IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CHEMOURS COMPANY FC, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 17-1612 (MN) (CJB)
	)	
DAIKIN INDUSTRIES, LTD. and DAIKIN AMERICA, INC.,	)	
	)	
Defendants.	)	

MEMORANDUM ORDER

At Wilmington this 30th day of June 2022:

On February 7, 2022, Defendants Daikin Industries, Ltd. and Daikin America, Inc. ("Defendants" or "Daikin") filed a motion seeking summary judgment on three grounds: (1) indefiniteness of the claims of U.S. Patent No. 7,122,609 ("the '609 patent"); (2) no infringement of the asserted claims[1] of the '609 patent or U.S. Patent No. 8,076,431 ("the '431 patent") under the doctrine of equivalents; and (3) no literal infringement of the asserted claims of the '609 or '431 patents. (*See* D.I. 263). The motion has been fully briefed (D.I. 264-66, 296-98, 300, 309 & 312), the Court heard argument (D.I. 390) and the parties submitted additional case law (D.I. 373 & 374). The Court addresses each of the grounds in turn.

1. Definiteness

Patent claims must "particularly point[] out and distinctly claim[] the subject matter which the applicant . . . regards as his invention." 35 U.S.C. § 112 ¶ 2 (pre-AIA). To be definite, the patent must inform, with reasonable certainty, those skilled in the art about the scope of the

[1] The asserted claims that remain are claims 3 and 4 of the '431 patent and claims 1, 3-4 and 7 of the '609 patent. (*See* D.I. 378 ¶ 2).

invention and provide objective "boundaries." *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 901 (2014). During claim construction proceedings, at Chemours's urging, the Court construed "melt flow rate" without requiring any specific measurement conditions or methods. Daikin argues that there are multiple ways to measure melt flow rate and a person of skill in the art could not determine which method the claims of the '609 patent require and, therefore, the claims are indefinite.[2] *See Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 789 F.3d 1335, 1345 (Fed. Cir. 2015) (on remand, holding claim invalid as indefinite "because read in light of the specification and the prosecution history, the patentee has failed to inform with ***reasonable certainty*** those skilled in the art about the scope of the invention" as "there is not reasonable certainty that molecular weight should be measured using M_p [as opposed to M_n or M_w, all of which leading to different results]" (emphasis in original)).

Notwithstanding Chemours's prior arguments at claim construction, during the June 1, 2022 argument, Chemours's counsel represented that "a person of skill in the art reading the patents and frankly industry standard would know when you look at the melt flow rate in the claims and what you're analyzing, what you're looking at as accused products is the melt flow rate as determined by the ASTM standard." (D.I 390 at 25; *see also* at *id.* at 27 ("we agree that the melt flow rate is determined by the ASTM standard"); *id.* at 31 ("if Your Honor wanted to say the melt flow rate of the claims is determined by the ASTM, the 1238 that it says in the specification, that would be – I think everything would be okay . . ."[3])).

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[2] The claims of the' 431 patent specify that the melt flow rate is "as determined by ASTM D1238 at 372° C." ('431 Patent at Claim 1).

[3] Counsel added a proviso that this construction was acceptable as long as Chemours could show the jury demonstratives of what a melt flow rate looks like using different parameters. The Court, however, declined to address that issue during the June 1, 2022 argument as that issue had not been raised previously.

"[Courts] may engage in a rolling claim construction, in which the court revisits and alters its interpretation of the claim terms as its understanding of the technology evolves. This is particularly true where issues involved are complex, either due to the nature of the technology or because the meaning of the claims is unclear from the intrinsic evidence." *Jack Guttman, Inc. v. Kopykake Enterprises, Inc.*, 302 F.3d 1352, 1361 (Fed. Cir. 2002) (citation omitted). Indeed, the Federal Circuit has repeatedly upheld a district court's decision to revisit claim construction as the case progresses, including at trial. *See, e.g.*, *Pressure Prod. Med. Supplies, Inc. v. Greatbatch Ltd.*, 599 F.3d 1308, 1315-16 (Fed. Cir. 2010) (not improper for district court to supplement claim construction in the midst of a jury trial where parties were given opportunity to consider new construction and present arguments accordingly); *CytoLogix Corp. v. Ventana Med. Sys., Inc.*, 424 F.3d 1168, 1172 (Fed. Cir. 2005) (as long as conflicting constructions are not presented to the jury, not erroneous for district court to resolve claim construction disputes at the close of evidence because "the district court has considerable latitude in determining when to resolve issues of claim construction").

That is the case here. Although the Court understands that the term does not, by itself, specify that the ASTM standard is used in making the measurement of melt flow rate, the parties appear to be in agreement that a person of skill in the art reading the patent specification would understand that the ASTM standard is what must be used in measuring the melt flow rate. Thus, the Court will revise the claim construction of "melt flow rate" to "the amount of mass or volume of a viscous material moving past a reference point as a function of time as measured in accordance with ASTM D-1238 and ASTM D-2116." This revised claim construction appears to moot Defendants' motion for summary judgment based on indefiniteness, and thus the motion will be denied.

2. Doctrine of Equivalents

Daikin argues that Chemours cannot resort to the doctrine of equivalents to assert that Daikin's products (all apparently with a melt flow rate of 35.0 or greater) infringe the asserted claims, all of which require a melt flow rate of "about 30±3 g/10 min." (*See, e.g.*, '609 Patent at Claims 1; '431 Patent at Claim 1). Relying on *Cohesive Technologies, Inc. v. Waters Corp.*, 543 F.3d 1351 (Fed. Cir. 2008), Daikin argues that the doctrine of equivalents is unavailable as a matter of law because the Federal Circuit forbids applying the doctrine of equivalents to claim limitations reciting "about."[4] The Court is not convinced that the issue is "purely legal," as Daikin suggests. Indeed, the Supreme Court's decision confirming the vitality of the doctrine of equivalents, *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*, 520 U.S. 17 (1997), addressed equivalents of a claim term requiring a pH of "approximately 6.0 to 9.0." The Supreme Court did not hold that no equivalents exist as matter of law and, in fact, remanded the case to the Federal Circuit with instructions to analyze infringement of this limitation under the doctrine of equivalents. *Id.* at 41.

The cases Daikin cites are not to the contrary. The Federal Circuit in *Cohesive* did not announce a bright-line legal test. Rather, the court noted that a limitation's purpose in the context of the invention may be considered in contemplating the range of equivalents (or whether there is any range in a given context). *See Cohesive*, 543 F.3d at 1368-70. And, for the most part, Daikin's other cited cases (D.I. 373) hold simply that the doctrine of equivalents is not foreclosed if the patentee fails to include words of approximation. It does not, however, follow (necessarily or

[4] In *Cohesive*, the Federal Circuit determined that "because the 'about 30 μm' limitation already literally encompasses diameters that are equivalent to 30 μm in the context of the patent, any particle diameter that performs the same function, in the same way, with the same result as a 30 μm diameter is already within the literal scope of the claim. Cohesive therefore cannot rely on the doctrine of equivalents." 543 F.3d at 1372.

logically) that the doctrine of equivalents is, in fact, foreclosed if the patentee ***does*** include such words.

It appears that what remains in this case is an issue of fact as to whether the melt flow rate of 35 or more of the accused products is an equivalent to the range recited in the asserted claims. Thus, Daikin's motion for summary judgment of no infringement under the doctrine of equivalents will be denied.

3. Literal Infringement

Daikin argues that Chemours cannot prove literal infringement because the accused products (again, all apparently with a melt flow rate of 35.0 or greater) do not fall within the claim requirement that the melt flow rate be "about 30±3 g/10 min." During the argument, the Court expressed some skepticism as to the strength of Chemours claim of literal infringement. But skepticism does not equate to the absence of a genuine issue of material fact. Here, Chemours expert, Dr. Bortner, ultimately opines that Daikin's accused products meet the claimed melt flow rate limitations and he supports his opinions with some analysis. Thus, the issue of literal infringement appears to present a "battle of the experts." As such, the issue is not amenable to summary judgment, and Daikin's motion for summary judgment of no literal infringement will be denied.

THEREFORE, IT IS HEREBY ORDERED that Daikin's motion for summary judgment (D.I. 263) is DENIED.

Maryellen Noreika

The Honorable Maryellen Noreika
United States District Judge