judgment will be granted only in the clearest of cases. While that may be, on a motion for summary judgment, both parties are required to put their best foot forward. A moving party bears the legal onus of establishing all of the facts necessary to obtain summary judgment and the responding party has an evidential burden of showing that there is a genuine issue for trial.

[134] Gemak relied on expert evidence seeking to contradict Jempak's experts, and opted not to have its experts advance evidence on the common general knowledge at the relevant time, or a

proposed construction of the claims. Moreover, despite having samples, methods and expertise available to it, Gemak elected to do no tests that go to the heart of the infringement issue. It is no answer to claim that other evidence may be available at trial to contradict evidence adduced on the motion.

[135] I conclude that Jempak has met its burden of establishing that, on a balance of probabilities, its products do not infringe the asserted claims of the Patents and that Gemak did not then demonstrate that there is a genuine issue for trial on infringement.

VIII. Conclusion

[136] I fully adopt and make mine Jempak's written and oral submissions made in support of the motion for summary judgment.

[137] In light of the evidence produced on this motion, I find that Jempak has met the onus of establishing the facts necessary to obtain summary judgment, and that Gemak, who was required to put its best foot forward, has failed to establish that there is a genuine issue for trial. As a result, the motion for summary judgment is granted.

[138] In the circumstances, I need not address Jempak's alternative request that the Court exercise its discretion to determine the issue by way of summary trial and dismiss the action.

IX. Costs

[139] At the conclusion of the hearing, the parties agreed that costs should be awarded to the party who was ultimately successful on the motion. However, the parties were not prepared to address the quantum of costs until after a decision was made.

[140] Given Jempak's success, the parties must either agree on a lump sum amount in favour of Jempak or, if they cannot agree, submit brief written representations, not exceeding 5 pages in length, that include the final global amount offered to the other party to settle the issue of costs and disbursements. The representations shall be submitted no later than June 5, 2020 for adjudication in writing. The parties are hereby put on notice that the most reasonable global amount offered by one party will be selected without any adjustment or splitting of the difference. This procedure has been selected to encourage the parties to settle the issue of costs between themselves.

JUDGMENT IN T-1288-18

THIS COURT'S JUDGMENT is that:

1. The motion for summary judgment is granted.

2. The Plaintiff's action against the Defendants is dismissed.

3. The Plaintiff shall pay costs in an amount agreed to by the parties or to be determined by the Court upon receipt of further submissions.

"Roger R. Lafrenière"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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