



Motion Granted to Amend Joint Claim Construction and Prehearing Statement

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In [Fennec v. Cipla](#), the United States District Court for the District of New Jersey recently granted Fennec Pharmaceuticals Inc.'s ("Fennec") motion to amend the Joint Claim Construction and Prehearing Statement to add constructions of two disputed terms that were consistent with the relevant patent's express language.

Fennec is a Hatch–Waxman litigation involving several patents covering Fennec's Pedmark® product. Pursuant to Local Patent Rule 4.3, the parties are required to file a Joint Claim Construction and Prehearing Statement ("JCCPS") that contains "[e]ach party's proposed construction of each disputed term" and is filed within 30 days after the exchange of preliminary claim constructions and 45 days before the parties opening claim construction briefs are due. Amendments to the JCCPS require a motion demonstrating good cause under Local Patent Rule 3.7.

One month after the parties submitted the JCCPS, Fennec informed defendants Cipla Limited and Cipla USA, Inc. (collectively, "Cipla") that Fennec wanted to amend the proposed construction of certain claim terms to mirror the definitions of those terms in the patent. The parties met and conferred regarding the issue, and after reaching an impasse, Fennec filed its motion for leave to amend.

The court granted Fennec's motion, finding that it was timely, supported by good cause, and Cipla would not be unduly prejudiced. The court found the motion timely because Fennec immediately notified Cipla when it discovered that it was necessary for it to amend the JCCPS and then immediately filed the motion to amend when the parties reached an impasse in the meet and confer requirement, all over a period of seven weeks.

The court found that good cause existed to grant the motion because allowing Fennec to amend its proposed constructions brought it into compliance with the law, *i.e.*, the Federal Circuit's precedent that "[w]here a patentee provides an express definition

for a term in the patent itself, that definition governs the construction of the term.” (citation omitted) The court also noted that while Fennec “could have been more diligent in discovering its need to amend sooner,” “perfect diligence is not required under Rule 3.7” and there was no evidence of gamesmanship. With respect to good cause, the court also noted that since the motion was filed, a new patent had been added to the case that contained the same claim term addressed in the motion to amend and that denying the motion to amend would leave the District Court with two different proposed constructions for the same claim term. Finally, with respect to unfair prejudice, the court noted that granting the motion would not significantly delay resolution of the matter and that, while Cipla argued that allowing the amendment would require it to expend significant resources, it did not lay out with any specificity what those additional resources would be.

Thus, parties looking to amend any disclosure required under the District of New Jersey’s Local Patent Rules should immediately notify the other party of the issue, promptly engage in the meet and confer process, and seek leave to amend the moment an impasse is reached. Further, any party opposing a motion to amend governed by Local Patent Rule 3.7 should not generally argue that it would require the expenditure of additional resources without identifying with specificity what those resources would be (e.g., additional depositions, extensive additional briefing, etc.).

Gibbons will continue to monitor and report developments in patent litigation in the District of New Jersey.

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